

THE SHIFT OF NON-PROFIT CONTRACT TO BUSINESS CONTRACT IN THE ISLAMIC FINANCIAL INSTITUTION BUSINESS ACTIVITIES

Muhammad Maksum, M. Asrorun Niam Sholeh, Yayuk Afiyanah

Faculty Of Sharia And Law, Syarif Hidayatullah State Islamic University

muhammad.maksum@uinjkt.ac.id , asrorun.niam@uinjkt.ac.id

yayuk.afiyannah78@gmail.com

Abstract: This article examines the shift of contract objectives from what originally set for non-profit objectives to business ones. Such shift is found in the three contracts; *wakalah* (power of attorney), *hawalah* (underground banking), and *kafalah* (guarantee). Referring to their uses in several Islamic financial products in Indonesia and comparing to the sharia resolution of Sharia Authority Council Malaysia and Islamic law (*fiqh*), the majority of these contracts is proven to apply fees (*ujrah*) and used both independently and in combination with other contracts. Here, the fees are mostly applied in the Islamic financial institutions, but unfortunately the customers who are involved in the contracts get less. This, in turn, affects and changes the contract classification which originally included the three in the non-profit contract and eventually turns them into the business contract. If the contracts are set for business objectives, they are then considered as service/lease based contracts (*ijarah*). In the construction of a real agreement (contract), this shift has implications on changes in the rights and responsibilities of the parties involved and can raise a dispute cause of misunderstanding of the status of the contract as voluntary (*tabarru'*) or business (*tijari*).

Keywords: *wakalah* (power of attorney), *hawalah* (underground banking), *kafalah* (guarantee), contract shift, fatwa

A. Introduction

The Islamic Financial Institutions (IFIs) run to get profits and empower the Community-based economics. To gain more profits, all activities in the IFIs are directed at increasing income. In addition, they also undergo revenue efforts and innovations due to the competition challenges both among the IFIs themselves and with Conventional Financial Institutions (CFIs). One of the revenue innovations is shifting the non-

profit contract (*tabarru'*) to business contract (*tijarah*). This shifting is influenced by political and economic interest.¹

The IFIs are different from the CFIs in implementing the contracts, particularly in terms of raising and distributing funds. *Wadiah* (safekeeping) and *mudharabah* (profit-sharing) contracts, for instance, are used in the fundraising activities. Meanwhile, the contracts in the distribution of funds include buying and selling based-contracts (*murabahah*/cost plus finance, *salam*/financing agricultural like goods, and *istisna*/ financing manufactured like goods); service/lease based contracts (*ijarah*); profit sharing-based contracts (*musyarakah*/joint venture and *mudharabah*/profit-sharing); and service-based contracts (*wakalah*/power of attorney, *hawalah*/underground banking, and *kafalah*/guarantee). Theoretically, these contracts are classified into business contracts (*mu'awadhat*) and non-profit contracts (*tabarru'*). Here, the business contracts include *murabahah*, *salam*, *istisna*, *ijarah*, *mudharabah*, and *musyarakah*, whereas the *tabarru'* contracts are *wakalah*, *hawalah*, and *kafalah*.²

Several types of non-profit contracts are actually used in Islamic financial products. The contracts include *wakalah*, *kafalah*, *hawalah*, *qard* (loan), *rahn* (Islamic pawnbroking), *wadi'ah* (safekeeping) and *hibah* (grants). Some of them are used independently and some are combined with other contracts, either with business or non-profit contracts. The *wakalah* contract that stands alone is *wakalah bilujrah* (power of attorney with fee) in Shariah Compliant Mutual Funds products. Nevertheless, it is mostly used in combination with other contracts. The *wakalah-hibah* contract, for example, is found in Islamic insurance, Islamic Annuities, and Islamic Pension Fund. The *wakalah*-purchase contract is applied in *murabahah* transactions. Surprisingly, some of these non-profit contracts are explicitly mentioned and some are not mentioned but are found in practice. The *wakalah* contract on *murabahah* transaction, the Sharia import LC products, *salam* and *istisna* contracts, for examples, are not mentioned but are used in practice. Here, bank employees can represent customers for certain transactions to the bank.³

The shift in the change of the nature of non-profit (*tabarru'*) to business (*tijari*) contract has been recognized by the National Sharia Council in the Indonesian Ulema Council. The economic interest involved in fatwa making.⁴ The council has ratified the imposition of fees on *wakalah* and *kafalah* contracts since the fatwas on the two

1 Mohamad Nur Yasin, "Reformasi Hukum Ekonomi Islam di Indonesia Studi Klausula Penyelesaian Sengketa Ekonomi Syariah Dalam Fatwa Dewan Syariah Nasional 2000-2017", *Jurnal Istinbâth*, Vol. 16, No. 1, 2017, p. 241.

2 Adiwarmanto A. Karim, *Bank Islam, Analisis Fiqih dan Keuangan* (Jakarta: Raja Grafindo Persada, 2006), p. 97.

3 Fatwa of Hay'ah al-Fatwa al-Kuwaiti no 258. Downloaded from [http://moamlat.al-islam.com/ Page.aspx?pageid=529&TOCID=323&BookID=506&PID=278](http://moamlat.al-islam.com/Page.aspx?pageid=529&TOCID=323&BookID=506&PID=278).

4 Said Syaripuddin, "Elastisitas Syariat Dalam Perubahan Sosial", *Jurnal Istinbat*, Vol. 15, No. 1, 2016, p. 50.

were issued, the fatwa No. 10/2020 and 11/2000. Both emphasize the nature of the two contracts is binding so that they cannot be canceled unilaterally.⁵ However, the terms *wakalah bilujrah* and *kafalah bilujrah* were only ratified in 2002 and 2007 under the fatwa No. 34 on Islamic import L/C and the fatwa No. 57 on L/C with *kafalah bilujrah* contract respectively. In the meantime, the *hawalah bilujrah* contract was ratified in 2007 under the fatwa No. 58 on *hawalah bilujrah*. The first fatwa on *hawalah*, the fatwa No. 12/2000 did not regulate the fees in the contract.

Basically, *wakalah* contract is one of the most widely used non-profit contracts. It is used in several products, especially transactions involving more than two parties. In connection with debt transfers, it is not widely applied as it deals with debts which involve a prohibition on additional benefits on loans. The *kafalah* contract, on the contrary, is not widely used. The question is if the non-profit contracts which have shifted into business contract are applied to both parties; Islamic Financial Institutions (IFIs) and customers. Many IFIs products place customers as representatives. They even designate them as double representatives, selling representatives and buying representatives in *murabahah* transactions. The next question is how the shift process takes place and gets support from Islamic legal sources and the opinions of Ulama or Muslim scholars.

B. Discussion

1. Shifting *Wakalah* Contact

Etymologically *wakalah* means protection and representation. In terminology, it is appointing someone to conduct a legal activity or transaction.⁶ In everyday life, the word *wakalah* is similar to giving power of attorney. A person who is entitled to *wakalah* means she/he is granted with power from another party to conduct or perform an activity or other legal actions.

The contract is used in 18 Islamic financial products, including *wakalah* service products, investments in Shariah Compliant Mutual Funds, Sharia Current Account Financing, Sharia import and export letters of credit (LC), *murabahah* (cost plus finance), Sharia Insurance, Settlement of Export Receivables, *Sertifikat Bank Indonesia Syariah*/SBIS (Bank Indonesia Sharia Certificates), Islamic factoring, Sharia pension program, intermediary services (*wasathah*), State Sharia Securities with *wakalah*, syndicated financing products, annuity programs, Sharia direct sales, *wakalah bilistismar* (Investment Agency), and *sukuk* (financial certificates) with

5 DSN dan BI, *Himpunan Fatwa Dewan Syariah Nasional MUI*, Vol.1, (Jakarta: DSN-BI, 2006), p. 71.

6 Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh*, Vol.5, (Syria: Dar al-Fikr, 2006), p. 4057.

wakalah bilistismar contract. The aforementioned products have been ratified under the the National Sharia Council fatwa No. 10/2000, 20/2001, 30/2002, 34/2002, 35/2002, and 41/2004. The other fatwas include the fatwa No. 52/2006, 53/2006, 60/2007, 63/2007, 75/2009, 126/2019 and 127/2019.

Generally, the *wakalah* contract applied in Islamic banking is specific and time-limited.⁷ The *Ulema* or Muslim scholars allow specific *wakalah* contract, but prohibit the one for general and unlimited activities considering it is general in nature and contains uncertainty (*gharar*).⁸ Here, the *Shafi'iyah* and *Hanabilah* prohibit *wakalah* contract which is general in nature. In contrast, the *Hanafiyah* and *Malikiyah* allow general *wakalah*. According to the *Malikiyah*, it is divided into two; *wakalah mufawwidah* (the transfer of authority to representatives over any activities which are allowed to represent in property or financial and other affairs except those limited by the representing parties and inapplicable according to the general view); and special *wakalah* (the transfer of authority to representatives to carry out an activity which has been determined). The *Muwakkil* (representing party) can determine several conditions that must be met by the representatives as long as they do not contradict the religion. To that end, the representatives are not responsible for risks except for their mistakes and *wakalah* is prioritized for fellow Muslims.⁹

The legality of *wakalah* is set with pillars and conditions. The pillars of *wakalah* include the person who represents or authorizes the *wakalah* (*muwakkil*), the person who receives the *wakalah* (representative), the object which is represented, and a statement of agreement. In details, the person who represents the *wakalah* is the legal owner who can act on the represented objects, including *mukallaf* or *mumayyiz* (the age at which a child can discern between right and wrong) children within certain limits; in matters that are beneficial to them such as representing to receive grants, charities or alike. In the meantime, the representatives must meet the legal competency requirements and be capable of carrying out the tasks they are represented in. Suffice to say, they are people who are granted with a mandate. Further, the represented object must be clearly known by the person representing it and is not considered as an object contradicting the Islamic law. In addition, it can also be represented according to the Islamic law. The *wakalah* services may be subject to fees. The National Sharia Council Fatwa No. 113 explicitly mentions the

7 The *wakalah* contract is limited in time, like a month or during one particular activity. Wahbah al-Zuhayli, *al-Fiqh*, Vol. 5, p. 4058.

8 Wahbah al-Zuhayli, *al-Fiqh*, Vol.5, p. 4058. Muhammad al-Khatib al-Syarbini, *Mughni al-Muhtaj ila Ma'rifah Ma'ani al-Minhaj*, j.2, (Beirut: Dar al-Fikr, tt.), p. 221; Mansur ibn Yunus ibn Idris al-Bahuti, *Kashshaf al-Qina' 'an Matn al-Iqna'*, j.3, (Riyad: Matba'ah al-Nasr al-Hadithah, tt.), p. 471.

9 Fatwa of Hay'ah al-Fatwa al-Kuwaiti no 232, 238, and 239. Downloaded from [http://moamlat.al-islam.com/ Page.aspx?pageid=529&TOCID=489&BookID=506&PID=547](http://moamlat.al-islam.com/Page.aspx?pageid=529&TOCID=489&BookID=506&PID=547), accessed April 9, 2020.

term *wakalah bilujrah* (*wakalah* with fees). The fatwa emphasizes the pillars and conditions and sets the provision of the fees in which the amount can be put in a nominal, percentage, or certain formula. Here, the fees can be paid in lump sum, in installments, or according to agreement.¹⁰

The *wakalah* contract is generally used in combination with other contracts. The combination of the *wakalah bilujrah* with *qard/mudharabah/hawalah* contract, for example, is applied in Sharia import and export LC products. Besides, the combination of the *wakalah bilujrah* with *qard* contract is in Settlement of Export Receivables and Islamic Factoring. In an LC product, the number of parties involved in the contract is at least 3-4 parties: Islamic banks, indebted customers, and other parties appointed by the customers (foreign banks in import or export LC).¹¹ The Islamic banks manage or arrange the required documents and collect bills. In the case of the *wakalah bilujrah* with *qard* contract, the fatwa by the National Sharia Council stipulates two provisions; first, the amount of the *ujrah* (fee) must be agreed at the time of the contract and stated in a nominal term, not in a percentage calculated from the basic receivable; and second, the absence of dependency (*ta'alluq*) between the *wakalah bilujrah* and *qard* contracts.¹² The permission to determine the fees based on percentages is confirmed by the fatwas issued by the Sharia Advisory Council of Bank Negara Malaysia, the Fatwa and Sharia Supervisory Board (*Hay'ah al-Fatwa al-Kuwaiti*) of Kuwait, and the Sharia Board of Al-Rajhi Bank.¹³ Here, the prohibition of *ta'alluq* in the National Sharia Council fatwa is a form of precaution to avoid usury (*qard*), referring to the Prophet Muhammad's hadith *kullu qard jarra manfaah wajh min wujuh al-riba* (any loan that specifies benefits is one of the usury practices).¹⁴

The Sharia import LC products can implement the *wakalah (salam/istisna)-murabahah* and *bay'-murabahah* contracts as alternatives. The *salam/istisna* contract, for example, is used to order overseas products. The orders are made by Islamic banks or importers (*wakalah*). Here, the banks as the customers arrange the documents and pay the price of the imported products to the receiving bank and the imported

10 The Fatwa No. 10 on *Wakalah* and No. 113 on *Wakalah Bilujrah*.

11 *Letter of Credit* is a statement from the banks at the request of their customer (usually the importers) to provide and pay a certain amount of money for the benefit of a third party (L/C recipient or exporter). The importer opens an L/C at a designated bank (opening bank/issuing bank) and the exporter opens a paying bank called an advising bank. See Kasmir, *Bank dan Lembaga Keuangan Lainnya* (Jakarta: Raja Grafindo Persada, 2005), p. 152-153.

12 DSN and BI, *Himpunan Fatwa*, Vol.1, p. 211-214, 223-225; DSN and BI, *Himpunan Fatwa Dewan Syariah Nasional*, Vol.2, (Jakarta: DSN-BI, 2010), pp. 75-76, 157-158.

13 See Bayt al-Tamwil Kuwait, "al-Fatawá al-Shar'iyah fi al-Masail al-Iqtisadiyah", Vol.1-3, Bank Al-Rajhi, "Fatawá al-Hay'ah al-Shar'iyah Lishirkah al-Rajhi al-Masrafiyah lil-Istithmar", Arab Saudi, fatwa no 75. Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah lil-Masarif wa-al-Muassasat al-Maliyah al-Islamiyah*, Vol.2, (al-Qahirah: Dar al-Salam, 2010), p. 299-300, 303.; Bank Negara Malaysia, *Resolusi Syariah dalam Kewangan Islam* (Malaysia: Bank Negara Malaysia, 2010), p. 104.

14 Abu Bakar Ahmad ibn al-Husayn ibn 'Ali al-Bayhaqi, *Sunan al-Bayhaqi*, Vol.2, (Beirut: Dar al-Ma'rifah, tt.), p. 72.

products are then sold to customers under a *murabahah* scheme. In return, the banks get fees from the arrangement activities on the basis of a *wakalah* contract.¹⁵

The *wakalah bilujrah* contract is combined with *hibah* (grants) in Sharia insurance products, Sharia pension program, and Sharia annuities. The donors hand over their donations (grants) to be managed by a company. Besides *hibah*, they can also give their *waqf* funds to be managed by the company. The insurance claim is paid off by the *tabarru* (non-profit) fund. The source of the fund in *waqf* insurance is taken from the proceeds of the *waqf* fund, not the *waqf* assets.¹⁶ For this reason, the *tabarru* fund must be separated from other funds.¹⁷ Such separation is useful for investment risk selection as the fund must be carefully managed according to the contract.¹⁸ The position of a company as a representative is mentioned in the National Sharia Council fatwa No. 53/2006.

The Sharia Advisory Council of Bank Negara Malaysia details the duties of representatives (insurance companies); managing the *tabarru* (non-profit) funds collected by customers, making investments, arranging claim payments, financing insurance, organizing administrative activities, conducting fund management, underwriting, performing risk portfolio management, and marketing.¹⁹ According to the National Sharia Council fatwa, the companies are entitled to a fee for their role, on a fixed nominal value or based on the profit sharing ratio for investment returns and *tabarru* benefits according to the agreement. The fees referred to only apply to *wakalah* contract while the profit sharing ratio is used in *mudarabah* contract.²⁰

Before applying the *wakalah bilujrah* contract, the Sharia insurance products have implemented *mudarabah*/profit sharing (*tijarah*) contract.²¹ The use of the contract raises ambiguity due to the role of the insurance companies as fund managers while the funds collected are *tabarru* funds (*hibah*/grants). Overall, the customers in the *mudarabah* contract act as *sahib al-mal* (the property owners).²² In a *tabarru* contract, a customer is the *muwakkil* (the representing party) while a company is the representative. The decision of Muslim World League (*Majma Fiqh Islam*) requires that Sharia insurance is based on mutual help (*ta'awun*) and prohibits

15 DSN and BI, *Himpunan Fatwa*, Vol.1, p. 212-123.

16 Bank Negara Malaysia, *Resolusi Syariah*, p. 66.

17 DSN and BI, *Himpunan Fatwa*, Vol.1, p. 412.

18 This separation of funds was decided at the 62nd Sharia Advisory Council meeting on 4 October 2006. Bank Negara Malaysia, *Resolusi Syariah*, p. 76.

19 DSN dan BI, *Himpunan Fatwa*, j.Vol, p. 399.

20 Bank Negara Malaysia, *Resolusi Syariah*, p. 77.

21 Muhammad Sayid al-Dasuki defines insurance as a transaction which obliges the insured party to fulfill its obligations in term of an amount of money to the insurer, and will replace it when a loss occurs to the insured. Muhammad Sayid al-Dasuki, *al-Ta'min wa Mauqif al-Syari'ah al-Islamiyah Minhu*, (al-Qahirah: Dar al-Hadith, 1967), p. 16.

22 DSN dan BI, *Himpunan Fatwa*, Vol.1, pp. 132-133.

business-based insurance (*tijari*).²³ The fatwa issued by the National Sharia Council number 53/2006 on *tabarru* contract has revised the provisions of *hibah* funds in Sharia insurance products. The fatwa clearly states that the *tabarru* contract must be bound to each insurance product.²⁴ An agreement on additional fee for a successful investment in *wakalah* is allowed up to a certain target. This concept is different from the concept of *mudarabah* in investment, where the profits are obtained by the *mudarib* (entrepreneur or investment manager) in a profitable state, whereas in a state of loss, they do not get any fees.²⁵

In Shariah Compliant Mutual Funds products (the fatwa No. 20/2001), the *wakalah* contract is carried out between investors (unit holders in mutual fund) and investment managers and custodian banks. Both the investment managers and the custodian banks act as the representatives of the mutual fund holders to manage and save the mutual funds and carry out other functions and roles. For their services, they receive fees which are determined based on a percentage of the mutual fund net asset value. As representatives, they are not responsible for any losses incurred except for negligence, deliberate action and violation to the agreement.

The one who acts as a representative in the *wakalah* contract in the Sharia Current Account Financing (*Pembiayaan Rekening Koran Syariah*) is customers. By the creation of law (*hilah*), *murabahah* contract decide the customer as agent of IFIs.²⁶ They get the power from the IFIs to purchase or rent goods and the goods are then sold under a *murabaha* scheme or leased to them. Here, the IFIs will benefit from the sale or lease. In the meantime, the customers as representatives do not receive any fees.²⁷ They also do not get any fees when they represent the IFIs in *murabahah* financing transactions. In another word, the IFIs represent the customers to purchase goods or objects and, in turn, sell the goods to them in a *murabaha* scheme.²⁸ This is done because Islamic banks act as a seller service as well as a bank that must have an object before selling and providing financing.²⁹

The use of *wakalah bilujrah* contract is found in Settlement of Export Receivables and Islamic Factoring products. Here, the IFIs play a role in arranging documents

23 Majma' al-Fiqh al-Islami, «al-Ijar al-Muntahi bil-Tamlik wa Sukuk al-Ta''jir», downloaded from [http://www.fiqhacademy.org.sa/qarat/12-4 dan 16-7.htm](http://www.fiqhacademy.org.sa/qarat/12-4%20dan%2016-7.htm), accessed April 3, 2020.

24 DSN dan BI, *Himpunan Fatwa*, Vol.1, p. 416.

25 'Ali Jum'ah Muhammad (ed.), *Fatawa' al-Mu'amalat al-Maliyah*, Vol.5, p. 363-364.

26 Izzatul Mardhiah, "Hilah dalam Produk Pembiayaan Syariah (Evaluasi Skema Akad KPR Murabahah dan Gadai Syariah)", *Jurnal Hayula*, Vol. 1, No. 1, 2017, p. 19.

27 The Fatwa No. 30/2002 on Sharia Current Account Financing

28 The Fatwa No. 4/2000 on the *murabahah* contract. The *wakalah* contract in *murabahah* financing is not explicitly stated. However, in practice it is performed voluntarily.

29 Muammar Bakry and Rahman Ambo Masse, "Diskursus Prinsip Syariah Dalam Akad Transaksi Murabahah Pada Perbankan Syariah di Makassar", *Jurnal Istinbat*, Vol. 19, No. 1, 2020, p. 11.

and collecting customer receivables from third parties, and get fees for the document arrangement and collection services. In these products, they can provide bailouts (*qardh*) for customers in the amount of their receivables to third parties.³⁰ The other products applying the *wakalah bilujrah* contract are Sharia Direct Sales and Syndicated Financing products. The agents in the Sharia Direct Sales can represent their company in selling products. They get paid according to the agreement. In the case of Syndication Financing, the representatives are the leaders from several IFIs who get the power to do so.³¹ The *wakalah* contract which does not specify fees are found in the products of Bank Indonesia Sharia Certificates. The participants of the Bank Indonesia Sharia Certificates, the IFIs here, can act as representatives in these products.

The *wakalah bilujrah* contract is also used in Intermediary Service (*wasathah*) products. This Intermediary Service may or may not involve the IFIs. In the case of involving the IFIs, the products are carried out by a third party. The third party or customer proposes financing to the IFIs. The object being financed is then sold by the customers to another party. The customers or intermediaries can rent the object. In this service product, the customers get fees.³²

The *wakalah* contract is developed into *wakalah bil istismar*. Such contract is found in the State Sharia Securities and *sukuk* (financial certificates). The issuers of the State Sharia Securities and *sukuk* are the representatives of the security and certificate holders to manage and invest funds. Here, the position of the representatives must be stated, if they get paid or not. In this *wakalah* contract, the representatives can guarantee the funds handed by the holders.³³ In the *wakalah bilistithmar* contract, customers hand over their funds to the IFIs to manage based on the *wakalah* principle. Their investments are estimated for a return of 5% in a year. The IFIs will be responsible if the investment is unsuccessful due to the violation to the signed agreement. However, if the IFIs have made an effort according to the agreement and do not succeed in making profits as determined, the investment risk is borne by the customers.³⁴ If, for example, the customers withdraw the money before the contract ends, the IFIs are not obliged to fulfill the promised investment return.³⁵ Such contract, according to the Sharia Advisory Council, is allowed.

30 DSN dan BI, *Himpunan Fatwa*, Vol.2, p. 75-76, 157-158.

31 The Fatwa No. 91/2014 on Syndicated Financing.

32 The Fatwa nomor 93 tahun 2014 on Intermediary in the Property Business.

33 The Fatwa No. 95/2014 on State Sharia Securities with *wakalah*, the fatwa No. 126/2019 and 127/2019 on *wakalah bil istismar* and *sukuk* with *wakalah bil istismar*.

34 Bank Negara Malaysia, *Resolusi Syariah*, p. 104.

35 This contract is likened to a *mudarabah* contract in which the contract expires due to a withdrawal of capital by *Sahib al-mal*. The Sharia Advisory Council fatwa at the 2nd meeting on 18 Jun 2007. Bank Negara Malaysia, *Resolusi Syariah*, p.

Apart from the fee issue, the use of *wakalah* contract in several Islamic financial products raises the issue concerning the dual role of representatives; the representative in buying and the representative in selling. The fatwa by the Fatwa and Sharia Supervisory Board (*Hay'ah al-Fatwa al-Kuwaiti*) of Kuwait confirms the position of one person as representatives for two parties. A representative can represent both the seller and the buyer. This facilitates transactions in the community. He/she can also become a *kafil* (guarantor) if he/she is given the authority to do the transaction (*aqd*) and handover (*qabd*) at the same time. However, if he/she is only authorized to do the transaction and is not allowed to do the handover (*taqabud*), he/she cannot be a *kafil*.³⁶

The dual role of representatives is found in Sharia export LC products. These products apply the *bay-wakalah* and *wakalah (bay/salam/istisna)-murabahah* contracts. Here, customers act as the representatives of Islamic banks to purchase goods and sell them back to themselves or other parties. The role of the customers is as a representative to purchase and sell at the same time. If they sell the goods to themselves, the price must first be determined by the representing party (*muwakkil*).³⁷ In addition, the first purchase on behalf of a Sharia bank must have occurred and the sale can then be made to them. The Muslim World League (*Majma Fiqh Islam*) recommends that buyers, not customers, should repurchase the purchased asset.³⁸ As a representative, the customers do not get fees.

The possibility of charging fees in the *wakalah* contract refers to Qur'an, hadith, and *ulema* consensus. The fees in the *wakalah* contract are relatively accepted by scholars. This is due to the existence of the Prophet's Hadith which clearly exemplifies the two models of *wakalah* with fees and without fees. The hadith narrated by al-Bukhari which states that the Prophet once represented his companions to buy a goat and the Prophet did not pay fees. At another time the Prophet asked Ibn Lutbiyah to collect zakat and the Prophet paid him a fees. It is also supported by the other hadith narrated by al-Bukhari and Muslim about the role of Busr ibn Sa'id as a

105. Wahbah al-Zuhayli, *al-Fiqh*, Vol..5, p. 3965.

36 Fatwa of Hay'ah al-Fatwa al-Kuwaiti no 20 and 421. Downloaded from <http://moamlat.al-islam.com/Page.aspx?pageid=529&TOCID=489&BookID=506&PID=538>.

37 Fatwa of Bayt al-Tamwil Kuwait, fatwa no 343. 'Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah*, Vol.5, p. 288; fatwa Nadwah al-Barkah al-Ula lil-Iqtisad al-Islami, Majmu'ah Dallah al-Barkah, qita' al-Amwal, Jedah, fatwa no 1/15. 'Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah*, j.5, p. 290-291.

38 Munazzamah al-Mu'tamar al-Islami, «Majma' al-Fiqh al-Islami wa Tawsiyat Majlis al-Fiqh al-Islami», Jedah, Meeting 1-2, declaration no 1. <http://www.fiqhacademy.org.sa/qyarat/5-2/3.htm>, accessed April 3, 2020.

zakat collector who got a reward or fee from Umar bin Khattab.³⁹ Ibn Lutbiyah from the tribe of *Asd* was once asked to collect alms and was given a reward.⁴⁰

Ibn Qudamah by referring to these hadith argues that *wakalah* may be accompanied by fees or no.⁴¹ Even al-Shawkani stated that if someone initially intends to do *wakalah* voluntarily (*tabarru'*) and then turns it into a business activity for a fee, then this is justified.⁴² Then al-Zuhayli concluded that the scholars had agreed on the ability of *wakalah* with the fees or no. This shows that the majority of scholars do not prohibit the imposition of fees in the *wakalah* contract which was originally benevolent (*tabarru'*). The *wakalah* contract which applies fees is considered as *ijarah*.⁴³ The position of the representative in the *wakalah bilujrah* is as a worker.

In addition, a representative (*wakil*) is also allowed to represent another party. The possibility regarding the dual role of representatives is a breakthrough in the National Sharia Council fatwa considering that many *ulema* or Muslim scholars prohibit a representative in an *ijarah* from renting objects for himself/herself. The fatwa is based on the opinion of previous Muslim scholars, which is considered weak (*marjuh*), but it is now very relevant to the current condition (*rajih*). The re-evaluation of their opinion by considering the legal *illat* and public benefits is based on the *i'adat al-nazar* theory.⁴⁴ Their opinion was once determined by the conditions and space surrounding it so that it can be superior (*rajih*) or weak (*marjuh*) due to different conditions and space at the present time. The majority of *ulema* prohibit the dual role of a representative due to *tuhmah* (allegedly lying) committed by the representative, which consequently harms the owner. After being reviewed, the legal *illat* (*tuhmah*) can be removed if the owner sets the rental rate. To that end, the representative can rent the object at the specified price. The possibility regarding the dual role is made through a review process.⁴⁵ The *i'adat al-nazar* method serves

39 "Narrated from Busr ibn Sa'ad that Ibn Sa'di al-Maliki said: Umar hired me to take alms or charity (*zakat*). After handing it over to him, he ordered that I be rewarded for (fee). I said: I work only because of Allah. Umar replied: Take what you are given; I have worked (like you) at the time of the Prophet, then he rewarded me; I also said what you said. Then the Prophet said to me: If you are given something without you asking, eat (accept) it and give alms." (HR. Muttafaq 'alayh). Muhammad ibn 'Ali al-Shawkani, *Nayl al-Awtar*, Vol.5, (al-Qahirah: Dar al-Hadith, 2000), p. 527.

40 Wahbah al-Zuhayli, *al-Fiqh*, Vol. 5, p. 4058. "Narrated from Abu Humayd al-Sa'idi, he said: Rasulullah appointed a man from the tribe of *Asd* named Ibn Lutbiyah as *amil* (officer) to collect *zakat* from the Tribe of *Sulaim*. When he returned (from the task), Rasulullah examined him." (H.R. Bukhari).

41 Ibn Qudamah, *al-Mughni*, (Kairo: Dar al-Hadis, 2004), juz 6, p. 468.

42 Al-Syaukani, *Nail al-Authar*, (Kairo: Dar al-Hadits, 2000), j. 4, p 527.

43 Wahbah al-Zuhayli, *al-Fiqh*, Vol. 5, p. 4058.

44 Ma'ruf Amin, *Era Baru Ekonomi Islam Indonesia, dari Fikih ke Praktik Ekonomi Islam*, (Depok: eLSAS, 2001), p. 54-55.; M. Atho Mudzhar, "KH. Ma'ruf Amin, Seorang Ulama yang Cemerlang dalam Ilmu Hukum Ekonomi Syariah dan Motor Penggerak Ekonomi Syariah Indonesia", *Pidato Promotor 1*, 2012, p. 9-10.

45 Ma'ruf Amin, *Era Baru Ekonomi*, pp. 54-55.

to dynamize Islamic law in order to achieve the goal of sharia, namely benefit (*maslahah*).⁴⁶

In conclusion, the customers as the representatives of the IFIs do not get any fees in Sharia Current Account Financing, *Murabahah* (cost plus finance), and Sharia Export LC products. On the contrary, they can receive fees in Sharia Direct Sales and Intermediary Services (*wasathah*) products. In the meantime, the IFIs as representatives get fees in all Sharia financial products, including Sharia Import and Export LC, Settlement of Export Receivables, Islamic Factoring, Sharia Insurance, Sharia Pension, Sharia Annuities, Shariah Compliant Mutual Funds, Syndicated Financing, *Sertifikat Bank Indonesia Syariah* / SBIS (Bank Indonesia Sharia Certificates), State Sharia Securities, and *Sukuk* (financial certificates).

2. Shifting *Hawalah* Contract

Literally, *Hawalah* means to move (*intiqaal*). The *Hanafiyah* defines it as the transfer of debt from those who owe the money to those who are obliged to pay it (*muhal 'alayh*). The legality of this contract is based on the Prophet's hadith stating: "Procrastination (delay) in repaying debts by a wealthy person is injustice. Therefore, if someone among you is given the right to transfer the debts to those who are capable of paying them, accept it." (HR. Ahmad).⁴⁷ *Hawalah* is classified into *hawalah mutlaqah* and *hawalah muqayyadah*. *Hawalah mutlaqah*, for instance, is transferring one's debt (*muhil*) to another (*muhal 'alayh*) without mentioning the debt. However, if the debt is limited to certain debts, it is known as *hawalah muqayyadah*.⁴⁸

The *hawalah* contract is used in several products. Its services for several products are regulated under the fatwa No. 12/2000. The *hawalah bilujrah* services, for instance, are regulated in fatwa No. 58/2007, the Settlement of Import Receivables is mentioned in fatwa No. 61/2007, the Sharia Subjective Novation is set under the fatwa No. 103/2016, and the subrogation which is based on the Sharia principles is regulated under the fatwa No. 104/2016. These products are related to the transfer of debt from one party to another.

The possibility to charge fees in *hawalah* services began in 2007 after the fatwa on *hawalah bilujrah* No. 58 was issued. The principle of this contract is benevolent activities. Therefore, the imposition of fees in the services, according to the National Sharia Council fatwa, can only be applied to *hawalah mutlaqah* products. Here, the

46 Ahmad Qorib and Isnaini Harahap, "Penerapan Maslahah Mursalah Dalam Ekonomi Islam", *Analytica Islamica*, Vol. 5, No. 1, 2016, p. 55.

47 Wahbah al-Zuhayli, *al-Fiqh*, Vol.6, p. 4187-4188, 4194-4195.; Muhammad ibn Isma'il al-San'ani, *Subul al-Salam Sharh Bulugh al-Maram*, Vol.3 (Beirut: Dar al-Kitab al-'Arabi, 1987), p. 61; al-Shawkani, *Nayl al-Awtar*, Vol.5, p. 236.

48 Wahbah al-Zuhayli, *al-Fiqh*, Vol.6, p. 4187-4188.; DSN dan BI, *Himpunan Fatwa*, Vol.1, fatwa no 58.

IFIs (*muhal alayh*) get fees for receiving a debt transfer from a customer (*muhil*) who owes another party (*muhal*). The customer does not have any receivables from the IFIs.

In Sharia Subjective Novation products, the *hawalah* contract is applied either with or without fees. If the transfer of debts or receivables is carried out without fees, it is then considered as non-profit (benevolent) contract. In contrast, if fees are involved, the *wakalah* services turn into a business. An Active Subjective Novation occurs when the creditor (*da'in*) is replaced, while Passive Subjective Novation happens when the debtor (*madin*) is replaced. Here, the subrogation takes place in the replacement of creditors (*da'in*) from one party to another.

If the transfer of debt or receivables is made by specifying an addition (*iwadh*), it cannot be completed in terms of money or receivables, but it must be made in goods. Such provision refers to the prohibition of buying and selling debt with another debt as selling and buying with money is done in cash and received at the time of the contract.⁴⁹ The *hawalah* contract in Novation and Subrogation can be carried out by the customers or IFIs. If, for example, the Novation is performed by a customer, it can be made without compensation or by selling the *murabahah* object. As for the replacement of the IFIs, either with novation or subrogation, it can take place with or without fees. This means the fees only apply to the IFIs, not the customers.

The combination of *hawalah* with *wakalah* is found in the Sharia import LC products. The determination of fees in LC products is based on the *wakalah* contract, not the *hawalah* if the cardholders own savings at the bank (*hawalah muqayyadah*). The fees in the *hawalah* contract can be collected if the cardholders do not have savings at the card issuing bank (*hawalah mutlaqah*). As for the products in the Settlement of Import Receivables, the IFIs as the party receiving the debt transfer have the right to get fees from their customers.⁵⁰ The combination of the *Hawalah* contract with other contracts is a legal creation that is not against sharia.⁵¹

Prohibition of fees in *hawalah* due to potential violations of sharia. Fees can incur additional exchange of money in debt transfers. The addition is prohibited because the exchange of money of a kind must be the same and in cash. Scholars who allow fees in *hawalah* include Mustafá 'Abdullah al-Hamshari.⁵² He allows these fees based on the *wakalah* earned (*qiyas*). Fees are compensation for the services

49 The Fatwa No. 103 and No. 104 on Sharia Subjective Novation and Sharia Subrogation.

50 The Fatwa No. 61 / 2007 on Settlement of Import Receivables.

51 Elimartati, "Analisis Metode Hilah Dalam Proses Fatwa DSN-MUI", *Jurnal Ilmu Syariah*, Vol. 15, No.1, 2017, p. 82.

52 'Athiyah Shaqr, *Ahsan al-Kalam fi al-Fatawa wa al-Ahkam*, vol. 5, p. 542-543.

provided. To avoid this practice of usury, scholars limit fees to only be given to *hawalah muthlaqah* transactions.

The amount of fees for *hawalah* services must be clear, fixed and certain at the time of the contract and is stated in nominal terms, not in a percentage calculated the basic receivable. The Fatwa issued by the Fatwa and Sharia Supervisory Board (*Hay'ah al-Fatwa al-Kuwaiti*) of Kuwait justifies the fees by percentage based on *hawalah* service and processing fees, not the amount owed.⁵³ Here, the imposition of the fees must be free of interest (*fa'idah*).⁵⁴ The interest may occur considering the bank provides a bailout (*qard*). The bailout is given by the bank to indebted customers (*muhil*). In addition, the interest can also come in different currencies. Transferring debts from the debtor with different currencies is not allowed as it is considered as buying and selling debt with another debt (*bay 'al-dayn bi al-dayn*) or buying and selling currency (*sarf*) which does not meet the conditions and criteria of the object in the contract. Such transaction is valid if the repayment of the debt in another currency is made at the current exchange price and both parties have agreed.⁵⁵

Referring to the above description, the use of *hawalah bilujrah* contract only applies to the IFIs. In addition, customers who use the *hawalah* contract are found in Active Subjective Novation product. In this product, they wish to transfer their debts to other customers. Such transfer adopts the *hawalah* service, but does not apply fees.

3. Shifting Kafalah Agreement

Kafalah literally means to collect, to hold, or to unite. It also means to bind (*iltizam*). The *Malikiyah*, *Syafi'iyah*, and *Hanabilah* scholars define it as uniting the dependents (*zimmah*) of a guarantor with those of the person he/she guarantees to determine the right to a debt, so that it becomes their responsibility both. The Muslims agree on the presence of collateral to avoid possible losses in debts. However, they have different opinions on the types of *kafalah*. Some think it is permissible, but according to others it is prohibited.⁵⁶

The *kafalah* contract is used in six Islamic financial products; *Kafalah* Services, Sharia Debit Cards, Multi-Service Financing, Sharia Credit Cards, Letters of Credit

53 The fatwa No. 721 mentions the possibility of charging fees for *hawalah* service from other banks, either for the bank customers or others. Bayt al-Tamwil Kuwait, the fatwa No. 177 and 721. 'Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah*, Vol. 13, pp. 35-36.

54 'Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah*, Vol. 5, pp. 360-361.

55 Downloaded from <http://www.eftaa-aleppo.com/index.jsp?inc=21&id=432&name=>, Mei 27, 2020.

56 Al-Sharbini, *Mughni al-Muhtaj*, Vol.2, p. 198; dan Ibn Qudamah, *al-Mughni*, Vol.4, p. 534; A.W. Munawwir, *Kamus Al-Munawwir*, (Surabaya: Pustaka Progressif, 1997), p. 828-829.

with *kafalah* contract, and Sharia Guarantee. It is classified into three forms; single *kafalah*, *kafalah bilujrah*, and *kafalah* in combination with other contracts. Legally, the Islamic financial products with the *kafalah* contract refer to the provisions set by the National Sharia Council fatwa No. 11, 57, 74, 42, 44 and 54.

The *kafalah* contract in Islamic banking is used as one of banking services.⁵⁷ As a guarantee, this contract is performed in terms of asset guarantee (*kafalah bilmal*) and personal/institutional guarantee (*kafalah bilnafis*). It exists to guarantee activities or businesses proposed by customers.⁵⁸ In Malaysia, for example, it is used as a guarantee contract provided by the Berhard Credit Guarantee Corporation (CGC) established in 1972 for small and medium enterprises, and a guarantee provided by Danajamin Nasional Berhard for investment in capital market (*sukuk* and conventional bonds) which was established in 2009.

Since its first release in 2000, the *kafalah* service products have opened up opportunities for the imposition of fees. In 2009, the possibility to charge fees was reinforced by applying the *kafalah* services in Sharia guarantee products (the fatwa No. 74/2009). In addition, the Multi-Service Financing products that use the *kafalah* contract are also allowed to set fees (the fatwa No. 44/2004).

The combination of *kafalah* with other contracts takes place in certain financial products. Such combination is found in Islamic Credit or Debit Card products and includes the *kafalah*, *ijarah*, and *qard* contracts. The Muslim World League (*Majma Fiqh Islam*) decision opens an alternative to *ijarah* and *qard* contracts in Credit Card products (*bitaqah al-I'timan ghayr al-mughattah*) provided the two contracts are separated. The *ijarah* contract, for example, is used for card issuance and *qard* for cash withdrawal.⁵⁹ In addition, the imposition of fees is not associated with *qard*, debt deferral, and cash for cash exchange at different values.⁶⁰ Basically, the *kafalah* contract is used to guarantee all transactions made by the card holders (for shopping or withdrawing cash),⁶¹ whereas the *ijarah* contract is applied as one of services provided by banks for customers. In the meantime, the *qard* contract takes place to bail out funds withdrawn by customers from ATMs or used to purchase goods. This type of combination mainly occurs in Islamic credit card products. In the Sharia

57 Adiwarmarman A. Karim, *Bank Islam*, p. 97.

58 'Ali al-Khafif, *al-Daman fi al-Fiqh al-Islami* (al-Qahirah: Dar al-Fikr al-'Arabi, 2000), pp. 193-194.

59 Majma' al-Fiqh al-Islami, «Bitaqah al-I'timan Ghayr al-Mughattah», downloaded from <http://www.fiqhacademy.org.sa/qrarat/5-2/3.htm>, April 3, 2020.

60 Bank Negara Malaysia, *Resolusi Syariah*, p. 150.

61 Generally, credit card named with *bitaqah al-i'timan* and debit card named with *bitaqah al-hism al-mubashir*. 'Abd al-Hamid Mahmud al-Ba'li, *Bitaqat al-I'timan al-Masrafiyah, al-Taswir al-Fanni wa al-Takhrij al-Fiqhi, Dirasah Tahliliyah Muqaranah* (al-Qahirah: Maktabah Wahbah, 2004), p. 6-7; 'Abd al-Wahhab Ibrahim Abu Sulayman, *al-Bitaqat al-Bankiyah, al-Iqradiyah, wa al-Sahb al-Mubashar min al-Rasid*, (Dimashq: Dar al-Qalam, 1998), p. 43.

Debit Card product, *ijarah* is the only possible contract. The purchase of goods at merchants or withdrawing money at ATMs in Debit Card products is immediately deducted from the cardholders' savings. The cost incurred by the customer is used to pay for the card issuance service (*ijarah*).

In Malaysia, the Sharia Credit Card products combine *bay 'al-'inah*, *wadi'ah*, and *ijarah* contracts. The card issuers sell goods to cardholders by deferring, and the card holders then sell them to the card issuers in cash. The cash funds are deposited in the *wadi'ah* account which the card holder can use to purchase goods using a credit card. Here, the card issuers charge some fee for card issuance and card services through *ijarah* contract. The sale and purchase contract in *bay 'al-'inah* is mentioned in separate documents.⁶² The Sharia Advisory Council prohibits the combination of *kafalah* and *wakalah* contracts on credit cards due to the fact that such combination can lead to usury gained from the fees set by the IFIs in the *wakalah* transaction. The IFIs play their role not only in representing customers, but also providing credit card services.⁶³ In contrast, this combination of contracts is allowed in Indonesia. According to the National Sharia Council, the two contracts are legal, including the imposition of fees. The fatwa mentions the guarantee (*kafalah*) fees are based on one's reputation service as justified by the Syafi'iyah circles.⁶⁴

The above illustration shows different arrangements regarding the use of *kafalah* contract on credit cards. The main issue here is avoiding usury due to the imposition of fees.⁶⁵ Practically, the credit card transactions apply multiple contracts (*uqud murakkabah*) and a change in contract (*tahawwul al-'aqd*). The parties involved in the credit cards play several roles and change from one condition to another.⁶⁶

The application of fees in *kafalah* is allowed in Indonesia and Malaysia, but prohibited in some Middle Eastern countries and Kuwait. This happens because Qur'an and Hadith as Islamic sources do not mention the fees in *kafalah*. The *kafalah* contract is basically closer to a virtue or benevolent activity and mutual help (*tabarru'*).⁶⁷ Its characteristics lie in the basis of willingness, binding one of the parties, being considered as the *tabarru* contract, and being classified as a civil contract (*madani*). The imposition of fees is not recommended in this type of contract.

62 Bank Negara Malaysia, *Resolusi Syariah*, p. 148-149.

63 Bank Negara Malaysia, *Resolusi Syariah*, p. 154.

64 Mustafá 'Abdullah al-Hamshari, *Ahsan al-Kalam fi al-Fatawá wa al-Ahkam*. DSN dan BI, *Himpunan Fatwa*, Vol.2, p. 15-16.

65 The relationship between the cardholder and the card issuer includes cash loans (*qard*) which are the source of the determination of compensation. If the determination of the compensation exceeds the real cost, this includes the prohibited interest. See Muhammad ibn Walid ibn 'Abd al-Latif al-Suwaydan, *al-Taklif al-Fi'liyah*, p. 222.

66 'Abd al-Hamid Mahmud al-Ba'li, *Bitaqat al-I'timan al-Masrafiyah*, p. 62.

67 Baha'u al-Din al-'Ala Yali, *al-Kafalah, fi al-Fiqh al-Islami wa Ba'd al-Qawanin al-'Arabiyah*, (Riyad: Dar al-Shawaf, 2004), p. 23-27.

The parties that are guaranteed under the *kafalah* scheme can offer a reward or *hibah* (grant) to the guarantor. If they need guarantees to achieve their goals and cannot obtain them from social guarantee, providing fees is possible in this condition. According to al-Zuhayli, the fee requirement requested by the guarantor is justified for benefit purpose.⁶⁸ The Fatwa and Sharia Supervisory Board (*Hay'ah al-Fatwa al-Kuwaiti*) of Kuwait only allows the imposition of fees (*rusum*) for activities, processes and stationeries including making a new or extended *kafalah* contract that requires administrative fees. Here, the *kafalah* contract is free of fees.⁶⁹

The imposition of fees for the *kafalah* contract is based on Mustafá Abdullah al-Hamshari's opinion claiming fees can be made in *wakalah*, *hawalah* and *kafalah* contracts. Al-Hamshari builds the possibility of *kafalah bilujrah* on rewarding the reputation (*jah*) service as justified by the Syafi'iyah circles even though some opinions say on the contrary. He also claims the reward on *daman* (*kafalah*) is similar to the one on *ju'alah* which is also justified by the Syafi'iyah. The legal basis includes al-Kahf [18]: 19, al-Qasas [28]: 26, Yusuf [12]: 72, al-Ma'idah [5]: 2, the hadith narrated by al-Bukhari about the Prophet's guarantee for the debt of the deceased, the hadith narrated by Muslim about Allah's help for His helpful servants, the hadith narrated by Tirmidhi about the possibility to create *sulh* (resolution), and the legal jurisprudence about the origin of *muamalah* (transaction) and the elimination of harm.⁷⁰

The stipulation regarding the imposition of fees in *kafalah* is based on the theory of *i'adat al-nazar*, which is to examine the strength/quality of the previous ulema's opinions in order to be relevant in the present.⁷¹ The number of opinions which allows the fees in the *kafalah* contract is limited, whereas the majority of *Ulema* forbid it. The condition in the past was unlikely to support the imposition of fees to take place. However, the current condition is changing, in the way the social guarantee or security is difficult to find. The *kafalah* fees can be charged if efforts, activities, and losses resulting from the contract occur.⁷² To this end, the opinion of *ulema* that allows the imposition of fees is suitable for the present era and according to needs. Herein lies the greatness of sharia that is compatible with people's lives and puts benefit as the driving force.⁷³ Even in terms of sharia economic development,

68 Wahbah al-Zuhayli, *al-Fiqh*, Vol. 6, pp. 4177-4178.

69 Fatwa of Hay'ah al-Fatwa al-Kuwaiti no 395. Downloaded from <http://moamlat.al-islam.com/Page.aspx?pageid=529&TOCID=489&BookID=506&PID=503>, Juni 9, 2020.

70 DSN dan BI, *Himpunan Fatwa*, Vol. 2, pp. 38-41.

71 Ma'ruf Amin, *Era Baru*, pp. 51-52.

72 Bayt al-Tamwil Kuwait, fatwa nomor 282 dan 275. 'Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah*, Vol.11, p. 376-377, 379.

73 Asmawi, "Konseptualisasi Teori Maslahah", *Jurnal Salam: Filsafat dan Budaya Hukum*, Vol.1, No.1, 2014, p. 311.

benefits that are not emphasized in the Al-Qur'an and Hadith or known as *maslahat mursalah* can be used as the basis for legal stipulation.⁷⁴

The imposition of fees in the *kafalah* contract in Malaysia refers to the *qiyas* (deductive analogy) method about getting reward for one's reputation (*akhdh al-ajr 'alá al-jah*) and asking for wages for maintaining and preserving Qur'an (*akhdh al-ju'l 'ala ruqyah min Al-Qur'an*). The Sharia Advisory Council uses direct *qiyas* to stipulate *kafalah bilujrah*. However, the National Sharia Council does not perform direct *qiyas*, but uses the opinion of *ulema* who apply it instead. Some of the previous *ulema* justify the rewarding practice in *jah*. This justification can be used as the basis for the imposition of fees in guarantee (*kafalah*) as they have similarities in terms of the completed work.⁷⁵ Nazih Hammad and Wahbah al-Zuhayli allow *kafalah bilujrah*. This imposition, according to al-Zuhayli, is considered based on public benefit and need for guarantee for it is difficult to find as a voluntary.⁷⁶ The the Fatwa and Sharia Supervisory Board (*Hay'ah al-Fatwa al-Kuwaiti*) of Kuwait prohibits the imposition of fees in the *kafalah* contract due to the *ulema* consensus (*ijma'*).⁷⁷ The Muslim World League (*Majma Fiqh Islam*) also bans it as when a guarantor issues some fund for a loan, it resembles a *qard* which is subject to additional benefits.⁷⁸

The *kafalah* contract with fees as illustrated only applies to the Islamic Financial Institutions (IFIs). Customers do not use the contract considering a guarantee for debts is generally carried out by the IFIs. Practically, the imposition of fees in the *kafalah* contract is only applied in Indonesia and Malaysia, but it is not used in the Middle East. In contrast, the fees in the *wakalah* contract are accepted in all countries. As regard to the imposition of fees in the *hawalah* contract, only Indonesia and the Middle East apply it. Malaysia does not justify the existence of fees in *hawalah*. Further, the fees in *kafalah* and *hawalah* are determined in nominal terms and are not tied to debt. The imposition of fees in the three contracts is basically due to the demands of necessity. Such imposition shows the shift of non-profit (*tabarru*) contract to business contract (*tijari*). In addition, the stipulation of fees in the three contracts indicates the influence of the business world on fatwas. Although the shift is not enjoyed as a mutual benefit that must be accepted by both parties because the

74 Ahmad Qorib dan Isnaini Harahap, "Penerapan Maslahah Mursalah Dalam Ekonomi Islam", *Jurnal Analytica Islamica*, Vol. 5, No. 1, 2016, p. 75.

75 Bank Negara Malaysia, *Resolusi Syariah*, p. 166.

76 Wahbah al-Zuhayli, *al-Fiqh*, Vol. 6, p. 4178.

77 'Ali Jum'ah Muhammad (ed.), *Fatawá al-Mu'amalat al-Maliyah*, Vol. 11, pp. 376-378, 380, 382, 384.

78 Majma' al-Fiqh al-Islami, "Khitab al-Daman", downloaded from <http://www.fiqhacademy.org.sa/qyarat/2-12.htm>, April 3, 2020.

majority who are entitled to wages are LKS not customers.⁷⁹ In the end, the fatwas put the need for fees and the difficulty in implementing the contracts voluntarily as considerations. However, the fees only apply to the IFIs, not customers.

C. Conclusion

The non-profit contracts, particularly *wakalah*, *hawalah*, and *kafalah* have shifted their main objectives from non-profit to business objectives. The three have opened to an additional concept known as *wakalah bilujrah*, *hawalah bilujrah*, and *kafalah bilujrah*. The addition of the word *ujrah* (fees) indicates they are now considered as business contracts. The fees generally apply to the Islamic Financial Institutions (IFIs) and are limited to customers. As representatives, the IFIs that act as *wakil*, *muhil* or *kafil* have the right to charge the fees. In contrast, a customer who becomes a representative (*wakil*, *muhil*, or *kafil*) generally does not set any fees.

The *wakalah* contract with fees carried out by the IFIs are found in *wakalah* service products, Shariah Compliant Mutual Funds, Sharia Import and Export Letters of Credit (LC), Sharia Insurance, Settlement of Export Receivables, *Sertifikat Bank Indonesia Syariah*/SBIS (Bank Indonesia Sharia Certificates), Islamic Factoring, Sharia Pension Program, Intermediary Services (*wasathah*), State Sharia Securities with *Wakalah*, Syndicated Financing Products, Annuity Programs, and Sharia Direct Sales. In the meantime, the *hawalah* contract with fees is applied in almost all Islamic financial products. Regarding the *kafalah* contract with fees, it is only applied by the IFIs and is not used by customers.

Legally, the *wakalah* with fees does not raise any debate in terms of its validity according to the Islamic law. Ibn Qudamah, al-Syawkani, and al-Zuhaili confirmed *wakalah* with fess based on the Prophet's hadith. The Prophet practiced the two models of *wakalah* with fees or no. As for the *hawalah bilujrah* the majority of scholars forbid it. The allowance of fees is based on the opinion of Mustafa al-Hamsari, who references (*qiyas*) to *wakalah* fees. However, the *hawalah bilujrah* can only be applied to *hawalah muthlaqah*, the party receiving the debt transfer, not the party owing the debt, with the party transferring it. An issue on prohibited buying and selling activities occur in *hawalah bilujrah*, buying and selling debt with another debt (*bay al-dayn*) and buying and selling currency (*sharf*). At last, the *ulema* argue about the use of the *kafalah* contract as most of them and the states do not allow such contract with fees. Indonesia and Malaysia, for instance, allow it considering some previous *ulema* have practiced it as reputation service. On the contrary, the Middle East does

⁷⁹ Andi Fariana and Sufiarina, "Justice (Al-Mashlahah) for The Economic Dimension", *Jurnal Istinbat*, Vol. 19, No. 1, 2019, p. 255.

not allow the imposition of fees in the contract at all. This ability is based on the opinion of the Syafi'iyah schools who allow asking for fees for collateral of dignity or good name.

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