Al-Wa'd as Muhallil of Multi Contract: Ambiguity of Applying *al-Wa'd* in Modern Transaction

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Abstract:

Wa'd (the unilateral promise) is an alternative for separate multi contract in one transaction and *ribâ* that are prohibited with Islamic law. The application of this promise faces difficulty because of difference of principle between unilateral promise that is not binding and the business practice that based on rule of law. The *fatwa* of DSN, in one side, use both unilateral promise (*wa'd*) and bilateral promise (*muwâ'adah*), and other side, consider such as binding in case and not binding in other case. This indicates the difficulty for applying *wa'd* at the modern contract. *Fatwa* of DSN has tendency on binding the promise, especially unilateral promise. The consequence of this binding is the confusion between promise and contract and the perform of both at the transaction. Of the six fatwas which accommodate promise, only one fatwa declares that promise is not binding, namely in regards to IMBT. In the remaining fatwa, some explicitly or implicitly agree on the binding of promise.

Keywords:

Promise (*wa'd*), binding (*mulzim*), contract (*'aqd*), multi contract, interest *(ribâ)*

Abstrak:

Wa'd (janji) menjadi alternatif untuk memisahkan dua akad dalam satu transaksi yang dilarang syariat dan untuk menghindari terjadinya riba. Penerapan janji mengalami kendala, karena karakter janji yang bersifat sukarela harus diterapkan dalam kontrak bisnis yang mengedepankan kepastian hukum. Pengaturan janji dalam fatwa Dewan Syariah Nasional (DSN) membuktikan kerumitan tersebut, sehingga janji dalam fatwa DSN dapat berupa janji sepihak (*wa'd*) atau janji dua belah pihak (*muwâ'adah*), dan janji tersebut ada kalanya bersifat mengikat dan tidak mengikat kepada mereka yang berjanji. Fatwa DSN memiliki kecenderungan janji bersifat mengikat. Pengikatan janji tersebut berakibat pada rancunya antara penggunaan janji dan akad dalam suatu transaksi, dan juga akibat hukum dari keduanya terhadap objek yang ditransaksikan. Dari enam fatwa yang mengakomodasi janji, hanya satu fatwa yang menyatakan janji yang tidak mengikat, yaitu dalam hal IMBT). Dalam fatwa yang tersisa lainnya, secara eksplisit maupun implisit, setuju pada pengikatan janji.

Kata Kunci:

Janji (*wa'd*), mengikat (*mulzim*), akad (*'aqd*), dua akad, riba

Introduction

The primary function of Islamic Financial Institutions (LKS) is to provide financing for customers in need. Basically, one of the LKS characters, which is adopted from Conventional Financial Insti-

KARSA: Jurnal Sosial dan Budaya Keislaman
Vol. 24 No. 2, Desember 2016: 282-300

DOI: 10.19105/karsa.v24i2.1003

tutions (LKK) system with a wide range of changes, keeps focusing on funding. Consequently, such character shall deal with some Islamic principles regarding the prohibition on additional charge in loans, commonly known as usury. Here, the principle of the prohibition of usury becomes the basis which differ LKS from LKK. In addition, it is considered as the most dominant Islamic principle adopted in the Islamic economic fatwa besides the principle of halal objects in a contract.[1]

The practice of *murâbahah* as the prima donna in LKS, for instance, tends to be changing from its initial Islamic concept when applied. Similarly, other products such as the practice of refinancing and that of sale and lease-back appear to be more complicated because they are facing the prohibition on the practice of multiple buying and selling on a single object, known as the *bay' al-'înah*. In *murâbahah* contract, Islamic banks serve as intermediary (*tâjir wasîth*) between the first seller (supplier) and customers (*bay' al-murâbahah al-muqtarinah bi al-wa'd*).[2] In the process, the banks have to buy the object of *murâbahah* after the customers have expressed their willingness and have promised to buy it.[3] In this case, they may represent the customers in buying and selling at the same time.[4] In the mean-time, the suppliers can also act as a representative of the banks to sell with *murâbahah* contract. Lewis, for example, percei-ves the paradoxical role of Islamic banks as finance and goods selling-buying intermediary in the *murâbahah* contract.[5] However, al-Suwaylim argues that the appropriate intermediary for Islamic banks is financial intermediary (*wasâthah mâlîyah*) instead of goods in-termediary.[6]

As an attempt to circumvent the aforementioned Islamic prohibitions, promise (*al-wa'd*) is included in the contract. Here, some Islamic financial products that implement the promise (*al-wa'd*) are *murâbahah*, *al-ijârah al-muntahîyah bi al-tamlîk* (IMBT), sale and lease-back, *musyârakah mutanâqishah*, and currency exchange (*sharf*). These products, except currencies buying-selling, are said to be products of the combination contract used in fund-raising, financing, or services.[7] Including promise in the com-bination contract a-ims to circumvent the ban of sharia regar-

[1] See for further details in Muhammad Maksum, "Economics Ethics in the Fatwa of Islamic Economics", *Jurnal Al-Ulum* 15, no. 1 (2015): 129-131, accessed on December 15, 2015, journal.iaingorontalo.ac.id/index.php/au/article/view/298.

[2] 'Alî Jum'ah Muhammad, ed., *Fatâwá al-Mu'âmalât al-Mâlîyah li al-Mashârif wa al-Muassasât al-Mâlîyah al-Islâmîyah, Vol. 1* (Cairo: Dâr al-Salâm, 2010), 45.

[3] DSN and BI, *Himpunan Fatwa Dewan Syariah Nasional MUI, Vol. 1.* (Jakarta: DSN-BI, 2006), 25.

[4] Muhammad, ed., *Fatâwá al-Mu'âmalât al-Mâlîyah,* 280-281, 287.

[5] Mervyn K. Lewis, "In what ways does Islamic banking differ from conventional finance?", *Journal of Islamic Economic, Banking, and Finance* 4, no. 3 (2008): 16, accessed on December 15, 2015, www.cfapubs.org/doi/full/10.2469/dig.v40.n1.19

[6] Sâmî Ibrâhîm al-Suwaylim, "Al-Wasâthah al-Mâlîyah fî al-Iqtishâd al-Islâmî," *The Journal of Islamic Economic of King Abdul Aziz Universit* 10, no. 1 (1998): 89.

[7] As regard to the combination contract, see Hasanuddin, *Konsep dan Standar Multi Akad dalam Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia* (Ph.D Thesis. Syarif Hidayatullah State Islamic University Jakarta, 2008)

DOI: 10.19105/karsa.v24i2.1003

ding the combination contract itself and usury.[8]

Nevertheless, including the promise does not mean the problem is solved. Yet, another layer of complexity arises later. Promise which is essentially a voluntary statement of one party or two parties becomes inapplicable because it creates uncertainty. As commonly known, financial transactions require legal certainty so that the parties who are in default can be prosecuted. If promise is legally considered binding, then the ambiguity between the promise itself and contract will occur. Such complexity leads Saeed Abdullah to conclude that the practice of *murâbahah* may appear as selling-buying contract on the surface, but essentially it is a type of financing with the benefits set out in advance.[9] In the process, the *murâbahah* contract is performed artificially because banks do not deal with the object of the contract, which means the relationship only happens in theory, not in practice.[10] In sum, this article attempts to analyze the complexity of unilateral promise in the modern Islamic financial products. Additionally, it develops the previous works by Jaih Mubarok and Hasanuddin on *the Theory and Implementation of al-Wa'd in Islamic Business Regulation*, published in *Ahkam Journal* 2012, which do not examine the complexity of including promise in modern transactions.

Unilateral Promise (*al-Wa'd*), Bilateral Promise (*al-Muwâ'adah*), and Contract (*al-'Aqd*)

The word of *al-wa'd* (promise) in Arabic can contain both positive and negative meanings. In positive meaning, for instance, it connotes one's promise to another or a few people promise one another. Meanwhile, it negatively connotes the word of *itta'addû* which means exceeding the limit. Ibn 'Arafah interprets a promise as one's statement of good intention in the future. Similarly, al-'Aynî, from Hanafiyah School, states that a promise is a statement embodying good intentions in the future.[11]

By referring to the two terms, three main components of promise can be inferred; a person who promises, a good intention which is promised, and the time when the promise takes place. 'Abd al-Razzâq al-Sanhûrî, as quoted by al-Islâmbûlî, states that promise occurs when someone obliges himself to do something for someone else in the future and does not bind on the current time.[12]

As for the promise in term of bilateral promise *(al-muwâ'adah)*, it happens between two people who promise each other, such as a promise in marriage, in

[8] Muhammad Maksum, *Fatwa Ekonomi Syariah di Indonesia, Malaysia, dan Timur Tengah* (Jakarta: Badan Litbang dan Diklat Kemenag RI., 2013), 143.

[9] Abdullah Saeed, *Menyoal Bank Syariah, Kritik Atas Interpretasi Bunga Bank Kaum Neo-Revivalis,* (Jakarta: Paramadina, 2006), 143.

[10] Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (The Netherlands: Kluwer Law International, 1998), 141.

[11] Ahmad Muhammad Khalîl al-Islâmbûlî, "Hukm al-Wa'd fî al-Fiqh al-Islâmî wa Tathbîqâtuh al-Mu'âshirah", *Al-Iqtishâd al-Islâmî Journal, King Abdul Aziz University* 16, no. 2 (2003): 45-46. Ibn 'Arafah states اخبار عن انشاء المخبر معروفا فى المستقبل, while al-'Aynî says الإخبار بإيصال الخير فى المستقبل

[12] al-Islâmbûlî, "Hukm al-Wa'd", 46. The Arabic text is الوعد هو ما يفرضه الشخص على نفسه لغيره بالإضافة إلى المستقبل, على سبيل ا لتزام فى الحال

KARSA: Jurnal Sosial dan Budaya Keislaman
Vol. 24 No. 2, Desember 2016:282-300

DOI: 10.19105/karsa.v24i2.1003

sale-purchase transaction and in currency exchange. Thus, the promise (*al-wa'd*) in the first sense is carried out by one party, whereas the second (*al-muwâ'adah*) is made by two parties.

In Islamic law, Muslim jurists interpret promise in the sense of *al-wa'd* as a unilateral promise to do good, not to exchange a specific object *(mu'âwadlât)*.[13] Here, the consequence of the promise is its fulfillment or un-fulfillment in the future.

The concept of promise differs from that of contract. The word contract *(al-'aqd)* means binding, setting, or building.[14] In addition, the word also means engagement or promise. Literally, the word of *al-'aqd* has been adapted to Indonesian, which means promise, agreement, and contract.[15] In practice, it is an agreement between two parties who require themselves to implement what has been agreed.[16] In this notion, contract means an activity carried out by two parties for particular purpose. Wahbah al-Zuhaylî clarifies that it is a bond among several ends, either real or abstract bond, by one party or two parties.[17]

According to Shubhî Mahmashânî, contract *(al-'aqd)* in general sense can be met by one or two parties.[18] The two- party contract includes buying and selling, renting, *salam*, and so on, while the one-party contract covers vow and oath (*al-nudzûr wa al-aymân*), which is related to '*ibâdah* practices; cancellation (*al-isqâthât*) in family law (*al-ahwâl al-syakhshîyah*) such as divorce, freeing slaves, and alike; endowment and will; and debt relief (*al-ibrâ`*), cancellation, and *kafâlah*.[19] In turn, al-Zuhaylî clarifies that both classifications are considered as contract in the general sense. Generally, contract includes all *mu'âmalah* transaction activities, the ones in which a person is willing to complete, involving either one party or two parties.[20] In business or particular sense, contract *(al-'aqd)* means engagement (link) between *ijâb* and *qabûl* (offer and acceptance) according to the applicable provisions (Islamic provisions) which legally affects the object of the engagement.[21] In other words, contract *(al-'aqd)* means engagement between one party and another according to sharia in a way that generates a specific law on the object of the contract.[22]

The concept of contract has similarities with that of engagement in civil law. The word of engagement (*verbin-tenis*) is legal relations (on wealth and treasure) between two people in which one demands something from the other and the other is required to meet the demand.[23]

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[13] Ibid., 46.

[14] Louis Ma'lûf, *al-Munjid fî al-Lughah wa al-A'lâm* (Beirut: Dâr al-Masyriq, 1986), 518.

[15] Tim Penyusun, *Kamus Besar Bahasa Indonesia,* 2nd Edition (Jakarta: Balai Pustaka, 1996), 15.

[16] 'Alá` al-Dîn al-Za'tarî, "Al-'Uqûd wa Ma'nâ Takyîfihâ al-Syar'î", accessed on July 20, 2011. http://www.alzatari.org/showart_details.php?id=103,2.

[17] Wahbah al-Zuhaylî, *al-Fiqh al-Islâmî wa Adillatuh*, *Vol. 4* (Syiria: Dâr al-Fikr, 2006), 2917.

[18] Shubhî Mahmashânî, *al-Nazharîyah al-'Âmmah li al-Mûjibât wa-al-'Uqûd fî al-Syarî'ah al-Islâmîyah,* 3rd Edition (Beirut: Dâr al-'Ilm li al-Malâyîn, 1983), 262.

[19] Mahmashânî, *al-Nazharîyah al-'Âmmah*, 262.

[20] al-Zuhaylî, *al-Fiqh al-Islâmî*, 2917-2918.

[21] Ibid., 2918; Ibn 'Âbidîn, *Radd al-Mukhtâr 'alá Dar al-Mukhtâr*, *Vol. 2* (Egypt: Al-Munîrah, nd.), 355.

[22] Kamâl al-Dîn ibn Humâm, *Fath al-Qadîr* (Beirut: Dâr al-Kutub al-'Ilmîyah, 1415 H), 2918.

[23] Subekti, *Pokok-pokok Hukum Perdata* (Jakarta: Intermasa, 1982), 122-123.

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DOI: 10.19105/karsa.v24i2.1003

The word of engagement has broader meaning than the word of promise. The promise, in this case, is an event in which one makes a promise to another or two people promise each other to accomplish a thing. Here, promise is one source of engagement.[24]

The difference between contract and conventional engagement lies in the importance of *ijâb* and *qabûl* and sharia principles. Further, promise in Islamic law and civil law also seems different, because it is regarded as a source of engagement in civil law, whereas in Islamic law it is different from contract. In other words, contract binds two parties, while promise only binds those who promise. Therein come questions associated with unilateral promise in good contract (*tabarru'ât*), exchange contract (*mu'âwadlât*) and bilateral promise (*al-muwâ'adah*) which seems to be binding, and its difference with contract.

Unilateral Promise (*al-Wa'd*) Fulfillment

Promises have been practiced by mankind for a long time and become a measure of their identity. Those who make a promise and keep it properly are regarded as a good person. On the contrary, those who make a promise and deny it are among promise breakers. In Islam, not fulfilling promise is considered a sign of hypocrites.[25] People who make a promise and are determined to keep it in the future and at that time they find it difficult to comply, then they are not required to fulfill it. However, if from the beginning, for instance, they make the promise only to accomplish a certain in-terest and do not intend to keep it, then they are considered as hypocrites who deliberately make a promise and do not intentionally comply it.

Fulfilling a promise is closely associated with one's commitment to his words.[26] Islamic jurists have different opinions about the law of fulfilling promise. Al-Razîn, for example, concludes four laws; making a promise regarding *harâm* (illegal) matters are forbidden to meet it; making a promise of something that is mandatory, to comply it is obliged; making a promise about *mubâh* (permissible) matters, to fulfill it is highly recommended; and according to some jurists, making a promise on the permissible, to comply it is a must both in religion and law. Here, the different opinion happens in the fourth law stating the obligation of fulfilling promise on permissible matters, both religious (*diyânatan*) and legal (*qadlâ`an*) matters.[27] In the meantime, Mubarok and Hasanuddin display three opinions by Islamic Jurists regarding the promise; binding promise, unbinding promise, and binding promise due to conditional circumstances.[28] In another sense, people who promise to pay debt must pay it because paying debt is man-datory. However, if one makes a promise of do-

[24] Ibid., 123.

[25] In a hadits narrated by Abû Hurayrah, the Prophet said: "*There are three signs of hypocrites; whenever he speaks, he tells a lie; whenever he makes a promise, he breaks it; and if you trust him he proves to be untrustworthy.*" (Muttafaq 'Alayh)

[26] al-Islâmbûlî, "Hukm al-Wa'd", 47.

[27] Ahmad ibn Muhammad al-Razîn, "Hukm al-Iltizâm bi al-Wafâ' bi al-Wa'd", accessed on January 20, 2016/ http://almoslim.net/node/82806.

[28] Jaih Mubarok dan Hasanudin, "Teori al-Wa'd dan Implementasinya dalam Regulasi Bisnis Syariah", *Jurnal Al-Ahkam* 12, no. 2 (2004): 212, http://journal.uinjkt.ac.id/index.php/ahkam/article/view/968.

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DOI: 10.19105/karsa.v24i2.1003

ing something bad or harming others, he must then nullify the promise by canceling it.[29] According to al-Syâfi'î, Abû Hanîfah, and the majority of Islamic scholars, the law of fulfilling promise is recommended (*sunnah*),[30] which means the act of not fulfilling promise is included in hated acts (*makrûh tanzîh*), but not considered as a sin. This opinion refers to a *hadîts mursal* by 'Athâ' ibn Yasâr who reported that someone asked the Prophet: *"I have lied to my wife?" Then he answered: "There is no good in lies". Again the man asked: "I promised her, but I undid it?" The Prophet then replied: "There is no sin on you".* In another hadits, the Prophet said: *"Someone who makes a promise to others and intends to keep it, but then he does not meet what he agrees with is not a sinner".* Nevertheless, these hadiths are among weak hadith (*dla'îf*). Consequently, both cannot be used as a legal basis for their status is not accountable.[31]

Other Islamic Jurists claim that keeping promise is obligatory and breaking it is indeed forbidden. Such opinion is expressed by Hanbali and Ibn Taymîyah. Further, Al-Amurî, as quoted by Mubarok and Hasanuddin, states scholars who oblige that one must keep a promise are Sa'îd ibn 'Umar (Ibn al-Usyu'), Ibn Syubrumah, Ibn al-Syath al-Mâlikî, Ibn al-'Arabî, Ishâq ibn Rahawayh, al-Ghazâlî, dan al-Jashshâsh.[32] This opinion is based on Quran, al-Shâf: 2, *"O those who believe, why do you say something that you do not do?"* This verse generally involves many aspects of human acts. In addition, it also refers to the hadith of the Prophet stating the signs of hypocrites, one of which is breaking promise.[33] According to Ibn Syubrumah and Ibn 'Arabî promise is binding and those who make it are required to fulfill it.[34] Most of Mâlikiyah schools confirm that fulfilling all promises is legally an obligation which gives an understanding that something obliged by religion is set as an obligation by judges.[35] In the meantime, some of Mâlikiyah schools argue that promise which is associated with cause is obliged to accomplish.[36] This opinion is based on the hadits of the Prophet regarding the prohibition of acts that harm one's self and others' (*la dlarar wa la dlirâr*).[37] Here, the promise which is bound by cause is classified into three types;[38] First, promise with cause, such as the promise of one person to another to pay a dowry when they get married. Therefore, if the person gets married with such promise, then he is obliged to pay the dowry. This opinion is very famous among Malikiyah schools as mentioned by al-Bâjî and al-Qarâfî; Second, promise without cause. If one makes a promise without a cause, he is not obliged to comply it. Such opinion is ex-

[29] Abû Muhammad 'Alî ibn Ahmad ibn Sa'îd ibn Hazm, *al-Muhallâ, Vol. 8* (Cairo: Dâr al-Ittihâd al-'Arabî, 1968), 29.

[30] al-Zuhaylî, *al-Fiqh al-Islâmî*, 2928.

[31] al-Razîn, "Hukm al-Iltizâm".

[32] Mubarok dan Hasanudin, "Teori al-Wa'd", 82.

[33] al-Razîn, "Hukm al-Iltizâm".

[34] ibn Hazm, *al-Muhallâ*, Vol. 8, 28. Ibn 'Arabî is one of scholars who agrees on the obligation of keeping promise as a dominant opinion. Mubarok dan Hasanudin, "Teori al-Wa'd", 83.

[35] al-Razîn, "Hukm al-Iltizâm".

[36] al-Islâmbûlî, "Hukm al-Wa'd", 47.

[37] al-Razîn, "Hukm al-Iltizâm".

[38] Al-Amurî chategorizes promise with cause into two forms; conditional promise (*al-wa'd al-mu'allaq bil-sharth*) and causal promise (*al-wa'd murâbit bi al-sabab*). Mubarok dan Hasanudin, "Teori al-Wa'd", 84.

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DOI: 10.19105/karsa.v24i2.1003

pressed by Ashbagh; and third, conditional promise, in this last type keeping the promise is mandatory.[39] For example, one is willing to sell goods to another (as a buyer), if the buyer is unable to pay in hand, but he promises to pay, so he must deliver the promise.[40] According to Islambûlî, he agrees on the idea that keeping promise is recommended (*sunnah*), while al-Razîn argues that fulfilling promise in line with religion and law is necessary. Such promise, according to al-Zuhaylî, means *al-iltizâm bi irâdah wâhidah*, requiring one's self to do something for other people in the future.[41]

In the 5th conference in 1988 in Kuwait, *Majma' al-Fiqh al-Islâmî* (Islamic Fiqh Academy) stipulates that a promise expressed by a customer (*âmir*) as a buyer in *murâbahah* contract, to the bank as the recipient of the promise (*ma'mûr*), is religiously binding (*mulzim*), unless he is in the state of *udzur* (incapable of paying). Basically, the promise is legally binding particularly when it depends on a specific reason. Hence, what is promised relies on the fulfillment of the promise itself. In practice, the implementation of fulfilling the promise is settled either with fulfillment or compensation for incurred losses as a consequence of ignoring the promise.[42]

The obligation of fulfilling promise is particularly true in unilateral promise and in the promise of an object in terms of good deeds (*tabarru'ât*). However, the obligation of fulfilling promise in bilateral promise (*muwâ'adah*) is dealing with the concept of contract especially on exchange contract (*mu'âwadlât*).

Ambiguity on *al-Muwâ'adah*; Promise or Contract

Promise which is associated with exchange transaction (*mu'âwadlât*) is not binding, and fulfilling it is also not required. The binding is based on contract rather than on promise.[43] According to al-Razîn, this is the prime opinion.[44] As described in the aforementioned definition of promise, promise or agreement involves good deeds, not exchange contract (*mu-'âwadlât*). If the promise is made in *mu-'âwadlât* contract, then it will be the form upon which the contract is based on.[45] Essentially, the applicable provision in a contract is the effect of the contract itself, not words or statement. It means although the buying-selling transaction involves the word of "promise" and as we know promise is naturally binding, then the transaction essentially happens.[46] Ibn Hazm said: *"Mutual promise to buy and sell gold for gold, silver for silver, wheat for wheat, or grapes for grapes, is allowed. In the end, whether they carry out the selling-buying transaction or not will not matter because such promise is not considered as selling-buying transaction"*.[47] Here, the statement *"I will sell and I will buy"* is not intended as selling-buying transaction but as promise.[48] The majority of contemporary

[39] al-Islâmbûlî, "Hukm al-Wa'd", 50-51.
[40] al-Razîn, "Hukm al-Iltizâm".
[41] al-Zuhaylî, *al-Fiqh al-Islâmî*, 84.
[42] Majma' al-Fiqh al-Islami's decision No. 5-3. DSN, accessed on January 12, 2016. http://www.fiqhacademy.org.sa/ qrarat/5-3.htm.
[43] al-Islâmbûlî, "Hukm al-Wa'd", 52.
[44] al-Razîn, "Hukm al-Iltizâm".
[45] al-Islâmbûlî, "Hukm al-Wa'd", 48.
[46] al-Razîn, "Hukm al-Iltizâm".
[47] ibn Hazm, *Al-Muhallâ, Vol. 8,* 513.
[48] al-Islâmbûlî, "Hukm al-Wa'd", 48.

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DOI: 10.19105/karsa.v24i2.1003

scholars agree on that promise is binding in exchange contract (*mu'â-wadlât*). In the meantime, other legal experts such as Sami Hamud and Yûsuf al-Qaradlâwî believe that such promise is legally binding for both parties. This opinion is based on the hadits of the Prophet regarding the prohibition of harming one's self and others'. Another basis is the benefit of transaction considering that both parties who make the promise feel safe, and the transaction activity runs with certainty and avoids disputes. This opinion is used as an inference during the first and the second conference by the Islamic Financial Institutions in Dubai and Kuwait.[49] The other reason is the freedom to make additional conditions.[50]

Nazih Hammad, as mentioned by Islambûlî, agrees with Musthafâ al-Zarqâ and al-Qaradlâwî's opinion that promise in *mu'âwadlât* contract is binding. He argues that two people who promise each other and agree to keep and comply it in the future, then the promise has been binding since they claim it. In turn, the promise turns into a legal contract and the law of contract applies to it because the law in transaction relies on intent and purpose instead of words.[51] However, Islambûlî does not agree with Hammad's opinion. He argues that the binding of promise does not become the basis of change from promise to contract considering that promise is still binding in the future, while contract is binding after which it is agreed on. On other words, the legal consequence of promise does not influence the object of the promise as soon as it is pronounced, but still it will apply in the future.[52]

According to al-Syâfi'î, if promise is binding, then *murâbahah* contract is not valid for two reasons; buying and selling goods that do not belong to the seller and the existence of *gharar* (betting or obscurity) in price.[53] If the promise of both parties binds them, then it resembles buying-selling transaction.[54] Al-Sarkhasî and *Majma' al-Fiqh al-Islâmî* stipulate the system of *khiyâr* (option) for three days to ensure whether customers are willing to continue to buy the objects that they have ordered or cancel them.[55] According to Yûsuf al-Qardlâwî, *gharar* rarely happens in the practice of Islamic banking because buyers know the price of the object to be traded and it avoids the occurrence of *gharar* in price. Practically, small *gharar* is alowed in *mu'âmalât* activities.[56]

The binding of *muwâ'adah* raises confusion in the concept of contract. Here, there is a difference between promise and contract in which it is related to will (intent), object in transaction, and the time when the transaction is complete. Generally, promise is a statement of a person's desire to do something, while the contract is the match of two wills from two sides

[49] al-Razîn, "Hukm al-Iltizâm".

[50] Mubarok dan Hasanudin, "Teori al-Wa'd", 85.

[51] al-Islâmbûlî, "Hukm al-Wa'd", 53.

[52] Ibid., 54.

[53] Muhammad ibn Idrîs al-Syâfi'î, *al-Umm, Vol. 3.* (Al-Manshûrah: Dâr al-Wafâ`, 2005), 48.

[54] Majma' al-Fiqh al-Islami's decision No. 5-3. DSN, accessed on January 12, 2016, http://www.fiqhacademy.org.sa/ qrarat/5-3.htm.

[55] Syams al-Dîn al-Sarkhasî, *Al-Mabsûth*, *Vol. 3.* (Beirut: Dâr al-Ma'rifah, 1986), 237-238.

[56] Yûsuf al-Qardlâwî's opinion is quoted by al-Sibhânî. 'Abd al-Jabbâr Hamd 'Abîd al-Sibhânî, "Mulâhâzhât fî Fiqh al-Shayrafah al-Islâmîyah". *The Journal of Islamic Economic of King Abdul Aziz University* 16, no. 1 (2003): 39.

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(parties). In terms of objects, the object mentioned in the promise is associated with good deeds (*tabarru`ât*), whereas the object in the contract is exchange transaction (*mu'âwadlât*) between the two parties. Regarding the time, the fulfillment of promise happens in the future, while the fulfillment of contract is in accordance with the agreement of both parties. Hence, if the contract has been agreed on, then both parties should meet the contents of the contract.[57]

The decision made by the *Majma' al-Fiqh al-Islâmî* stating that unilateral promise is binding, whereas mutual promise is not, according to al-Misri, has several loopholes. *First*, the two options lead to alternatives taken by business actors to choose any option that is beneficial for them. *Second*, the binding which tends to one party gives rise to inequality in contract because one is charged with the responsibility of another. *Third*, the binding of good promise for one party or two parties have actually shifted the functions of the promises into contract transaction which is binding for the parties since the beginning.[58] In this context, al-Zuhaylî mentions the possibility of contract executed by one party, even though such case is very rare. He exemplifies the contract of a guardian on his behalf, in one side, and on behalf of his minor, in another. Another example is a grand-father who wed his granddaughter (from his son) to his grandson (from another son). Here, al-Zuhaylî does not call it as promise but unilateral contract.[59]

In this context, al-Misri reminds that Islamic banks actually confirm the conventional banking practices. Here, the Islamic banks' credibility is doubtful because their practices have basically led to banned practices, yet they justify them.[60] By doing so, the position of promise in contract combination transaction could fall on prohibited area if not implemented correctly. The followings are some contract combinations that use promise.

Unilateral Promise (*al-Wa'd*) as *Muhallil* of Multi Contract

1. Promise in *Murâbahah* Contract

The fatwa of *murâbahah* product is legelized by the National Sharia Council-Indonesian Ulama Council (DSN-MUI) in 2000. Such fatwa is included in the frist collection of fatwa issued by the Islamic Economics institutions. Essentially, it regulates general terms, types of *murâbahah* contract, insurance in the contract, *murâbahah* debt status, delayed payments, and customer's bankruptcy.

The *murâbahah* contract according to the DSN's fatwa is selling-buying contract in which banks legitimately buy the object of the contract in advance and sell it to customers with an acquisition cost and profit margin. Here, the banks can partly or fully finance the object of the contract.[61] According Qal'ahjî, *murâbahah* presented in *fiqh* is selling contract with initial price and fixed profit. In practice, the type of *murâbahah* applied in Islamic banks is *murâbahah al-âmir bi al-syirâ`* meaning one asks another to buy certain objects with required qualifications and buy

[57] al-Islâmbûlî, "Hukm al-Wa'd", 52.

[58] al-Masri, "The Binding Unilateral Promise (Wa-'d)", 31-32.

[59] al-Zuhaylî, *al-Fiqh al-Islâmî wa Adillatuh*, 88.

[60] al-Masri, "The Binding Unilateral Promise (Wa-'d)", 31.

[61] DSN and BI, *Himpunan Fatwa*, 25.

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them back by giving certain profits.[62] In turn, customers apply for product financing by by promising (*wa'd*) to purchase the product.[63]

Al-Syâfi'î agrees when someone asks another to buy something he likes and then gives him certain profits. Such practice is similar to *murâbahah* contract. Similarly, Mâlikiyah schools define *murâbahah* as buying and selling transaction where the owner of product explains the price acquisition of the product and takes profit as he desires. In the meantime, Hanafiyah Schools define *murâbahah* as delivering goods with initial contract, and basic price as well as profit. According to Syâfi'îyah and Hanabilah schools, *murâbahah* is buying-selling transaction with basic price or price set by the seller with profit such as one dirham for every ten dirham as long as both parties know the price.[64]

In this sense, it appears that there are two types of selling-buying contracts in *murâbahah*. To avoid the two types occur in a single contract, promise is applied to separate them. Here, the promise is made by customers and is addressed to banks to order the object of the contract. In this regard, Islamic Jurists have different opinions. Al-Dasûqî, for instance, believes such practice as *bay' al-'înah* because one seller asks for another's help to achieve his goal to pay less, but acquire large profits. Among Islamic scholars, the practice is commonly known as *bay' al-muwâshafah* which is completely different with *murâbahah* as justified by sharia.[65] The majority of Islamic jurist allows the practice of *murâbahah* with unbinding promises.[66] Al-Syâfi'î exemplifies a person (as a buyer) says, "buy this product and I'll give you profit (seller). Such transaction is valid and the statement "I'll give you profit" is *khiyâr* (option) whether to buy or to cancel. In this case, besides including promise, al-Zuhaylî also confirms that *murâbahah* procedures are fully and correctly implemented.[67] The procedures that he emphasizes are; *First*, Islamic banks should clearly possess and receive the objects of *murâbahah*; *second*, representing clients (customers) to buy and sell the objects of the contract is restricted except during emergency; *third*, minimizing the possibility to use this contract is recommended because it tends to resemble *qardl*. In other words, frequent use may lead to practice loan with interest.[68]

Further examination is related to the binding of promise by the DSN's fatwa. Theoretically, there are two types of *murâbahah* authorized by the DSN, namely *murâbahah* with purchase obligation (*murâbahah muqtarinah bi al-wa-'ad al-mulzim li tharaf wâhid aw li tharafayn*)

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[62] Muhammad Rawâs Qal'ahjî, *al-Mu'âmalât al-Mâlîyah al-Mu'âshirah fî Dlaw`i al-Fiqh wa al-Syarî'ah* (Beirut: Dâr al-Nafâ`is, 1999), 89, 93.

[63] Ibid., 95-97; Wahbah al-Zuhaylî, *Al-Mu'âmalât al-Mâlîyah al-Mu'âshirah* (Damascus: Dâr al-Fikr, 2002), 69-70; DSN and BI, *Himpunan Fat-wa,* 25.

[64] Muhammad ibn Idrîs al-Syâfi'î, *al-Umm*, 33; Muhammad al-Khathîb al-Syarbînî, *Mughnî al-Muhtâj ilâ Ma'rifah Ma'ânî al-Minhâj*, Vol. 2, (Beirut: Dâr al-Fikr, tt.), 77.

[65] Al-Dasûqî, as quoted by al-Sibhânî, forbids such selling-buying practice. al-Sibhânî, "Mulâhâzhât", 34.

[66] Ibid., 37.

[67] al-Zuhaylî, *al-Mu'âmalât al-Mâlîyah*, 70-71.

[68] Ibid., 70-71. Fatwa by an Egyptian mufti, 'Alî Jum'ah Muhammad, No. 279 "Al-Bay' bi al-Taqsît", accessed on December 23, 2010, http://www.dar-al-ifta.org.

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and *murâbaḥah* without purchase obligation.[69] The DSN adopts various opinions from different Islamic scholars regarding the binding of promise. However, the fatwa is likely to place the promise as an obligation which is legally binding. It is seen from two evidences; the justification to imposition compensation or to lose advances (down payment) deposited by customers to bank, and the implementation of financing insurance system.[70]

2. Promise in *al-Ijârah al-Muntahîyah bi al-Tamlîk* contract

The use of promise is also found in *al-Ijârah al-Muntahîyah bi al-Tamlîk* (IMBT) contract which was approved by the DSN in 2002. Surprisingly, it is the first product which explicitly consists of two contracts approved by the DSN.

IMBT contract is a contract which aims at replacing one model of financing, leasing, in conventional financial institution activities. Leasing is a lease transaction that ends with the transfer of ownership of the leased object to the lessee.[71] In *fiqh*, each contract has purpose and legal consequences. Like other contracts, IMBT possesses two legal consequences, the transfer of profit and that of ownership. Therefore, the term *ijârah* is a mere transfer of profit, while *tamlîk* is a transfer of ownership by purchase, *hibah* (gift), or alike. Kamali assesses that *ijârah* in Islamic banks is a form of long-term financing of goods without interest.[72]

The contract used in IMBT is the combination of *ijârah-hibah* or *ijârah-bay'*. In the *ijârah-hibah*, for instance, the *ijârah* ends with the transfer of ownership with *hibah* option which is handing over *ijârah* objects from owner to tenant (lessee). As for the *ijârah-bay'*, after the leasing period is completed, the lessee can have the leased object by purchasing it. *Majma 'al-Fiqh al-Islâmî* (Islamic Fiqh Academy) offers three alternatives on IMBT contract after the lease period has expired; continuing the lease, stopping the lease and handing over the leased object to its owner, and purchasing the object according to market price.[73] The Sharia Advisory Council's fatwa points the last model, after the lease period is over, purchasing *ijârah* asset then happens.[74]

The DSN's fatwa includes promise to separate *ijârah* contract from *hibah* contract or purchase contract at the end of the lease. Once the duration of lease is completed, the *hibah* or purchase contract will functionally apply. Practically, IMBT contract is available after the object of *ijârah* is in the possession of Islamic banks (through purchase contract).[75] The acquisition mechanism of the leased object is not described in the DSN's fatwa, but it emphasizes that *ijârah* and *hibah* contract

[69] DSN and BI, *Himpunan Fatwa*, 25.

[70] Ibid., 25.

[71] Kasmir, *Bank dan Lembaga Keuangan Lainnya* (Jakarta: Raja Grafindo Persada, 2005), 258.

[72] Mohammad Hashim Kamali, "A Sharia Analysis of Issues in Islamic Leasing", *The Journal of Islamic Economic of King Abdul Aziz University* 20, no. 1 (2007): 7.

[73] Fatwa No. 44 (5-6), the fifth conference on December 10-15, 1988 in Kuwait, accessed on July 3, 2011, http://www.fiqhacademy.org.sa/qrarat/5-6.htm.

[74] Bank Negara Malaysia, *Resolusi Syariah dalam Kewangan Islam* (Malaysia: Bank Negara Malaysia, 2010), 3.

[75] Jordanian Fatwa Commission, No. 932, September 26, 2010, accessed on November 15, 2010. http://www.aliftaa.jo/index.php/ar/fatwa/show/id/608.

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or purchase contract should be separated and stand on its own.[76] In the early stages, Islamic Financial Institutions and customers carry out lease contract. After the duration of the contract has expired, the two parties agree to make selling-buying contract as long as the customers are willing to continue the ownership of the lease asset.[77] In addition, the Islamic Fiqh Academy also regulates the separation of the two contracts.[78] In this context, promise plays its role as *muhallil* (approver) on the ban on multi contract practices.

In terms of the binding of promise, the DSN's fatwa reiterates that promise in IMBT contract is not binding and is made by two parties, customers who promise to buy the object of IMBT and Islamic financial institutions that promise to sell it (*muwâ'adah*). Here, the customers may continue to transfer the ownership of the object or stop leasing it.[79]

3. Promise in Currency Exchange (*Sharf*) Contract

Currency exchange plays as a significant transaction in modern trade and cross-country to exchange different currencies. In Islam, currency exchange is known as *sharf* which literally means addition. Terminologically, it is trading money for money in the same or different one kind (e.g. gold for gold, silver for silver, or gold for silver).[80] In general, *sharf* transaction is a part of buying-selling transaction.

One of the fundamental systems in currency exchange is in cash and at the same price. Such exchange adopts the legal transaction of gold and silver. The in-cash and at-the-same-price system is based on the hadith of the Prophet.[81] Therefore, an exchange in the same kind of currency should be at the same price, while exchange in different currency is according to the applicable exchange rate in which the selling-buying contract takes place.[82] In this case, currency exchange in receivables is not justified because it may lead to the practice of usury.

According to its fatwa, the DSN authorizes four types of currency exchange (foreign exchange); (1) spot, it is a type of foreign exchange (forex) over the counter and its settlement is no later than two days; (2) forward, it is a foreign exchange transaction in which its value is set in the present, but applicable in the future, from 2 x 24 hours to one year; (3) swap, foreign exchange contract with spot's price but modified with the forward's price; and (4) option, it is a contract to obtain rights to buy or sell which does not require a certain number of units

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[76] DSN and BI, *Himpunan Fatwa*, 160.

[77] Bank Negara Malaysia, *Resolusi Syariah*, 3.

[78] Majma' al-Fiqh al-Islâmî's (Islamic Fiqh Academy) decision, No. 110 (12/4), during the twelfth conference on September 23-28, 2000 in Riyâdh, accessed on July 3, 2011, http://www.fiqhacademy.org.sa/qrarat/5-2/3.htm.

[79] DSN and BI, *Himpunan Fatwa*, 160.

[80] al-Zuhaylî, *al-Fiqh al-Islâmî*, 3659.

[81] the Prophet sais, "*(Sell) gold for gold, silver for silver, wheat for wheat, poem for poem, date for date, and salt for salt, (under one condition) in cash and at the same price. If it is in different kind, sell as you wish as long as it is in cash.*" In another hadith, it is stated that, "*The Prophet forbade selling silver for gold in receivables (not in cash).*" (Narrated by Muslim)

[82] The Fatwa by the Islamic Financial Services Board, Kuwait, No. 168 confirms that currency exchange is in cash and is handed over when the contract takes place, accessed on June 9, 2012, http://moamlat.al-islam.com.

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of foreign exchange on specific price and time or end date.[83]

The use of promise is found in *forward* transaction. Therein, the DSN's fatwa bans such transaction because it embraces the existence of *gharar* (betting or obscurity) in price. In such practice, the fixed price when the contract happens may not necessarily be the same as when the object is delivered. The promise mentioned in the DSN's fatwa is the promise from both parties (*muwâ'adah*). In contrast, the fatwa allows forward agreement. However, it does not clarify the difference between *muwâ'adah* and forward agreement considering that the agreement here can be interpreted as a promise or selling-buying contract in terms of commitment to sell and buy.[84] Other fatwas, such as the fatwa by the Sharia Advisory Council of Bank Negara Malaysia and that by the Sharia Advisory Council in Kuwait, also prohibit *muwâ-'adah* in forward's currency exchange. Nevertheless, the fatwa by the Sharia Advisory Council approves *forward* system as long as the contract or transaction is based on the promise of one of the parties, not both parties (*muwâ'adah*). [85] In addition, the Islamic Financial Services Board (IFSB) also authorizes the existence of promise in *forward* transaction.[86] As the re-sult, unilateral promise to buy foreign currency which is received or delivered in the future is justified for the promise is not a contract and only binds one party.[87]

At last, the *Majma' al-Fiqh al-Islâmî* (Islamic Fiqh Academy) prohibits currency exchange in receivables, even with promise.[88] Meanwhile, it allows *muwâ'adah* as long as *khiyâr* applies to both parties.[89]

4. Promise in Sale and Lease Back Contract

Sale and lease-back is a selling-buying contract where the object is to be leased by the seller and the buyer may promise to sell it to the initial seller. Literally, selling-buying (*bay'*) contract means releasing or admitting ownership. In general, Islamic Jurists define buying and selling as property exchange without pressure (in which one is seen from the existence of *ijâb* and *qabûl* (declaration and acceptance).[90] In addition, it is typically modified with other contracts, such as the combination of *bay'* and *ijârah* (sale and leaseback), that of bay' and IMBT which is used in State Islamic Securities (*Surat Berharga Syariah Negara*/SBSN) and *murâbaḥah* conversion.

In the process, the SBSN applies sale and leaseback contract. The Indonesian Gobernment, through the Ministry of Financial Affairs, sells its assets to another party, and then it would lease these assets within a certain time. In this case, it does

[83] Kasmir, *Bank*, 236-239.

[84] DSN and BI, *Himpunan Fatwa*, 165.

[85] Bank Negara Malaysia, *Resolusi Syariah*, 138.

[86] The Fatwa by the Islamic Financial Services Board, Kuwait, No. 28, accessed on June 9, 2012, http://moamlat.al-islam.com.

[87] The Fatwa by the Islamic Financial Services Board, Kuwait, No. 2, 5, 17, and 140, accessed on June 9, 2012, http://moamlat.al-islam.com.

[88] Majma' al-Fiqh al-Islâmî, "Al-Ittijâr fi al-'Umalât", accessed on July 3, 2011, http://www.fiqhacademy.org.sa/ qrarat/5-2/3.htm.

[89] Majma' al-Fiqh al-Islâmî, "Al-Wafâ bi al-Wa'ad wal-Murâbaḥah li al-Âmir bi al-Syirâ`", accessed on July 3, 2011, http://www.fiqhacademy.org.sa/qrarat/5-2/3.htm.

[90] Ramadlân Ḥâfizh 'Abd al-Raḥmân, *Al-Buyû' al-Dhârrah* (Cairo: Dâr al-Salâm, 2006), 11.

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not actually intend to sell them considering that it would buy them back. To anticipate the buying-selling and the lease transaction to happen in one contract, the transfer of assets is carried out through promise (*wa'd*).[91] The transfer of objects in two contracts shall concern the principles of validity in each contract. The DSN's fatwa affirms that selling-buying (sale) contract is separated from *ijârah*. In this case, the *ijârah* can only be done after the selling-buying contract on assets occurs.[92] The Sharia Advisory Council's fatwa stipulates that such contract is carried out by a representative (*wakîl*). Hence, the representative status must be mentioned.[93] In the meantime, the Syria's Fatwa allows the selling and buying of one object at a time. Such fatwa refers to the opinion among Mâlikiyah schools that allows someone who buys an object (other than food) and then resells it to another party prior to receiving it (*al-qabdl*) as long as the initial purchase has happened.[94]

The implementation of promise in the contract aims at anticipating the occurrence of *bay al-'înah* which according to the majority of Muslim jurists is forbidden. The DSN does not explicitly issue its Fatwa regarding the prohibition or permissibility on the use of *bay' al-'înah*. Nonetheless, it has approved the combination contract of *bay'-bay'* (sale with sale) in debt swap (*hiwâlah*) product. In this product, the LKS buys customers' object in cash (through *qardl*), and then resells it to them in installments (on credit) with higher price (*murâbahah*).[95] The use of *bay 'al-'înah* contract is performed due to emergency; there is no other sufficient contract to accommodate such practice[96] which is according to Abraham considered as the first and most widely used legal tactic (*hîlah*).[97]

As regard to the status of promise, the DSN's fatwa calls it as an alternative, the buyer may promise to resell the object to the initial seller.[98] In its next fatwa, the fatwa number 72 regarding the *ijârah* on SBSN, the promise is confirmed in the contract. Here, the promise is no longer an alternative but a part of the contract.[99] The Fatwa by the Sharia Board of Al-Barakah distinguishes the term promise (*wa'd*) and option (*khiyâr*). Accordingly, promise can replace *khiyâr* for it is one-sided (unilateral).[100] However, the Fatwa does not explicitly state whether the promise is binding or not. In practice, the promise is binding because the state, in this regard the SBSN publisher, will buy back the object of the contract.

5. Promise In *Musyârakah Mutanâqishah* Contract

Literally, *Musyârakah* is derived from the word of *syirkah* which means cooperation or association (*ikhtilâth*). Here, *syirkah* is defined as associating the properties of two parties so that the pro-

[91] DSN and BI, *Himpunan Fatwa*, 265-266.

[92] Ibid., 195.

[93] Bank Negara Malaysia, *Resolusi Syariah*, 4.

[94] The Fatwa No. 1637, March 31, 2009, accessed on October 27, 2015, http://www.eftaa-aleppo.com/index.jsp?inc= 21&id= 1637.

[95] DSN and BI, *Himpunan Fatwa*, 189-190.

[96] Maksum, *Fatwa Ekonomi Syariah*, 179.

[97] Muhammad ibn Ibrâhîm, *al-Hiyâl al-Fiqhîyah fi al-Mu'âmalât al-Mâlîyah* (Cairo: Dâr al-Salâm, 2009), 106.

[98] DSN and BI, *Himpunan Fatwa*, *Vol. 2,* 195.

[99] Ibid., 204.

[100] Muhammad, ed., *Fatâwá al-Mu'âmalât al-Mâlîyah*, 298-301.

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perties cannot be distinguished to whom they belong. Terminologically, *musyârakah* is an agreement between two parties in terms of capital, employment, and profit.[101] Basically, *musyârakah mutanâqishah* contract is a combination of *syirkah* and *bay'*.[102] In this contract, Islamic banks and customers establish cooperation contract (*musyârakah*) in which the banks promise to buy and the customers promise to sell *musyârakah* assets. In turn, these assets are leased by the customers. The lease payment as the customers' right becomes the payment for the assets in installments.[103] A portion (*hishshah*) of bank's capital in *musyârakah* assets will be in customers' full ownership at specific time through selling-buying (*bay'*) contact, either in cash or in installments.[104] The selling-buying contract may be made through *murâbahah* system. The Fatwa by Faisal Sudan as one of the Sharia Supervisory Board of Islamic Bank members, prohibits the modification of *syirkah* and *bay'* contract in one transaction.[105] Ibn Qudâmah allows *syarîk* (the contract's party) to buy another party's portion (*hishshah*) because it means he buys another's assets.[106] Similarly, Ibn 'Âbidîn (d. 1252 H) narrows the permissibility to sell these assets, which is only addressed to the contract's party (*syarîk*), not to another.[107] In con-trast, Kamâl Tawfîq concludes the possibility of selling *syirkah* assets to the contract's parties or other parties outside of the *syirkah* participants.[108]

The DSN's fatwa firmly requires *wa'd* (promise) from the two parties to sell and buy objects.[109] In this case, the promise is used to anticipate the possibility to which customers neglect the contract.[110] If, for instance, the customers cancel to buy the objects, the LKS can sell them to the third party based on the promise.[111] In this regard, the DSN offers *muwâ'adah*, mutual promise between parties as the binding. Here one of the parties may execute the object of the contract based on the promise. In such case of contract, the ban on selling or buying the object of the contract by one of the parties is not found because each party has a portion of the object. Therefore, he may legally sell the object to other parties. The clause of authority to sell the object of the contract if one party does not keep his promise has con-sequently brought to the position of the promise as the contract itself.

6. Promise in the DSN's Fatwa

The DSN's fatwa number 85 regarding promise (*wa'd*) in Islamic financial and business transactions which was enacted in 2012, assures the DSN's attitude towards the position of promise in modern transaction. If, for instance, the DSN formerly defines that promise is binding in a particular fatwa or it is not binding in another, this time it expressively

[101] al-Zuhaylî, *al-Fiqh al-Islâmî, Vol. 5,* 3875-3877.

[102] DSN and BI, *Himpunan Fatwa, Vol. 2,* 217; Bank Negara Malaysia, *Resolusi Syariah*, 43.

[103] Bank Negara Malaysia, *Resolusi Syariah*, 43.

[104] DSN and BI, *Himpunan Fatwa, Vol. 2,* 216-217.

[105] Muhammad, ed., *Fatâwá al-Mu'âmalât al-Mâlîyah, Vol. 3,* 367-368.

[106] Ibn Qudâmah al-Maqdisî, *al-Mughnî, Vol. 5,* (Cairo: Dâr al-Hadîts, 2004), 173.

[107] Ibn 'Âbidîn, *Radd al-Mukhtâr*, 365.

[108] Kamâl Taufîq Muhammad Hathâb, *Jurnal Dirâsât Iqtishâdîyah Islâmîyah* 2, no. 10 (2014): 48.

[109] DSN and BI, *Himpunan Fatwa*, 217.

[110] Bank Negara Malaysia, *Resolusi Syariah*, 45.

[111] Ibid., 45-46.

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states that the promise is binding. Hence, people who make promise shall carry it out.[112]

The fatwa sets up a few things, including general provisions, legal provisions, provisions regarding with parties who make promise, and provisions associated with the implementation of the promise itself. In the general provisions, the DSN only outlines an explanation on unilateral promise (*wa'd*) as a statement of will by a person or a party to do good things (or not do bad things) to another party (*maw'ûd*) in the future. However, it does not provide explanations related to bilateral promise (*muwâ'adah*). There are two possibilities of loopholes in the terminology of *muwâ'adah*; *first*, the promise set forth in this fatwa is unilateral promise; and *second*, the promise here is intended for both unilateral promise and mutual promise. Further, the meaning of binding (*mulzim*) is that the person who makes promise (*wâ'id*) must fulfill his promise (to complete *maw'ûd bih*/the object of promise), and is likely to be forced by *maw'ûd* (the one to which the promise is told) and/or authorities to comply it. In sum, the fatwa states that the binding of promise is *qadlâ`an* (enforced by law).

In addition, the DSN's Fatwa stipulates that promise can only be made by those who are legally skillful and capable (*ahlâyah al-wujûb wa al-adâ`*). It means they must have the ability and authority to realize *maw'ûd bih* (the object of promise). If, therefore, the promise is made by those who are legally incapable, its effectiveness/implementation depends on the permission of their guardian.

The promise mentioned in this fatwa is the one depending on conditions, according to the opinion among Mâlikiyah schools. The conditional promise is the binding after the conditions are met by the party to which the promise id told. Besides, it must be stated in writing in the promise deed/contract, and the promised object or conditions do not contradict with the sharia.[113]

Conclusion

Since the beginning, the DSN's fatwa tends to position promise as an alternative to a contract which is needed to be completed and is binding. Of the six fatwas which accommodate promise, only one fatwa declares that promise is not binding (the one in regards to IMBT). In the remaining fatwa, some explicitly or implicitly agree on the binding of promise, and others state that promise may or may not be binding, particularly in *murâbahah*. Here, the last fatwa which throughly sets the regulations of promise becomes the fatwa which concludes that promise is binding despite the fact that the DSN confirms the kind of promise which is binding is conditional promise. Under this condition, as mentioned by al-Islâmbûlî, the position of promise has replaced contract for it can be legally prosecuted.

The use of promise in contract, particularly in the combination contract, is intended to prevent banned practices, such as the practice of joining two contracts in one transaction and the possible occurrence of usury. At last, the promise is used because the position of LKS is be-

[112] The DSN's Fatwa No. 85/DSN-MUI/XII/2012 regarding promise (*wa'd*) in Islamic financial and business transactions.

[113] The DSN's Fatwa No. 85/DSN-MUI/XII/2012.

DOI: 10.19105/karsa.v24i2.1003

ing intermediaries so that the parties involved in the contract are more than two parties.[]

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