

## OPERATIONAL APPLICATION OF SELECTED QAWĀ'ID FIQHIIYAH (ISLAMIC LEGAL MAXIMS) IN STRUCTURING ISLAMIC ASSET FINANCING PRODUCTS IN MALAYSIA: TRANSITIONING FROM CONTROVERSIAL PRODUCTS TO MORE ACCEPTABLE ALTERNATIVES

Ahmad Azam Othman<sup>1a\*</sup>, Muhammad Naim Omar<sup>2a</sup>, Mohamad Asmadi Abdullah<sup>3a</sup>,  
Ghazali Jaapar<sup>4a</sup> and Mzee Mustafa Mzee<sup>5b</sup>

<sup>a</sup>Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia,  
53100 Kuala Lumpur, MALAYSIA

E-mail: [aazam@iium.edu.my](mailto:aazam@iium.edu.my)<sup>1</sup>

E-mail: [mhdnaim@iium.edu.my](mailto:mhdnaim@iium.edu.my)<sup>2</sup>

E-mail: [masmadi@iium.edu.my](mailto:masmadi@iium.edu.my)<sup>3</sup>

E-mail: [ghazali@iium.edu.my](mailto:ghazali@iium.edu.my)<sup>4</sup>

<sup>b</sup>Karume Institute of Science and Technology, Box 467, Zanzibar, TANZANIA

E-mail: [mzee.mzee@kist.ac.tz](mailto:mzee.mzee@kist.ac.tz)<sup>5</sup>

\*Corresponding Author: [aazam@iium.edu.my](mailto:aazam@iium.edu.my)

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### ABSTRACT

*The qawā'id fiqhiiyah (Islamic legal maxims) constitute a foundational factor in the formulation and development of Islamic banking asset financing products. When used together with the primary sources of Sharī'ah—the Qur'an, Sunnah, ijma', and qiyās—these maxims offer a structured framework to ensure that the structure and operation of Islamic banking asset financing products remain fully compliant with Sharī'ah principles. Their operational application permissibility is critical in assessing the, suitability, and Sharī'ah compliance of new product proposals, as well as in determining whether existing products require modification, substitution, or supplementation to address evolving market and regulatory demands. Accordingly, this article examines the operational application of qawā'id fiqhiiyah in structuring Islamic asset financing products within the Malaysian Islamic banking context. Their application depends closely on the nature of the underlying contractual arrangements, whether they are based on sale, lease, or equity structures. The article also examines how these applications can support the global recognition of Malaysia's Sharī'ah-compliant banking practices. Adopting a qualitative, doctrinal approach, the article analyzes relevant fiqh principles, regulatory frameworks, and selected case studies of sale-based, lease-based, and equity-based asset financing products. The study shows that the systematic application of qawā'id fiqhiiyah enables contentious or doubtful (mushkil or shubhah) asset-financing products to be replaced with less problematic or fully compliant alternatives. This approach facilitates the design of financial products that are entirely Sharī'ah-compliant and free from*

*juristic disagreement (khilāf). Such outcomes would strengthen the credibility and global acceptance of Malaysian Islamic banking products, further positioning the country as a leading hub for Shariah-compliant financial innovation.*

**Keywords:** *Qawā'id fiqhiyyah, Islamic asset financing products, Malaysia Islamic banking, Sharī'ah compliance, Global recognition.*

## 1. INTRODUCTION

Malaysia's Islamic banking system is globally recognized for its comprehensive framework and innovative structuring of financial products. At the core of this success lies the operational application of *qawā'id fiqhiyyah* (Islamic legal maxims), which serve as guiding principles in Islamic jurisprudence that facilitate the application of *Sharī'ah* rules to practical situations and provide a systematic framework for deriving rulings and guiding legal reasoning. Derived from the primary sources of *Sharī'ah*—the *Qur'an*, *Sunnah*, *ijmā'*, and *qiyās*—these maxims act as interpretive tools that promote consistency, justice, and flexibility in legal rulings (al-Nadawi, 1994; 'Azzam, 2005; Kamali, n.d.; Mansoori, 2018). They function as overarching principles that can be applied to new situations without the need for case-by-case textual evidence.

Moreover, *qawā'id fiqhiyyah* play a crucial role in the structuring of *Sharī'ah*-compliant financial products, particularly as demand grows for innovative solutions that adhere to *Sharī'ah* principles while addressing modern economic needs in both local and global markets. These legal maxims provide a structured framework that enables scholars and practitioners to navigate complex financial arrangements, ensuring that product designs gain international recognition while preserving both the procedural form and substantive essence of Islamic law (Mansoori, 2018; Laldin et al., 2020). In the development of asset-financing products, *qawā'id fiqhiyyah* are central in shaping *Sharī'ah*-compliant alternatives to conventional financial instruments. Sale-based contracts, lease-based arrangements, and equity-based partnerships all rely, to varying degrees, on these legal maxims—alongside other *Sharī'ah* sources—to establish their legitimacy under Islamic law.

This study explores how *qawā'id fiqhiyyah* are operationalised and applied in structuring sale-based, lease-based, and equity-based asset financing products in Malaysia Islamic banking sector. It further explores how such operational application enables the replacement of contentious or doubtful (*mushkil* or *shubhah*) asset financing products with less controversial alternatives, ultimately transforming them into products that are fully *Sharī'ah*-compliant

and free from juristic dispute (*khilāf*). In doing so, the study highlights the potential of Malaysia's approach to strengthen the integrity and credibility of its *Sharī'ah*-compliant banking framework, while enhancing its global recognition

## 2. LITERATURE REVIEW

*Qawā'id fiqhiyyah* are fundamental principles distilled from classical jurisprudence that provide universal guidance for applying *Sharī'ah* across a wide range of contexts. Rather than functioning as independent sources of law, these maxims operate as higher-order normative constructs that synthesise dispersed rulings into coherent doctrinal frameworks. Their juristic significance lies in their capacity to promote internal consistency, methodological discipline, and adaptive application of *Sharī'ah* across varying factual matrices.

The majority of Muslim jurists, particularly contemporary scholars, recognise five principal legal maxims (*al-qawā'id al-khams al-'asāsiyyah*) as forming the conceptual backbone of Islamic legal reasoning (Muda & Mat Zin, 2000). These maxims are not merely heuristic tools; they articulate foundational normative commitments embedded within the *Sharī'ah*. They are:

1. الأمور بمقاصدها – Matters are determined according to intentions.
2. اليقين لا يزول بالشك – Certainty is not overruled by doubt.
3. المشقة تجلب التيسير – Hardship begets facility.
4. الضرر يزال – Harm must be eliminated.
5. العادة محكمة – Custom is authoritative ('Azzam, 2005; Muda & Mat Zin, 2000; Kamali, n.d.).

These maxims articulate general principles of the *Sharī'ah* as a whole and apply across the entire spectrum of *fiqh* without restriction (Kamali, n.d.). Beyond these five fundamental maxims—which underpin numerous legal rulings—other maxims exist that serve largely as elaborations or extensions of them. Additionally, there are subsidiary maxims that are less comprehensive in scope but nonetheless address more specific and detailed issues within *fiqh*. Typically, maxims in this latter category are either derived from the five fundamental legal maxims or developed independently to address particular legal concerns.

Moreover, *qawā'id fiqhiyyah* serve as both analytical tools and operational frameworks, facilitating consistent and principled decision-making in contemporary financial transactions, making them particularly relevant for

contemporary commercial transactions. In Malaysia, where Islamic banks are responsible for developing *Sharī'ah*-compliant asset financing products, *qawā'id fiqhiyyah* serve as a guiding framework to ensure both legal compliance and operational practicality.

The rapid growth of Islamic finance especially in the Islamic banking has increased the demand for well-structured, *Sharī'ah*-compliant financial products that meet stringent domestic and international standards and can withstand thorough scrutiny. Central to ensuring this compliance is the application of *qawā'id fiqhiyyah*, which serves as overarching principles guiding the interpretation and operationalization of *Sharī'ah* law in contemporary financial practices. While the theoretical underpinnings of these maxims have been extensively discussed, their practical integration into banking operations, particularly in structuring asset financing products, remains an area of ongoing research and debate. This review critically examines the literature on *qawā'id fiqhiyyah*, highlighting their application in Malaysian Islamic banking and their role in enhancing global recognition.

## 2.1 *Classical Scholarship on Qawā'id Fiqhiyyah*

Classical Muslim scholars such as Al-Suyuti (1983) and Ibn Nujaym (1993) wrote notable works on *qawā'id fiqhiyyah*. Their works aim to provide jurists with a framework for identifying legal patterns, analogies, and the operationalization of *qawā'id fiqhiyyah*. Al-Suyuti, writing within the Shāfi'ī tradition in *Al-Ashbah wa al-Nazā'ir*, systematically derives universal legal principles from specific cases and demonstrates their application to new circumstances, especially when explicit textual evidence is absent. This approach is particularly valuable for contemporary finance, as it allows practitioners to trace the legal rationale behind contracts and obligations to established *fiqh* rules.

Ibn Nujaym, writing from a Ḥanafī perspective in *Al-Ashbah wa al-Nazā'ir*, presents a similar compendium but emphasizes practical jurisprudential application. His work categorizes cases for applied problem-solving, bridges theoretical maxims with day-to-day transactional practice, and provides precedent-based guidance for emerging commercial structures. These features make Ibn Nujaym's work especially relevant for operational *Sharī'ah* compliance in contemporary asset financing, where classical *fiqh* principles must be adapted to modern contractual arrangements.

## 2.2 *Modern Scholarship on Qawā'id Fiqhiyyah*

A number of contemporary Muslim scholars, including al-Zarqa (1996),

al-Nadawi (1994), ‘Azzam (2005) and Kamali (n.d.), have significantly contributed to the modern discourse on *qawā‘id fihiyyah*, emphasizing their relevance in integrating jurisprudential theory with practical applications in contemporary contexts.

In his work *Sharḥ al-Qawā‘id al-Fiḥiyyah*, al-Zarqa (1996) offers a comprehensive commentary on *qawā‘id fihiyyah* grounded in earlier foundational writings. He provides systematic explanations and practical illustrations for each legal maxim, including real-life commercial scenarios, while highlighting the maxims’ contextual flexibility. His approach demonstrates how legal maxims can adapt to evolving commercial practices without compromising *Sharī‘ah* compliance.

Al-Nadawi (1994) in *al-Qawā‘id al-Fiḥiyyah*, presents the legal maxims as concise principles distilled from a detailed analysis of classical *fiqh* rulings. He emphasizes their universality and applicability across different *madhāhib*, offering a framework for applying these principles to modern contexts while remaining within the objectives of *Sharī‘ah*. His work provides a clear and structured understanding of *qawā‘id fihiyyah*—their development, foundations, sources, objectives, and applications—from the perspective of the four Sunni *madhāhib*.

Similarly, ‘Azzam’s *al-Qawā‘id al-Fiḥiyyah* (2005) examines both the major legal maxims and those subject to scholarly disagreement. He outlines their foundations, sources, and operational applications in various jurisprudential matters. His analysis incorporates contemporary legal issues and their corresponding solutions within the framework of the four Sunni *madhāhib*.

In his influential article *Qawā‘id al-Fiḥ: The Legal Maxims of Islamic Law*, Kamali (n.d.) offers a concise yet thorough explanation to *qawā‘id fihiyyah* as a fundamental aspect of *Sharī‘ah* theory. He traces their historical development and examines related concepts, including *al-dawābiṭ* (controlling rules), *al-naẓariyyah al-fiḥiyyah* (general theories of *fiqh*), and *al-furūq* (legal distinctions). Kamali’s work is especially noteworthy for its insights into how do the operational application of *qawā‘id fihiyyah* work and apply, particularly in Islamic banking and its product structuring.

Taken together, the works of al-Zarqa, al-Nadawi, ‘Azzam and Kamali highlight the continued significance of *qawā‘id fihiyyah* in modern legal and financial contexts. Their scholarship provides essential methodological and conceptual guidance for translating universal legal principles into practical operational frameworks. Within the Malaysian context, these insights have been instrumental in informing the structuring of Islamic asset financing

products, ensuring that modern financial contracts comply with *Sharī'ah* requirements while responding effectively to market demands.

In addition to the foregoing works, several contemporary Muslim scholars have contributed significantly to the study of *qawā'id fiqhiyyah*, particularly in relation to their application within Islamic finance. Key contributions include those by Mansoori (2018), Laldin et al. (2020), and Saiti and Abdullah (2016).

*Sharī'ah Maxims: Modern Applications in Islamic Finance* by Mansoori (2018) explores the theoretical foundations and practical implementation of Islamic legal maxims in a systematic manner. He traces the origins of selected maxims, surveys the evolution of classical and modern literature on the subject, and highlights their role in *ijtihād*. The work analyses five major legal maxims and demonstrates their relevance to contemporary commercial practices. Mansoori further discusses essential concepts in Islamic commercial law—including contractual stipulations, promissory obligations, liability (*damān*), trust (*amānah*), *gharar*, *ribā*, sale, and agency—through the interpretive framework of relevant maxims. He also underscores the significance of intentionality within contractual interpretation. In assessing contemporary financial practices, the book points out several drawbacks and critiques related to buy-back structuring.

Laldin et al. (2020), in *Islamic Legal Maxims and Their Application in Islamic Finance*, provide a comprehensive exploration of forty essential legal maxims. Their work systematically outlines the Qur'anic and Prophetic evidence underpinning each maxim and offers precise conceptual clarification of their jurisprudential scope. Beyond explicating their classical formulations, the authors demonstrate the practical operationality of these maxims within both general *fiqh* discourse and contemporary Islamic finance, including selected financial products and structures. The methodological clarity and doctrinal precision presented in the book make it accessible to *Sharī'ah* jurists, regulators, and Islamic finance practitioners, thus contributing to a more robust understanding of Shariah governance within modern financial systems.

Saiti and Abdullah (2016), in their article "*The Legal Maxims of Islamic Law (Excluding Five Leading Legal Maxims) and Their Applications in Islamic Finance*," focus on the secondary *al-qawā'id al-fiqhiyyah* not covered by the five primary maxims codified in the *Majallah*. They contend that these secondary maxims may complement or extend the primary maxims or function independently in addressing emerging legal challenges. Their study further examines the implications of these maxims within Islamic finance and banking, illustrating how they inform *Sharī'ah*-compliant practices, regulatory considerations, and the resolution of novel contractual and ethical issues.

In summary, the contributions of classical jurists (e.g., al-Suyūṭī, Ibn Nujaym) and contemporary scholars (e.g., al-Nadawī, al-Zarqā', 'Azzam, Kamali, Mansoori and Laldin et al.) highlight the enduring importance of *qawā'id fiqhiyyah* as both a jurisprudential foundation and an operational mechanism. In the Malaysian context, these maxims continue to shape the structuring of asset-financing products and support responsible innovation within Islamic banking, thereby enhancing *Sharī'ah* compliance and contributing to the sector's broader international recognition.

### 3. METHODOLOGY

This study employs a doctrinal and comparative methodology, combining classical Islamic jurisprudence analysis with contemporary regulatory guidance in Malaysia. The doctrinal approach involves an in-depth review of primary *fiqh* sources, including texts on *qawā'id fiqhiyyah*, classical commentaries, and scholarly interpretations, to identify relevant maxims applicable to financial transactions (Rahman et al., 2019). Complementing this, the study examines contemporary Shariah advisory rulings, Bank Negara Malaysia guidelines, and existing product structures those are based on sale, lease and equity contract. Comparative analysis enables the identification of consistencies and divergences between classical principles and their practical application in modern financial products (Majeed et al., 2023). This methodology enables a thorough examination of both theoretical principles and practical frameworks, allowing the study to explore how *qawā'id fiqhiyyah* guide product design, strengthen legal robustness, and promote ethical and transparent financial practices. By integrating doctrinal analysis with practical assessment, the methodology offers a comprehensive understanding of how Islamic legal maxims influence the structuring of sale, lease, and equity-based asset financing products in Malaysia.

### 4. RESULTS & DISCUSSION

The operational application of *qawā'id fiqhiyyah* within the Malaysian Islamic banking framework constitutes a fundamental determinant in assessing the feasibility of introducing and structuring an asset financing product and in guiding its structural design. The application of these principles is closely contingent upon the character of the underlying contractual arrangements, whether they are premised on sale-based, lease-based, or equity-based principles.

#### 4.1 Operational Application of *Qawā'id Fiqhiyyah* in Structuring Sale-based Asset Financing Products

Sale-based asset financing structures have constituted a principal mode of consumer and corporate financing provided by Malaysian Islamic banks since the inception of Islamic banking in Malaysia in 1983. The earliest iteration of such financing was grounded in the principles of *bay' al-īnah*, formulated to facilitate the extension of credit in a manner compliant with Islamic law. Through the application of this sales-based mechanism, a diverse range of financial products was subsequently developed in Malaysia—particularly during the formative years of the Islamic banking industry—to address the heterogeneous needs of market participants (Bank Negara Malaysia, 2011).

*Bay' al-īnah* denotes a contractual arrangement involving the sale and subsequent repurchase of an asset by the same party. Under this arrangement, the original seller transfers an asset to the buyer for cash and subsequently repurchases the same asset on a deferred payment basis at a price exceeding the original cash consideration. Conversely, *bay' al-īnah* may also be structured whereby the asset is initially sold on a deferred payment basis and later repurchased for cash at a price lower than the deferred sale price (Bank Negara Malaysia, 2011). According to the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Shari'ah Standard, *bay' al-īnah* is defined as “a process of purchasing a commodity on a deferred payment basis, and then selling it for a lower cash price to the same party who originally sold the commodity” (AAOIFI, 2015).

Scholarly discourse (*ikhtilāf al-'ulamā'*) on the legality (*ḥukm*) of *bay' al-īnah* demonstrates notable divergence across the principal Islamic legal schools. Abū Yūsuf regarded *bay' al-īnah* as valid and not *makrūh*, emphasizing its permissibility within the framework of contractual law. In contrast, Muḥammad al-Shaybānī, together with Shāfi'ī and Zāhirī scholars, considered the transaction valid yet *makrūh*, stipulating that the contract remains legally effective provided all essential elements (*arkān*) are duly fulfilled. These scholars further argued that a contract cannot be invalidated solely based on a concealed or improper intention, unless such intent is overtly manifest, thereby leaving the ultimate judgment of the parties' intentions to divine discretion (Al-Zuhayli, 1989). Similarly, Imām Abū Ḥanīfah allowed for the permissibility (*ḥalāl*) of *bay' al-īnah* in instances where a third party participates in the transaction, whereas in its absence, the contract assumes the status of *fāsīd* (defective). Conversely, the Ḥanbalīs and Mālikīs categorically deem it invalid and *ḥarām*, a position supported by prophetic warnings against manipulative trade practices (Al-Zuhayli, 1989). One *ḥadīth* cautions:

“When people become greedy for dinars and dirhams, engage in *‘īnah* transactions, pursue the tails of cattle (i.e., preoccupy themselves with agriculture), and abandon striving in the path of Allah, Allah will afflict them with calamities until they return to their religion.”

This prohibition is further reinforced by historical reports, including a narration involving Zayd ibn Arqam and Sayyidatina ‘Ā’ishah (RA), in which the sale and repurchase of a slave at a loss was condemned as the “worst kind of sale and purchase.” The narration explicitly warns that such actions could nullify the spiritual merit of one’s *jihād* unless repentance is sought.

The Ḥanbalī and Mālikī prohibition of such type of sale is based on *sadd al-dharā’i’* (blocking the means to harm), aimed at preventing engagement in prohibited practices such as *ribā* (interest). Collectively, these perspectives illustrate the nuanced deliberations within Islamic jurisprudence, which balance formal contractual validity with ethical and religious considerations, highlighting the spectrum of legal and moral reasoning concerning *bay’ al-‘īnah* (Al-Zuhayli, 1989).

The foregoing analysis demonstrates that scholarly views on the permissibility of *bay’ al-‘īnah* continue to be divergent.

Within the framework of Malaysian Islamic banking, *bay’ al-‘īnah* is primarily utilized in asset financing transactions, encompassing land, residential, and vehicle financing. The operational mechanism of *bay’ al-‘īnah* in such financing arrangements typically proceeds as follows and is briefly illustrated in Figure 1.

- i. The Islamic bank purchases a specific asset from the customer for a cash price.
- ii. The Islamic bank subsequently sells the same asset back to the customer on a deferred payment basis.
- iii. The customer obtains possession of the asset and undertakes deferred payments to the bank over an agreed tenure (Mat Ali et al, 2022; Hassan et al, 2016).

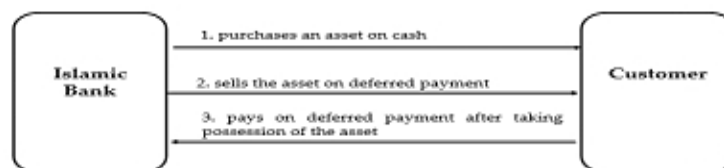


Figure 1. *bay’ al-‘īnah* asset financing structure

This contractual structure enables Islamic banks to provide financing in compliance with *Shari'ah* principles, while simultaneously facilitating liquidity to the customer.

In Malaysia, however, the approach permitting *bay' al-'inah* has been adopted as a pragmatic alternative to conventional interest-based (*ribā*) products, which are unequivocally prohibited under *Shari'ah* principles. This practice aligns with the legal maxim:

تقديم درء المفسدة المجمع على وجوب درءها على درء المفسدة المختلف في وجوب درءها

"Priority is given to averting a harm that is unanimously agreed upon over averting one that is disputed"

(Abdussalam, n.d.).

In this context, given that *ribā* is universally and definitively proscribed, while *bay' al-'inah* remains subject to scholarly debate, the potential harm (*mafsadah*) associated with *bay' al-'inah* is deemed tolerable as a lesser evil to prevent the greater transgression of *ribā* (Haji Baki, 2007).

However, Islamic banking products in Malaysia that employ *bay' al-'inah* face growing scrutiny, as some contemporary Middle Eastern scholars question its validity, and the AAOIFI *Shari'ah* Standards explicitly prohibit its use in sales, *istisnā'*, and lease contracts (AAOIFI, 2015; See also Bakar, 2007). Such concerns may generate negative perceptions and undermine confidence in Malaysian Islamic finance, both locally and globally. To address this, *Shari'ah*-compliant alternative asset financing contracts must be introduced. These alternatives would adhere strictly to recognized *Shari'ah* principles while offering comparable financial solutions. Implementing such contracts can minimize disputes, enhance transparency, and strengthen the credibility of Islamic banking products, ensuring their wider acceptance and recognition in the international financial system.

The use of *bay' al-'inah* in structuring asset financing product is not limited to existing assets but has also been applied to assets that are under construction or yet to be built, its application raises significant concerns when the underlying subject matter is not yet in existence. Classical jurists maintain that a valid sale requires the asset to be deliverable and free from excessive uncertainty (*gharar fāḥish*). The sale of a non-existent asset renders the transaction susceptible to invalidity, exposing both the financial institution and the customer to legal and *Shari'ah* non-compliance risks (Al-Zuhayli, 1989). To avert such outcomes, reliance on *bay' al-'inah* in construction-based asset financing is increasingly viewed as problematic.

To mitigate this risk, it is recommended that the contract of *istisnā'* (manufacturing or construction contract) that refers to “a contract of sale involving the manufacture, production, or construction of a specified asset according to agreed terms between the seller, manufacturer/developer, and customer” (Bank Negara Malaysia, 2011) to be used for financing assets that are under construction or yet to be built. Should the contract be invalid, both the bank and the customer could suffer detriment. This aligns with the legal maxim:

الضرر يزال

“Harm must be eliminated”

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000).

*Istisnā'* offers an exception to the general prohibition against selling non-existent items by permitting the manufacture or construction of a specified asset pursuant to mutually agreed terms. This contractual form is well-suited to financing projects involving assets that are to be built or manufactured, such as residential units, commercial properties, factory equipment, and infrastructure. The permissibility of *istisnā'* based on *istihsān* reflects its practical utility and its alignment with contemporary financing needs. The AAOIFI Shari'ah Standard defines *istisnā'* as “a contract of sale for specified items to be manufactured or constructed, where the manufacturer or contractor undertakes to deliver the goods upon completion,” (AAOIFI, 2015) thereby affirming its applicability to construction-based financing.

The proposed application here is not the ordinary *istisnā'*, given that Islamic banks typically do not undertake construction activities themselves, the viable approach is the use of parallel *istisnā'* (*istisnā' muwāzī*)—a structure comprising two independent contracts as follows and is briefly illustrated in Figure 2

#### A. *First Istisnā' Contract (Customer–Bank)*

The customer commissions the Islamic bank to construct an asset with detailed specifications. The price and payment terms, which may be deferred, are mutually agreed upon. The bank thereby assumes responsibility for procuring the asset.

#### B. *Second Istisnā' Contract (Bank–Contractor/Developer)*

Independently of the first contract, the Islamic bank commissions a contractor to construct the asset according to the same specifications. The two contracts must remain legally separate to avoid impermissible conditionality (*ta'alluq*). The bank bears construction risk during the production phase,

consistent with the principle that profit is justified only when accompanied by risk (*al-kharāj bi al-ḍamān*).

### C. Delivery and Payment

Upon completion, the contractor delivers the asset to the Islamic bank, which subsequently transfers ownership to the customer. The customer then pays the agreed sale price—typically in instalments—reflecting the bank’s profit margin. This sequence ensures that ownership and risk lie with the Islamic bank at the appropriate stages, thereby satisfying *Shari’ah* requirements (AAOIFI (2015); Hassan et. al, (2016); Hasan (2011))

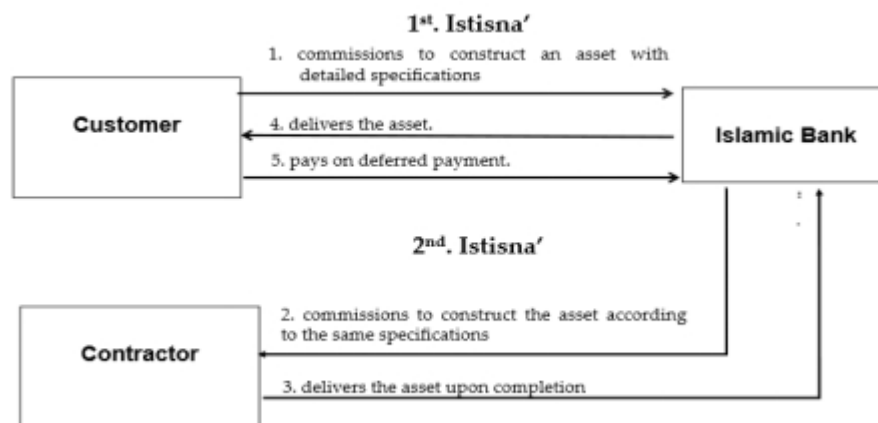


Figure 2. Parallel *istisnā'* (*istisnā' muwāzī*) asset financing structure

The use of *istisnā' muwāzī* offers a practical alternative for financing assets under construction, even though *tawarruq* (monetization-based financing) may also be used for such purposes. Although the term *istisnā' muwāzī* does not appear in classical *fiqh* discussions, it is generally permissible according to the legal maxim:

الأصل في الأشياء الإباحة

“The original ruling on things is permissibility”

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000).

If *tawarruq* were used instead, it would still face objections from certain contemporary scholars. Therefore, adopting *istisnā' muwāzī* is preferable to avoid such disputes. This aligns with another legal maxim:

الخروج من الخلاف مستحب

“Avoiding areas of scholarly disagreement is recommended”

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

Although *tawarruq* may serve similar financing objectives, it does not involve genuine asset creation and functions primarily as a monetization tool. Its continued use has drawn criticism from contemporary scholars on the grounds of economic substance and form-over-substance concerns. In contrast, parallel *istisnā'* is inherently asset-driven and better aligned with *Shari'ah* objectives (*maqāṣid al-Shari'ah*) relating to fairness, transparency, and the promotion of real economic activity.

In assessing appropriate contractual structures for construction-based financing, guidance from established *Shari'ah* legal maxims is particularly instructive. The maxim:

الأصل في الأشياء الإباحة.

"The default ruling on matters is permissibility"

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000),

provides a foundational basis for permitting contractual innovations so long as they do not contravene explicit prohibitions. At the same time, the legal maxim الخروج من الخلاف مستحب ("Avoiding areas of scholarly disagreement is recommended" (Al-Suyuti 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000), cited by classical and contemporary jurists alike, highlights the desirability of selecting contractual forms that minimise juristic dispute and enhance legal certainty. In this context, parallel *istisnā'* emerges as a favourable mechanism for construction-related financing, as it aligns with both permissibility and prudential considerations. Its structured separation of contractual obligations helps mitigate *Shari'ah* concerns associated with direct sale contracts, while offering flexibility and clarity for both financiers and project developers. Accordingly, parallel *istisnā'* is widely regarded as a preferable and more robust *Shari'ah*-compliant option in construction financing frameworks.

For the effective use of parallel *istisnā'* in contemporary asset financing, Islamic banks must give careful attention to several key considerations. First, they should provide comprehensive and precise specifications for the asset to minimise uncertainty and reduce the risk of disputes between contracting parties. It is also essential to maintain full independence between the two *istisnā'* contracts, ensuring that neither is explicitly or implicitly contingent upon the other. In addition, strong risk-management measures are necessary to address potential construction delays, defects, and delivery risks that may arise during the manufacturing or building process. Institutions must also implement clear compliance protocols to ensure that the arrangement does not contravene *Shari'ah* principles, particularly those relating to ownership, possession, and liability. Finally, the structure should be aligned with relevant regulatory and property laws, including rules governing the transfer of title

and consumer protection, to safeguard both legal enforceability and market integrity.

In short, parallel *istisnā'* provides a robust, *Shari'ah*-compliant, and economically substantive structure for financing assets that are under construction or yet to be built. It avoids the *gharar*-related problems inherent in *bay' al-'inah* and mitigates the doctrinal criticisms associated with *tawarruq*. Its emphasis on real asset creation, clear risk allocation, and contractual independence makes it particularly suited to modern Islamic banking operations. As such, parallel *istisnā'* represents a preferable and more principled approach to structuring asset financing in contemporary Islamic financial practice.

Given that *bay' al-'inah* remains a highly debated and controversial contract within contemporary Islamic banking, it is increasingly recommended that financial products structured on *bay' al-'inah* be substituted with *tawarruq*-based arrangements. The recommendation to adopt *tawarruq* as an alternative aligns with the legal maxim:

الخروج من الخلاف مستحب

“It is commendable to avoid areas of scholarly disagreement”  
(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

This maxim, recognised across major schools of Islamic jurisprudence, encourages the selection of legal positions that minimise exposure to significant juristic dispute, especially when practical and viable alternatives exist. The underlying rationale is to promote prudence, safeguard the *Sharī'ah* compliance of transactions, and preserve public confidence in Islamic financial practices. Although the maxim does not require absolute avoidance of all disagreement—since disagreement (*ikhtilāf*) is inherent in Islamic legal reasoning—it emphasises the merit of opting for opinions that command broader acceptance when dealing with matters affecting public interest (*maṣlahah 'āmmah*), such as banking and financial services.

In this context, *tawarruq* is viewed as a more widely accepted contract across different *madhāhib*, thereby reducing potential *Sharī'ah* concerns among stakeholders and regulators. By shifting from *bay' al-'inah* to *tawarruq*-based products, financial institutions not only align themselves with this maxim but also strengthen consumer confidence and enhance the global acceptability of their offerings.

*Tawarruq* refers to a contract in which an individual purchases a commodity on a deferred payment basis and subsequently sells it to a third party for cash at a

lower price, (Kuwait Ministry of Waqf and Islamic Affairs, 1993), thereby obtaining liquidity without engaging in interest-based transactions (*ribā*). Scholarly opinions differ regarding the permissibility of *tawarruq*. The majority of classical jurists from the Ḥanafī, Shāfi'ī, and Ḥanbalī schools consider *tawarruq* to be permissible (*mubāḥ*), as the transactions fulfil the essential legal requirements (*arkān* and *shurūṭ*) of a valid sale and do not involve elements of *ribā*. In contrast, the Mālikī school, along with several contemporary scholars, argues that *tawarruq*—particularly in its organised form—contradicts the spirit of *Sharī'ah* (See Ahmad, 2007; Al-Zuhayli, 1989). Their primary concern is that the objective of *tawarruq* is often to obtain cash rather than to engage in genuine trade, causing it to resemble a disguised loan with interest.

The preceding scholarly discussions indicate that *tawarruq* is not unanimously accepted among Muslim jurists, thereby rendering it a somewhat controversial transaction. Nevertheless, the degree of controversy associated with *tawarruq* does not reach the level commonly attributed to *bay' al-ṭinah*. Consequently, *tawarruq* is generally regarded as preferable to *bay' al-ṭinah* and may serve as a viable alternative to it.

The AAOIFI standard distinguishes between individual (or classical) *tawarruq* and organised *tawarruq* (*tawarruq munazzam*). In individual *tawarruq*, the transactions are carried out by the buyer independently, without any prior arrangement among the parties involved. By contrast, organized *tawarruq* involves a structured and coordinated arrangement between the bank, the customer, and the commodity supplier or broker. (AAOIFI, 2015).

In modern financial practice, organised *tawarruq* has attracted criticism from some Middle Eastern scholars and standard-setting bodies. For instance, the AAOIFI Sharī'ah Standards prohibit organised *tawarruq*, as the prearranged sequence of transactions may involve elements of *tawāṭu'* (collusion) and *ḥīlah* (legal stratagem), both of which contravene the ethical objectives of *Sharī'ah* (*maqāṣid al-sharī'ah*) (AAOIFI, 2015).

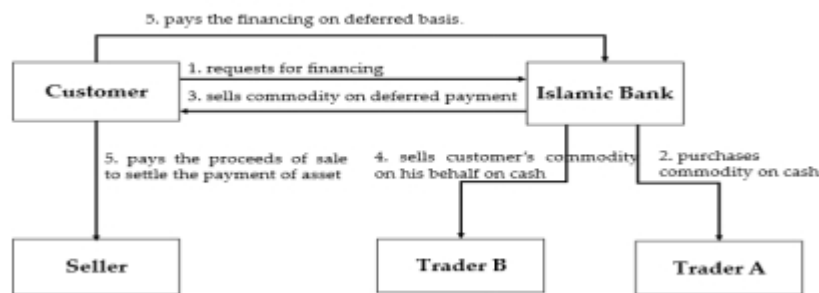
Conversely, the Sharī'ah Advisory Council (SAC) of Bank Negara Malaysia permits the use of *tawarruq munazzam* under specific conditions. First, the transactions must involve genuine ownership as well as a real transfer of risk. Moreover, the commodities involved must be *Sharī'ah*-compliant and truly tradable in the market. The SAC also emphasises that there must be a clear separation between the sale and purchase contracts. Finally, to preserve the validity of the sale, there must be no prior agreement between the buyer and the ultimate purchaser (Bank Negara Malaysia, 2011).

In Malaysia, the application of *tawarruq* has become increasingly prominent across Islamic banking products, particularly in asset-based financing such as

home and vehicle financing. In practice, *tawarruq* is predominantly implemented in an organised form and has been widely adopted as the underlying structure for numerous contemporary Islamic financial products.

The *tawarruq* process generally occurs as follows and is briefly illustrated in Figure 3.

- i. The customer applies to the Islamic bank for financing.
- ii. The Islamic bank purchases a specified commodity from a trader A on cash.
- iii. The Islamic bank then sells the commodity to the customer at a higher deferred sale price, payable over an agreed period.
- iv. The customer, through the Islamic bank as *wakīl*, sells the commodity in the market to a trader B for cash at a lower price than the deferred sale price.
- v. The customer receives the cash proceeds to pay to the seller, while the Islamic bank receives payment from the customer over the deferred period. (Mat Ali et al, 2022; Hassan et al, 2017).



**Figure 3.** *tawarruq* asset financing structure

In essence, *tawarruq* enables customers to obtain liquidity in a *Shari'ah*-compliant manner. It replicates the economic effect of conventional loans while avoiding *ribā*, since the transactions are structured as actual sales.

The permissibility of *tawarruq* in Malaysia is further supported by the legal maxim:

الحاجة تنزل منزلة الضرورة عامة كانت أو خاصة

“Need, whether general or specific, is treated as a necessity.”  
(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

This maxim indicates that *tawarruq* may be utilised to meet the genuine financial needs of individuals and institutions, particularly in providing liquidity through *Shari'ah*-compliant mechanisms.

Additionally, the application of *tawarruq* is consistent with another legal maxim:

المشقة تجلب التيسير

*“Hardship brings about ease”*

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

This maxim reflects a foundational principle of *Sharī‘ah*, namely that the law does not intend to impose undue hardship upon individuals. In contemporary Islamic finance, *tawarruq* operates as a facilitative mechanism that provides liquidity to customers who require cash but must avoid *ribā*-based financing. In circumstances where access to funds is necessary for legitimate needs—such as personal financing, business capital, or debt restructuring—the structured use of *tawarruq* offers a *Sharī‘ah*-compliant alternative. Thus, its permissibility may be viewed as an application of the principle that hardship warrants lawful facilitation within the bounds of *Sharī‘ah*.

The operational application of *tawarruq* is grounded in several interrelated legal maxims, including:

الضرر الأشد يزال بالضرر الأخف

*“A more severe harm is eliminated by undertaking a lesser harm.”*

(al-Burnu, 1996; Muda & Mat Zin, 2000)

ارتكاب أخف الضررين

*“Committing the lesser of two harms.”*

(Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

يختار أهون الشرين

*“The lesser of two evils is chosen.”*

(al-Burnu, 1996; Muda & Mat Zin, 2000)

إذا تعارض مفسدتان روعى أعظمهما ضررا بارتكاب أخفهما

*“When two harms conflict, the greater harm is avoided by committing the lesser one.”*

(Ibn Nujaym, 1993; Ahmad, 2002; Muda & Mat Zin, 2000)

These maxims collectively articulate the doctrine of harm minimisation in Islamic jurisprudence. In the context of modern financial systems—where conventional financing structures are predominantly interest-based—the outright denial of liquidity facilities may result in greater hardship or financial harm to individuals and businesses. By contrast, *tawarruq*, when properly

structured and executed in compliance with *Sharī'ah* requirements (including genuine sale, transfer of ownership, and absence of legal stratagems that amount to *ribā*), is regarded by many contemporary scholars as the lesser harm compared to engaging in interest-based transactions.

Accordingly, the permissibility of organised *tawarruq* in jurisdictions such as Malaysia is often justified not as an ideal financing mode, but as a pragmatic solution within a dual financial system. Its acceptance reflects a juristic balancing exercise: avoiding the greater harm of *ribā* while tolerating a structured mechanism that achieves liquidity through sequential sale contracts. This reasoning, however, remains subject to ongoing scholarly debate, particularly concerning whether certain applications risk transforming *tawarruq* into a mere legal device (*hilah*) that undermines the substantive objectives (*maqāṣid al-sharī'ah*) of prohibiting *ribā*.

To avoid reliance on *bay' al-īnah* and *tawarruq*, both of which are viewed as controversial—particularly within the context of asset financing—the use of *murābahah* is proposed as a means of reducing juristic disagreement, a practice that is generally encouraged. This recommendation aligns with the well-established legal maxim:

الخروج من الخلاف مستحب

“Avoiding areas of juristic disagreement is commendable”  
(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

*Murābahah* constitutes one of the most widely applied sale-based contracts in contemporary Islamic finance, particularly in the structuring of asset-financing products across Islamic banking settings. As defined in classical legal literature, *murābahah* refers to a cost-plus sale in which the seller discloses the asset's original acquisition cost and subsequently stipulates a clearly determined and mutually agreed profit margin. (Bank Negara Malaysia, 2017; Hassan et al, 2016; Hassan et al, 2017; see also AAOIFI, 2015). This contractual form is therefore situated within the category of trust-based sales (*bay' al-amānah*), underscoring the ethical imperative of full transparency in the disclosure of cost, profit, and any ancillary expenses.

The *murābahah* contract derives its legitimacy from the general permissibility of trade in the *Qur'an*:

“Allah has permitted trade and prohibited *ribā*.” (*Surah al-Baqarah*, 2:275)

This verse establishes a clear distinction between profit generated through lawful trade (*bay'*) and unlawful profit derived from interest (*ribā*). Since

*murābahah* involves the sale of tangible goods and transfer of ownership, it falls under the permissible category of *bay'*.

At the same time, the permissibility of *murābahah* is unanimously accepted among classical *fuqahā'* (jurists), as it fulfills the essential elements (*arkān*) of a valid sale — namely, offer and acceptance (*ṣīghah*), seller (*bā'i*), buyer (*mushtarī*), subject matter (*mabī'*), and price (*thaman*) (Bank Negara Malaysia, 2017).

Moreover, *murābahah's* legitimacy is supported by the legal maxim:

الأصل في المعاملات الإباحة إلا ما دل الدليل على تحريمه

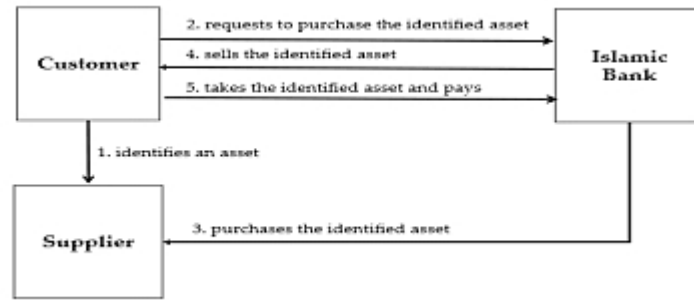
“The original ruling in transactions is permissibility, except where there is evidence of prohibition”

(Al-Suyuti, 1983; Ibn Nujaym, 1993).

Therefore, in the absence of any clear prohibition, *murābahah* remains permissible so long as it complies with *Sharī'ah* requirements and avoids elements of *ribā*, *gharar fāhish* (excessive uncertainty), or *tadlīs* (deception).

In Malaysia, *murābahah* is frequently structured for the financing of tangible assets such as real estate, house, vehicles, equipment, and commodities. The structure is in the form of *murābahah li al-āmir bi al-shirā'* (*murābahah* to the purchase orderer). The transaction typically proceeds as below and is briefly illustrated in figure 4.

- i. The customer identifies an asset to be purchased
- ii. The customer requests the Islamic bank to acquire it.
- iii. The Islamic bank purchases the asset from the supplier, taking legal ownership and possession.
- iv. The Islamic bank then sells the asset to the customer at the original cost plus an agreed profit margin, with payment deferred over a specified period.
- v. The customer takes delivery of the asset and pays the total price in instalments or in a lump sum, depending on the agreed terms (Mat Ali et al, 2022; Hassan et al, 2017).



**Figure 4.** *murābahah li al-āmīr bi al-shirā'* (*murābahah* to the purchase orderer) asset financing structure

The *murābahah* structure ensures that financing is conducted through trade rather than lending. The bank's profit represents the legitimate return for bearing ownership risk and undertaking a sale transaction, rather than interest on money lent.

To ensure *Sharī'ah* compliance, several conditions must be observed. The bank is required to acquire actual ownership and physical possession (*qabd ḥaqīqī*) of the asset prior to its sale to the customer. Furthermore, the cost and profit margin should be fully disclosed and mutually agreed upon. The asset itself at the same time must adhere to *Sharī'ah* principles, remaining free from any prohibited elements. Finally, the transaction must not constitute a buy-back arrangement (*īnah*), as such an arrangement would be inconsistent with *Sharī'ah* requirements (Bank Negara Malaysia, 2017; Al-Zuhayli, 1989). Failure to meet these conditions could render the *murābahah* invalid (*bāṭil*) or defective (*fāsid*).

While *murābahah* is widely accepted and applied, it has been criticized by some scholars for resembling conventional lending, particularly when the sale is merely a formality and the underlying asset is not genuinely traded. Such practices may contravene the ethical spirit of *Sharī'ah* if the sale becomes a means of obtaining cash instead of facilitating genuine trade.

However, proponents argue that the structured *murābahah* contract, when executed properly with genuine asset transfer and ownership, remains *Sharī'ah* compliance. It provides a practical mechanism for Islamic banks to engage in financing activities while avoiding *ribā*.

The widespread acceptance of *murābahah* is further supported by several legal maxims, including:

المشقة تجلب التيسير

"Hardship brings about ease"

(Al-Suyuti, 1983; Ibn Nujaym, 1993).

and

الحاجة تنزل منزلة الضرورة عامة كانت أو خاصة

“Need, whether general or specific, is treated as a necessity.”

(Al-Suyuti, 1983; Ibn Nujaym, 1993)

These maxims justify the use of *murābahah* to meet the legitimate financial needs of individuals and institutions, especially in contexts where alternative *Sharī'ah*-compliant financing options are limited.

#### 4.2 Operational Application of *Qawā'id Fiqhiyyah* in Structuring Lease-based Asset Financing Products

In Malaysia, asset financing products may be structured based on *ijārah*. *Ijārah* refers to a contract in which one party is allowed to benefit from the use (*manfa'ah*) of an asset or service owned by another party in exchange for an agreed payment or rental. This indicates that *ijārah* can be categorized into two main types. The first is *ijārah al-a'yān*, also known as *ijārah al-manāfi'*, which involves leasing tangible assets such as buildings, vehicles, or machinery. The second is *ijārah al-a'māl*, also referred to as *ijārah al-ashkhāṣ* or *ijārah al-khadamāt*, which relates to hiring services, including human labour or professional expertise such as the work of employees, contractors, or consultants (Bank Negara Malaysia, 2017; AAOIFI, 2015).

The legitimacy of *ijārah* is well-established in the *Qur'an*, the *Sunnah*, and the consensus (*ijmā'*) of the Companions (Al-Zuhayli, 1989). These sources collectively affirm that *ijārah* is a lawful and recognised method of generating income, as it is based on the exchange of legitimate benefits for consideration rather than the exchange of money for money, which could lead to *ribā* (interest). The structuring of *ijārah*-based asset financing products is intended, to a considerable extent, to avoid reliance on *bay' al-īnah* and *tawarruq*, both of which are widely regarded as contentious, particularly within asset financing arrangements. The adoption of *ijārah* structures is therefore proposed as a means of mitigating juristic divergence. This approach is further supported by the well-established legal maxim:

الخروج من الخلاف مستحب

“Avoiding areas of scholarly disagreement is recommended”

(Al-Suyuti 1983; Ibn Nujaym 1993; Muda & Mat Zin, 2000)

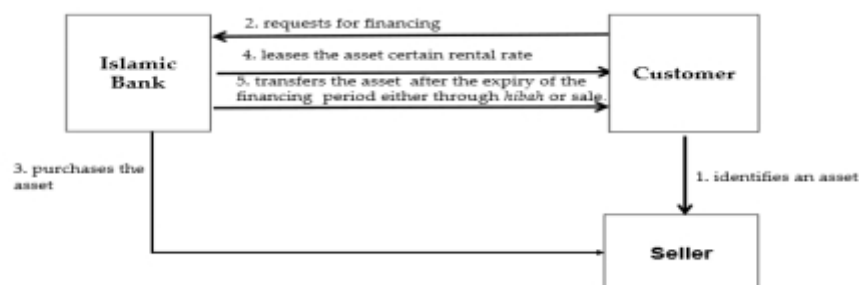
The structure *ijarah-based asset financing products* is either in the form of *al-ijarah muntahia bi al-tamlik* (AIMAT), *al-ijarah thumma al-bai'* (AITAB) and *ijarah mawsufah fi al-dhimmah* (forward lease).

AIMAT literally means leasing that ends with transfer of ownership. It refers to “an *ijarah* contract which shall have the ultimate purpose of the lessee owning the leased asset and shall contain a mechanism for the transfer of ownership of the leased asset to the lessee from the lessor during or at the end of the lease period” (Bank Negara Malaysia, 2017) or “a form of leasing contract which includes a promise by the lessor to transfer the ownership in the leased property to the lessee either at the end of the term of the *ijarah* period or by stages during the term of the contract” (AAOIFI, 2015). The leased asset is leased to the lessee and in consideration the lessee pays an agreed monthly leasing payment to the lessor. It is agreed by that at the end of the lease period, lessor promises to transfer ownership of the leased asset to the lessee.

The transfer of ownership of the leased asset may take place in several ways, depending on the lessor’s agreement. First, the asset may be transferred to the lessee through a sale, whether for a token amount, another agreed consideration, an accelerated payment of the remaining lease instalments, or payment of the asset’s market value. Alternatively, the lessor may transfer ownership to the lessee by way of a gift. Moreover, the transfer may also occur through a conditional gift, whereby ownership is granted once the lessee has completed payment of the remaining instalments (AAOIFI, 2015; Ayub, 2007).

AIMAT asset financing commences with the customer identifies and determines an intended asset for him to own and he approaches the Islamic bank for financing the intended asset. The bank then purchases or appoints the customer to purchase the intended asset from the vendor and leases the intended asset to the customer at an agreed monthly leasing payment for certain period. The bank transfers the asset to the customer after the end of leasing period either through sale, gift or gift contingent upon the payment of the remaining instalments.

Brief illustration of AIMAT is mentioned in Figure 5.



**Figure 5.** AIMAT asset financing structure

On the other hand, AITAB literally means leasing that ends with a sale. The leased asset is leased to the lessee by the lessor with monthly leasing payment

for the benefit enjoyed from the leased asset. AITAB is concluded with the understanding based on unilateral promise that the lessor will sell the asset to the lessee upon expiry of the leasing period (Bank Negara Malaysia, 2017; Lahsasna, 2014). The sale may take place with payment at nominal value due to the reason that the selling price has been substantially paid in form of monthly payment (Hassan et al, 2018). Brief illustration of AITAB is mentioned in Figure 6.

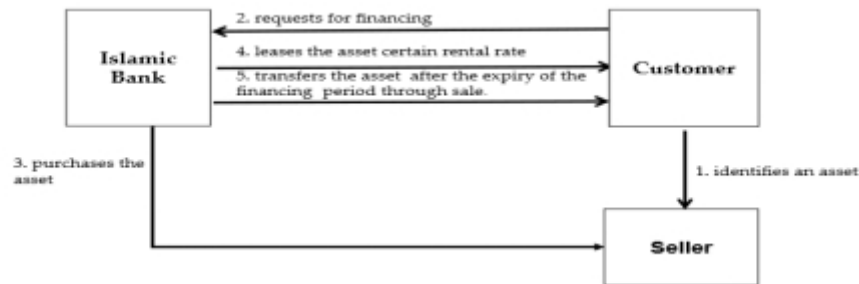


Figure 6. AITAB asset financing structure

Forward lease literally means a lease that associated with liability. In this type of lease, the asset involved does not exist at the time of signing the contract, thus it is the lessor's liability to ensure that the specified asset will be available on the agreed future date, so that the rent can be realized (Bank Negara Malaysia, 2017; Hassan et al, 2018). In Malaysia, forward lease has been applied for home financing products either as a standalone product on its own or as a hybrid along with other products, i.e., *musyarakah mutanaqisah* (Bank Negara Malaysia, 2017).

Generally, it starts with the customer executes Sale and Purchase Agreement and pays 10% deposit to developer. Customer obtains 10% shares in the property. The Islamic bank jointly purchases the house under *musharakah* contract by paying the remaining balance to developer and acquires 90% shares in property. The customer undertakes to purchase bank's share during the co-ownership period. The Bank leases its portion to customer under forward lease since the house is still under construction. The customer pays advanced rental payment and acquisition payment to bank. Property is fully owned by customer upon customer's full acquisition of bank's shares (Hassan et al, 2017).

AIMAT, AITAB, and forward lease structures provide practical and legally sustainable alternatives to *bay' al-ṭinah* and *tawarruq*. Although these specific terminologies are not explicitly discussed in classical *fiqh*, their permissibility is supported by the foundational legal maxim:

الأصل في المعاملات الإباحة إلا ما دل الدليل على تحريمه

*“The original ruling in transactions is permissibility, except where there is evidence of prohibition”*

(Al-Suyuti, 1983; Ibn Nujaym, 1993),

as well as the legal maxim:

الأصل في الأشياء الإباحة

*“The original ruling on things is permissibility”*

(Al-Suyuti, 1983; Ibn Nujaym, 1993).

Accordingly, in the absence of clear textual prohibition, these structures remain permissible if they comply with *Sharī‘ah* requirements and avoid elements of *ribā*, *gharar fāḥish* (excessive uncertainty), and *maysīr* (gambling).

Their permissibility in the Malaysian context is further reinforced by the legal maxim:

الحاجة تنزل منزلة الضرورة عامة كانت أو خاصة

*“Need, whether general or specific, is treated as a necessity.”*

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

This maxim recognises that genuine financial needs—whether at the individual or institutional level—may justify the adoption of *Sharī‘ah*-compliant financing mechanisms that avoid contentious structures.

Moreover, these arrangements promote facilitation and mitigate hardship, particularly for customers who are unable to acquire assets through outright cash payment but aspire to eventual ownership. This objective aligns with the legal maxim:

المشقة تجلب التيسير

*“Hardship brings about ease”*

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000),

as well as the legal maxim:

الضرر يزال

*“Harm must be eliminated”*

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000).

In sum, *ijārah*-based asset financing structures in Malaysia represent juristically grounded and operationally viable mechanisms that not only conform to *Shari'ah* principles but also respond to contemporary financial needs while minimising legal and doctrinal controversy.

#### 4.3 Operational Application of *Qawā'id Fiqhiyyah* in Structuring Equity-based Asset Financing Products

Asset financing products in Malaysia may be structured based on equity-based contracts such as *mushārah* and *mudārah*.

The structuring of *mushārah*-based asset financing product aims to mitigate reliance on *bay' al-īnah* and *tawarruq*, both of which are often regarded as controversial particularly in asset-based financing. Such an approach aligns with the legal maxim:

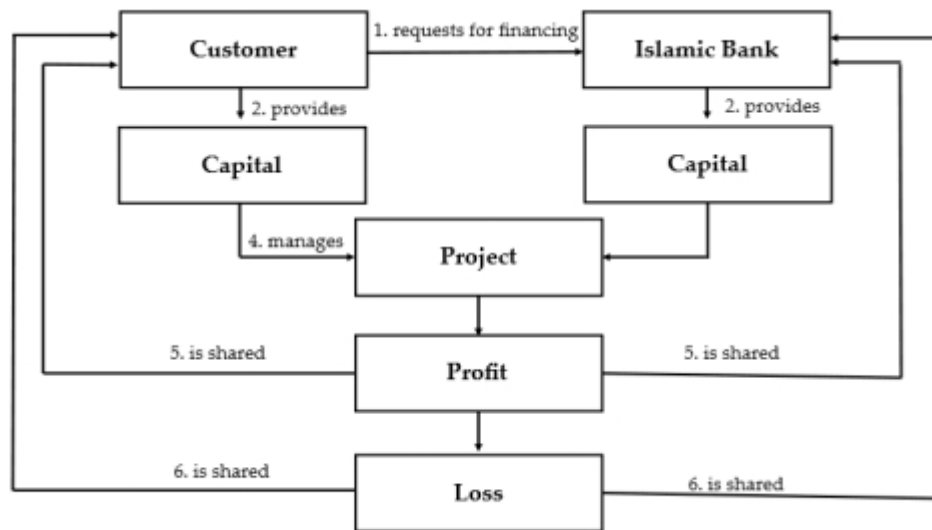
الخروج من الخلاف مستحب

“Departing from scholarly disagreement is recommended.”  
(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

*Mushārah* is a contractual arrangement between two or more parties who jointly contribute capital with the objective of generating profit. According AAOIFI Shari'ah Standards, *mushārah* refers to “an agreement between two or more contracting parties to share assets, labour, or liability for the purpose of earning profit” (AAOIFI, 2015)

Within the Malaysian Islamic banking framework, *mushārah* is operationalised in financing of the project that is known as project financing. A typical *mushārah*-based project financing structure involves the following and is briefly illustrated in Figure 7:

- i. The customer, usually acting as a contractor, requires additional capital and invites the Islamic bank to participate as an equity partner by contributing financing to complete a designated project.
- ii. The Islamic bank contributes a specified portion of capital, while the customer contributes another portion, as mutually agreed.
- iii. Both parties' capital contributions are utilised by the customer to execute and complete the project.
- iv. If the project is successful, the Islamic bank and the customer share the profits in accordance with the agreed profit-sharing ratio.
- v. If the project is not successful, the Islamic bank and the customer share the loss in accordance with the ratio of their capital contribution. (Muhamad & Ahmed, 2023; Hassan et. al, 2016).



**Figure 7.** *musharakah*-based project financing structure

*Musharakah*-based financing must adhere to several key requirements to ensure compliance with *Sharī'ah* principles. Firstly, the capital contribution of each partner must be clearly defined and objectively quantifiable. Secondly, all activities undertaken by the partnership must be legally permissible (*halāl*) under Islamic law, thereby ensuring that all operations conform to ethical and religious norms. Furthermore, profit-sharing ratios should be determined at the outset and expressed as proportions rather than fixed monetary amounts, reflecting the variable nature of returns. Any losses incurred must be borne strictly in accordance with each partner's respective capital contribution, reinforcing the principle of equitable risk distribution. Finally, no partner is permitted to guarantee another's capital or profit, as such guarantees would contravene the fundamental *Sharī'ah* tenet of shared risk and responsibility (Bank Negara Malaysia, 2017)

The above requirements collectively ensure that *musharakah* arrangements operate in accordance with Islamic ethical and financial norms, promoting equitable participation and accountability among partners.

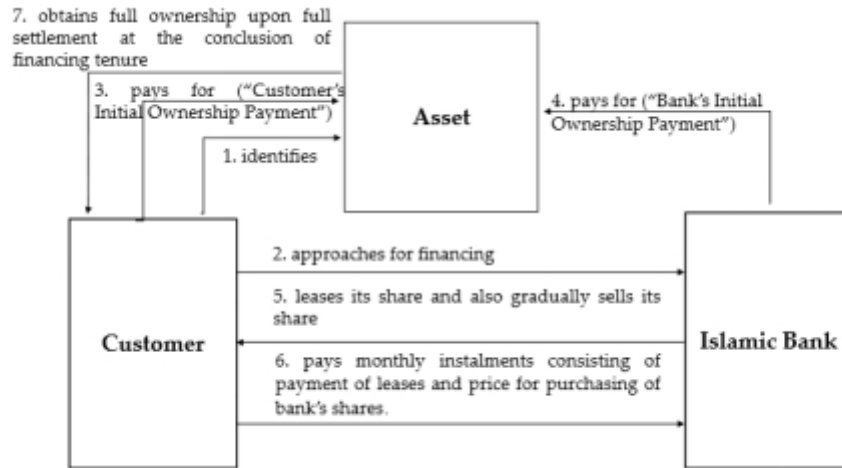
*Musharakah* is also operationalised through the *musharakah mutanaqisah* (MM), a diminishing partnership arrangement in which one partner undertakes to progressively acquire the ownership share of the other partner until full ownership of the underlying asset is achieved. MM is widely employed in Islamic asset financing products, offering a *Sharī'ah*-compliant alternative to interest-based financing.

Under the MM framework, both the Islamic bank and the customer contribute their respective portions of capital required for the acquisition of the asset,

based on a predetermined and mutually agreed profit-sharing ratio at the inception of the contract. The bank subsequently leases its ownership share of the asset to the customer, while the customer commits to gradually purchasing the institution's share throughout the agreed financing tenure. Upon the customer's complete acquisition of the bank's ownership portion, the partnership is deemed terminated and full ownership vests in the customer. The contractual arrangement integrates elements of sale and lease, both of which are fundamental in ensuring that the transaction remains entirely free from interest (*ribā*).

The application of MM in asset financing typically involves the following stages:

- i. **Asset Identification:** The customer identifies the asset intended for acquisition.
- ii. **Financing Application:** The customer approaches the Islamic bank to obtain Shariah-compliant financing.
- iii. **Joint Acquisition:** Both parties jointly acquire the identified asset, whereby the customer contributes an initial ownership payment ("Customer's Initial Ownership Payment") and the bank contributes the remaining portion ("Bank's Initial Ownership Payment") for the acquisition of the property.
- iv. **Leasing Arrangement:** The bank leases its ownership share in the asset to the customer under an *ijarah mawsufah fi al-dhimmah* (forward lease) during the construction phase, and a standard *ijarah* (operational lease) after construction is completed.
- v. **Progressive Ownership Transfer:** The customer gradually acquires the bank's ownership share by making periodic instalments ("Monthly Instalments"), a portion of which constitutes the progressive purchase of the institution's share ("Ownership Payment"), in accordance with the terms of the financing facility.
- vi. **Adjustment of Ownership Shares:** Through the Ownership Payments, the customer's beneficial ownership and rights in the asset increase incrementally, while the bank's ownership proportion decreases correspondingly.
- vii. **Full Ownership:** At the conclusion of the financing tenure and upon full settlement, the customer obtains all ownership rights previously held by the Islamic bank, thereby becoming the sole owner of the asset (Mat Ali et al, 2022; Hassan et al, 2018; Hasan, 2011).



**Figure 8.** *mushārah mutanaqisah* (MM) asset financing structure

MM offers a practical and legally sound alternative to *bay' al-īnah* and *tawarruq*. Although the term *mushārah mutanaqisah* is not explicitly addressed in classical *fiqh*, its permissibility is supported by the legal maxim:

الأصل في المعاملات الإباحة إلا ما دل الدليل على تحريمه

"The original ruling in transactions is permissibility, except where there is evidence of prohibition"

(Al-Suyuti, 1983; Ibn Nujaym, 1993)

and legal maxim:

الأصل في الأشياء الإباحة

"The original ruling on things is permissibility"

(Al-Suyuti, 1983; Ibn Nujaym, 1993).

If *bay' al-īnah* and *tawarruq* were used instead, it would still face objections from certain contemporary scholars. Therefore, adopting MM is preferable to avoid such disputes. This aligns with another legal maxim:

الخروج من الخلاف مستحب

"Avoiding areas of scholarly disagreement is recommended."

(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

Similarly, the structuring of a *mudārabah*-based asset financing product is intended to reduce dependence on *bay' al-īnah* and *tawarruq*, both of which have been subject to considerable juristic scrutiny and are frequently regarded as contentious, particularly within asset-based financing arrangements. The

adoption of *mudārabah* is therefore advanced as an alternative mechanism that mitigates exposure to juristic disagreement—an approach that is itself encouraged within Islamic jurisprudence. This principle is reflected in the legal maxim:

الخروج من الخلاف مستحب

“Departing from an area of juristic disagreement is recommended.”  
(Al-Suyuti, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000)

*Mudārabah* refers to “a form of partnership contract between a capital provider (*rabb al-mal*) and an entrepreneur (*mudarib*), wherein the *rabb al-mal* provides capital to be managed by the *mudarib*. Profits generated through the deployment of that capital are shared between the parties based on a mutually agreed ratio, whereas financial losses are borne solely by the *rabb al-mal* unless they result from misconduct, negligence, or breach of contract by the *mudarib*.” (Bank Negara Malaysia, 2017)

In accordance with the AAOIFI Shari’ah Standards, *mudārabah* is defined as “a profit-sharing partnership in which one party provides the capital (*rabb al-mal*) and the other contributes managerial expertise (*mudarib*).” (AAOIFI, 2015)

Within the domain of asset financing, *mudārabah* is most prominently applied in project financing structures. A typical *mudārabah*-based project financing arrangement operates as follows and is briefly illustrated in Figure 9.

- i. The customer, usually a contractor seeking capital, invites the Islamic bank to participate as a capital provider by providing capital to carry out a specified project.
- ii. The bank contributes the agreed quantum of capital.
- iii. The customer provides work and his expertise.
- iv. The customer utilizes the capital for the execution and completion of the project.
- v. Upon completion and realization of profit, the returns are distributed between the customer and the bank based on the predetermined profit-sharing ratio.
- vi. If the project fails and suffers loss, the loss is borne by the Islamic bank unless it results from misconduct, negligence, or breach of contract by the customer. (Muhammad & Ahmed, 2023; Hassan et al, 2016; Hasan, 2011).

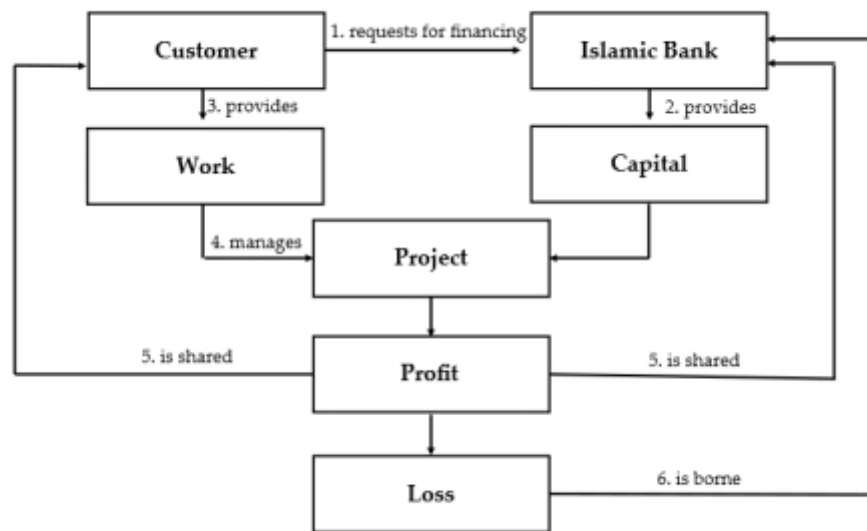


Figure 9. *mudārabah*-based asset financing

To ensure full compliance with *Sharī‘ah* principles, *mudārabah*-based financing must satisfy several fundamental conditions. Firstly, the capital provided by the *rabb al-māl* (customer or investor) should be clearly defined, quantifiable, and properly transferred to the *mudarib* (bank) in accordance with the agreed terms. Secondly, the underlying business activity must be lawful (*ḥalāl*), with the *mudarib* assuming full responsibility for all managerial and operational aspects of the venture. Moreover, profit-sharing arrangements must be established at the outset through a mutually agreed ratio, expressed as a percentage rather than a fixed or absolute amount. Financial losses are to be borne solely by the *rabb al-māl*, except in cases where losses result from the *mudarib*'s misconduct (*ta‘addi*), negligence (*taqṣīr*), or breach of contractual obligations (*mukhālafah al-shurūṭ*). Furthermore, neither the capital nor the profit may be guaranteed, as such guarantees would violate the *Sharī‘ah* principle of risk-sharing that is central to the *mudārabah* contract (Bank Negara Malaysia, 2017).

The comprehensive implementation of these conditions’ positions *mudārabah* arrangements within the theoretical framework of Islamic finance, thereby operationalizing principles of equitable participation and codifying accountability among all contractual parties.

## 5. CONCLUSION

This study demonstrates that *qawā‘id fihiyyah* provide an essential framework for structuring Islamic asset financing products based on various

*Sharī'ah*-recognised contracts in Malaysia, effectively bridging classical jurisprudential principles with contemporary Islamic banking practice.

One of the most significant *qawā'id fiqhiyyah* applied in operationalising asset financing structures is the well-established legal maxim:

الخروج من الخلاف مستحب

*"Avoiding areas of juristic disagreement is commendable"*  
(al-Suyūṭī, 1983; Ibn Nujaym, 1993; Muda & Mat Zin, 2000).

This maxim guides practitioners in shifting the operational application of controversial *Sharī'ah*-based contracts to those that are less disputed. For example, it supports transitioning from *bay' al-īnah*-based asset financing products to *tawarruq*-based alternatives. It also facilitates the migration of under-construction asset financing structured on *bay' al-īnah*—widely considered contentious—to more acceptable structures such as *istisnā'*-based financing.

Other important *qawā'id fiqhiyyah* relevant to the structuring of asset financing products include:

الأصل في المعاملات الإباحة إلا ما دل الدليل على تحريمه

*"The default ruling in transactions is permissibility, except where there is evidence to the contrary"*

(al-Suyūṭī, 1983; Ibn Nujaym, 1993), and

الأصل في الأشياء الإباحة

*"The default ruling on matters is permissibility"*

(al-Suyūṭī, 1983; Ibn Nujaym, 1993).

These guiding principles support the development of newly innovated, non-controversial asset financing products to replace those built on *bay' al-īnah*, which lack broad international acceptance, and—though to a lesser extent—certain forms of *tawarruq*, especially *tawarruq munazzam*. Applications include transitioning to structures such as *istisnā' muwāzī* and *ijārah maawsūfah fī al-dhimmah* for under-construction financing, as well as AIMAT, AITAB, and MM for financing completed assets.

Overall, the application of various *qawā'id fiqhiyyah*, particularly those operationalised in the structuring of Islamic asset financing in Malaysia, is both widely accepted and instrumental in enhancing the global viability of non-

disputable financing products. Nevertheless, challenges remain, primarily due to differences in interpretation among *Sharī'ah* scholars and the need to harmonise classical jurisprudence with modern commercial requirements.

In conclusion, this study contributes to Islamic banking scholarship by demonstrating a systematic methodology for operationalising *qawā'id fiqhiyyah* in the design of Islamic asset financing products in Malaysia. By integrating jurisprudential maxims into product structuring, the research offers valuable insights for scholars, regulators, and industry practitioners seeking to strengthen product robustness. The findings also implicitly suggest avenues for future empirical research, particularly in examining client and institutional experiences to assess how the application of jurisprudential maxims influences operational efficiency, consumer confidence, and market stability. Ultimately, the study reaffirms the importance of *qawā'id fiqhiyyah* as both a theoretical foundation and a practical mechanism for ensuring that Islamic banking asset financing products remain compliant, resilient, and ethically grounded—thereby supporting Malaysia's continued advancement toward global recognition in Islamic finance.

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