



An Analysis of the Legal and Governance Framework for Protection and Promotion of the Rights of the Islamic Bank, Customers, and Community: A Case Study of Brunei Darussalam

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Abstract

Islamic corporate governance is aimed at maintaining Shariah compliance in the Islamic finance industry. Thus, it seeks to achieve the strategic objectives of Shariah (*maqāṣid* al-Shariah). Accordingly, it should protect and promote the stakeholders' rights as long these rights are recognized by Shariah. However, the literature on the role of Islamic corporates in protecting and promoting the rights of the stakeholders is not sufficient in contrast to conventional corporate governance. This paper fills this gap by looking into how far Shariah board in Brunei Darussalam protect and promote the rights of the bank, customer, and community with reference to the *maqāṣid* (objectives) of Shariah, specifically, the *maqāṣid* of wealth as well as the laws of the Brunei Darussalam. After the discussion, it can be concluded that Shariah boards in Brunei Darussalam significantly protect and promote the rights of the bank, the customer, and the community but they prioritize the bank over the customer, especially, in the deposit products and the attached facilities. This paper makes use of legal and content analysis methods.

Keywords: Shariah board, right, Islamic bank, customer, community, *Maqāṣid* of wealth.

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1. Introduction

Islamic Corporate Governance (ICG), like its conventional counterpart, refers to a system by which corporates are directed and controlled with the purpose to meet the corporation's objective by protecting all the stakeholders' interests and rights (Hasan, 2007). Thus, an Islamic corporation be it an Islamic bank (IB), Islamic insurance company, or the like, should take responsibility to make certain that the stakeholders' rights and interests are respected and fulfilled. This also applies to the contractual rights provided to the banks and the customers. It also goes hand in hand with the *maqāṣid* (objectives) of Shariah, especially, the preservation of wealth.¹ The wealth *maqṣad* (singular of the word *maqāṣid*) is manifested in obtaining wealth through legitimate means and using it for legitimate channels (Ibnu 'Āshūr, 2001). It also implies making wealth within the reach of the *ummah* (Muslim community) (Ibnu 'Āshūr, 2001). Ibn 'Āshūr broke the wealth *maqṣad* down

¹ The *maqāṣid* (objectives) of Shariah includes the preservation of faith, life, mind, progeny, and wealth (Al-Imam Al-Ghazali, 2014).

into the circulation of wealth, establishment of ownership, explicit wealth, protection of wealth, and legitimate wealth (Ibnu 'Āshūr, 2001). These five domains emerged from a deduction process based on the *Qurān*. It should be noted that the word “wealth”, in this context, shall include the right to acquire or use it as the means should follow their ends (Kamali, 1989).

2. Literature Review

Literature shows that researchers of Islamic corporate governance agree that ICG takes into account the welfare of the whole Islamic society (Fatima et al., 2019). In the context of an Islamic bank, the Islamic society includes BOD, managers, shareholders, SB, customers, and regulators (Al-Nasser Mohammed and Muhammed, 2017). According to (Iqbal and Mirakhor, 2004), the relationships between these stakeholders are based on concepts of the right of property and contract. The former principle requires the stakeholders to acquire property through lawful means and not to waste or squander it. It also gives them the right to jointly own it. Under the latter principle, the managers should fulfill their explicit and implicit obligations toward other stakeholders under partnership contracts, namely, *mushārah* and *muḍarabah* (Besar, 2019). The existing literature discussed the general principles aimed at protecting and promoting the rights of the stakeholders such as *shūra* (consultation, accountability, transparency, and adequate disclosure (Alnofli, 2021). However, they are concerned with the relationship between managers and other stakeholders rather than between SB and other stakeholders.

Moreover, one should remember that the contractual rights of the stakeholders are not always the same. They depend on the nature of the contract between the stakeholders. Similarly, the protection of financial rights under the *maqṣad* of wealth is continuously open for research through legal reasoning (*ijtihād*) (Malik, 2019). Accordingly, attention should be given to the contracts between the stakeholders and the context where and when *maqāṣid* al-Shariah applies. This paper fills this gap by considering the role of the SB in protecting the rights of the stakeholders and the appropriate methods it proposes for doing so within the jurisdiction of Brunei Darussalam.

3. Methods

This study uses qualitative content analysis for examining the rights of the stakeholders and the methods of protecting and promoting these rights. It also makes use of doctrinal analysis for understanding the relevant legal rules (Hutchinson and Duncan, 2012). These legal rules are used as a yardstick for benchmarking the role of the Shariah board (SB) in protecting and promoting the rights of the stakeholders. The SB's standpoints on the rights of the stakeholders are inferred from secondary sources. These secondary sources consist of the resolutions/ *fatwas*, terms and conditions of the banking products, annual reports, and official websites of the Bank Islam Brunei Darussalam (BIBD). The legal rules are obtained from primary sources. These primary sources are legislation and central banks' guidelines.²

The paper also applies the wealth *maqāṣid* framework mentioned above according to the view of (Ibnu 'Āshūr, 2001) for evaluating the role of the Shariah board in protecting and promoting the rights of the stakeholders from an Islamic perspective.

4. Results and Discussion

4.1 Protection and promotion of the rights of the bank and customer

SB took different methods for protecting and promoting the rights of the bank and customers. These methods vary with the time of communication between the bank and the customer, and the types of products as follows.

4.1.1 Protection and promotion of the rights of the bank and customer before the conclusion of the contract

Aiming for promoting the freedom of the bank, and the customer, SB considers that communication including offer and acceptance between the parties to a contract is a precondition for the conclusion of the contract and should be present at the same ceremony (*majlis al-'aqd*) (Rani et al., 2020). This ensures that the parties are aware of each other, directing their attention to making a contract and agreeing to it. To support this aim, SB typed the terms and conditions of the offered transactions in both Malay and English languages and give the

² Primary sources of law are rules of law that are binding upon the courts, government, and individuals such as constitutions, statutes, regulations, treaties, court orders, administrative regulations, policy material. See (Ahmad et al., 2020).

latter superiority over the former in event of a contradiction between them (BIBD *Wakālah* Terms and Conditions of Deposit Products, section 25.8). It goes, further, to publish them via its official website (General | Bank Islam Brunei Darussalam, 2022). These terms and conditions are shown to the customers to read before the conclusion of the contract in writing (BIBD account opening form, paragraph 6).

In addition, any communication between the parties, be it an offer or acceptance, notification, or instruction of the customer to the bank, approval of the assignment of the customer's rights, or waiver of a bank's right shall be made in writing (BIBD *Wakālah* Terms and Conditions, sections, 1.7, 7.4, 8.2 and 10.2); (*Tawarruq* Terms and Conditions of Sale, sections, 15 (a), 10, 19). Besides, SB necessitates the submission of the customer's identity card or passport and any other document as it thinks necessary before or during the conclusion of the contract (BIBD *Wakālah* Terms and Conditions of Deposit Products, sections 1.6 and 25.2 (I)). To prove the contractual rights of the parties, SB encourages the presence of two witnesses at the time of the conclusion of the contract regardless of their gender (Rani et al., 2020). This supports the *maqṣad* of explicit wealth.

Furthermore, SB requires that the parties to a contract should be *rāshid* (sensible). Again, this is to make certain that they can fully, comprehend the contents of the contract and inhibit imprudent and reckless behavior usually caused by infants. A legal entity such as companies must contain shareholders, contracts, capital, business, and profit (Rani et al., 2020). This enables the counterparty to know the company and trust it. On the part of the IB, they are an incorporated and registered company with the object of Islamic banking business. Moreover, managers representing the bank are adults and professionally qualified for understanding the banking contracts and putting them into practice. The staff is rich with experts in various areas including Islamic banking, finance, accounting, and law (BIBD Annual Report, 2020). With regards to the customers who are willing to contract with the bank, they should attain the age of 18 years old or, in some cases, above (BIBD *Wakalah* Terms and Conditions, Section 1.3).³

From a legal point of view, the offer and acceptance of the parties are essential for the formation of a contract. They can be expressed by spoken, written words, or gestures (Bruneian Contract Act, article 3). They should also be declared by the free will of the parties orally or in written form. In addition, the parties should have a common understanding of the terms of the contract (Bruneian Contract Act, article 10). As for the parties of the contract, they should be at, or above the age of majority (Bruneian Contract Act, articles 11 and 12).⁴ Thus, the age requirement laid down by SB is aligned with the law.

In support of the circulation of wealth around the community, SB considers that the religion of the parties is immaterial for the validity of commercial contracts (Rani et al, 2020). Similarly, according to them, it does not matter whether the corporate customer is practicing Islam or not. The bank can open an account for conventional insurance companies and other companies with Shariah non-compliance (Rani et al, 2020). When it comes to the law, all competent people whatever their religion are free to contract (Bruneian Contract Act, article 10). Nevertheless, according to the SB, IBs may penalize people who have been blacklisted for failing to pay their debts by boycotting them (General *Wakalah* Terms and Conditions of Deposit Products, section, 1.8) (Rani et al., 2020). In practice, banks measure the borrowers' creditworthiness by referring to their self-inquiry report lodged with the credit bureau.⁵

4.1.2 Protection and promotion of the rights of the bank and customer after the conclusion of the contract

Methods used for protecting and promoting the rights of the bank and customer after the conclusion of the contract vary with the purpose, and then, the type of the contract. Thus, this section is divided into two parts. One for the deposit products and the other for financing products.

4.1.2.1 Protection and promotion of the rights of the bank and customer under deposit products

On the side of *maqṣad* of the circulation of wealth, SB recognized some deposit products including *wadī'ah yad ḍamān* (safekeeping with guarantee), *mushārakah* (joint partnership), and *muḍārabah* (dormant partnership), *bay' bi thaman 'ājil* (BBA) (deferred payment sale) and *wakālah* (agency). The SB went deeper

³ One example for products offered for customers above 18 years old is *al-mushārakah al-mutanāqisah* with minimum age requirement of 21 years old (Home Financing | Bank Islam Brunei Darussalam, 2022).

⁴ The age of majority is defined to be 18 years (Martin, 2013).

⁵ Self-Inquiry Report (SIR) is the credit report that contains the detailed credit information that one has taken up, such as credit card, car, home, personal education financing, electric bill, telephone and internet subscription, from different financial and non-financial institutions. The Credit bureau is a unit under the Regulatory and Supervision Department of Brunei Darussalam Central Bank (BDCB) established to facilitate the financial institutions in determining a borrower's creditworthiness. See (About Credit Bureau, 2022.)

to explain the ownership rights of the parties and support the means of promoting these rights. As far as the *wadī'ah yad damān* is concerned, the bank is entitled to wholly, or partly use the money deposited for any kind of transaction, and, solely, acquire any profit resulting from it. The customer is entitled to have an amount equal to the deposit safe and available for withdrawal at any time. To facilitate utilization of the deposit, the customer is provided with a telegraphic transfer service and demand draft upon his request (Foreign Currency | Bank Islam Brunei Darussalam, 2022). However, they have no right to the profit unless the bank decides to give the customer a monetary gift out of the profit. This gift gives value to the relationship between the bank and its customers (Rani et al., 2020). To ensure that the transaction between the bank and the customer is explicit, IBs provide the customer with a monthly financial statement (Foreign Currency | Bank Islam Brunei Darussalam, 2022). Regardless of the term given for this transaction, Bruneian law recognizes this transaction since it is equivalent to the debtor-creditor relationship.⁶

As regards *mushārahah* and *muḍārahah* contracts,⁷ SB acknowledges that each of the parties owns their share of the profit as per agreed. The loss caused on the capital shall be borne by both parties according to the respective ratio of contribution in *mushārahah* and solely by the customer in *muḍārahah* unless it is caused by negligence on the part of the bank. This is because it is difficult to ascertain the exact value of the expertise, effort, and skills exerted by the entrepreneur, in this case, the bank. Both parties have a right to be treated honestly and fairly (Rani et al, 2020).

From a legal point of view, both *mushārahah* and *muḍārahah* are called partnerships which is a relation that subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits thereof between them (Bruneian Contract Act, article 192). The difference in the name given to the contract underlying a firm is traced back to the fact that Brunei Darussalam applies two legal systems; Islamic law and English common law (Constitution of Brunei Darussalam 1959, article 3 (4); Application of Laws Act, article 2). In Bruneian law, partners are free to agree on how to distribute profit and loss among them (Bruneian Contract Act, article 206). Thus, rulings declared by SB with regard to the profit and liability of the partners of *mushārahah* and *muḍārahah* mentioned above are applicable. In parallel with the values of Islam, partners, by law, are bound to be just and faithful to each other (Bruneian Contract Act, article 210).

SB suggested that the *mushārahah* and *muḍārahah* capital should be in the hands of a Muslim partner (Rani et al., 2020). Thus, IBs themselves would be responsible for managing the capital as specified by the two contracts. This greatly enhances the chance of commitment to Islamic principles of business, thus, promoting the legitimacy of the ownership and wealth while using capital.

As to the BBA (sale of property with deferred payment), designed for investment deposit, SB recognized the parties' freedom to circulate and own the property. The bank sells an asset to the customer with prompt payment of the price, and, accordingly, grants the right to immediate price while the customer enjoys the ownership of the asset. Then, the customer resells the same asset to the bank on deferred payment giving the former a right to price and profit, whilst the latter re-owns the asset (Rani et al., 2020). The rights of the parties mentioned above are the same as the ones stipulated by the law for the ordinary sale which gives the buyer and the seller the right to property in goods and price respectively (Bruneian Contract Law, article 4).

To make the terms and conditions of the two contracts clear and explicit and avoid any mix-up over them leading to disagreement between the parties, SB requires that the two contracts be separated (Rani et al 2020). This concurs with the *Ḥadīth* that the Prophet Muḥammad (ﷺ) prohibited one sale in one (Tirmithi, 1996). This also goes in the direction of Bruneian law which requires the meaning of the contract to be certain or capable to be certain, otherwise the contract shall be void (Bruneian Contract law, article 30).

With regards to *wakālah* products, the bank acts on behalf of the customer in dealing with the money deposited (Rani et al, 2020). It is free to use the money deposited for any investment project and transact with any third parties as long the dealings do not contradict Shariah (BIBD *Wakalah* Terms and Conditions of Deposit Products, section 2.3). This would widen the opportunities for the circulation of wealth. It also has a

⁶ The English common law which is part of the Bruneian legal system, considers the relationship between the bank and customer as that of debtor and creditor relationship and not an agent and principal and nor trustee and beneficiary relationships. Accordingly, money deposited to the bank by the customer ceases altogether to be the money of the customer and, thus, the former is entitled to deal with it as his own, make what profit of it he can, which profit he retains to himself, paying back only the principal. See (Foley v Hill, 1848).

⁷ *Mushārahah* is a profit-loss sharing partnership, while *muḍārahah* is a kind of partnership in profit whereby one party provides capital (*rab al-māl*) and the other party provide labor (*muḍārib*) (Rani et al, 2020).

right to *wakālah* fees deducted from the profit against its work. Moreover, it is entitled to any sum amount out of the profit that exceeds the customer's expected rate of return (Rani et al, 2020). Contrary to the freedom of the customer to contract, the bank, holding a stronger bargaining position, may terminate the *wakālah* without assigning any reason to the customer (BIBD *Wakālah* Terms and Conditions, section 18.2).

Conforming to the legal concept of deposit, the customer has the right to recover the sum amount equivalent to the deposited funds and the expected rate of profit after deducting the *wakālah* fees (Rani et al, 2020).⁸ From a legal perspective, *wakālah* is equivalent to the agency contract.⁹

The SB assented to the measures protecting the property of the parties. To protect the ownership of the bank, the bank may suspend an account opened under *wakālah* contract if the document or information required for the contract is not provided within the period prescribed by the bank (BIBD *Wakalah* Terms and Conditions of Deposit Products, section, 25. 2 (I)). This matches with Bruneian law which regards the defaults of one party as a justification for not performing the other party's obligation in reciprocal contracts and the principle of reciprocity established by the verse "If you were to retaliate, retaliate to the same degree as the injury done to you. But if you resort to patience, it is better for the patient" and others (Bruneian law of Contract, article 55; *Surat al-Nahl*, 16: 126).

For the protection of the customer's property, the bank should only rely on the customer's specimen signature in effecting transactions on the customer's account to prevent an unauthorized person from dealing with the customer's deposits (BIBD *Wakalah* Terms and Conditions of Deposit Products, Section, 1.7.). Again, this goes along with the Bruneian law of evidence which deems a statement in a document to be made by a person if such person has signed on it and, thereby, it may be admissible evidence for, or against that person (Bruneian Law of Evidence, article 73 (A) (4)).

Giving a boost to the circulation, ownership, and clarification of wealth, the bank offers customers various options to deposit and withdraw money, or cheques and transfer money. IBs established a number of branches distributed over various areas of the country for in-person dealings. They also installed cash deposit machines, cheque deposit machines operating 24 hours, and automatic teller machines (ATM) (Find ATM / Branch | Bank Islam Brunei Darussalam, 2022). The services provided by the ATM include account balance checks, cash withdrawals, bill payments, and money transfers from one account to another in Brunei Darussalam (Find ATM / Branch | Bank Islam Brunei Darussalam, 2022) (BBD *Wakalah* Terms and Conditions, section no.5.3). These services can also be conducted via a mobile application and an internet banking account which can also transfer money worldwide (BIBD NEXGEN Online | Bank Islam Brunei Darussalam, 2022). However, SB did not assent to the freedom of the bank to enter a deal with conventional insurance companies and other companies practicing Shariah non-compliance business under the bill payment facilities. The reason for this is that such agreements would amount to assistance or contribution to obtaining illegitimate wealth. Nevertheless, the payer is allowed to deposit the amount of payment into the abovementioned companies directly into their account at the Islamic bank (Rani et al, 2020).

Correspondingly, SB acknowledged the use of debit cards under *wakālah bi al-ujrah* (paid agency) (Rani et al., 2020). Within this concept, the bank represents the customer in paying any price owed to a merchant via deduction of the latter's available account balance. It deserves fees/charges for this task and any attached service such as ATM cash withdrawal on the condition that the customer receives a reasonable notification of these fees/charges to make the deal explicit (BIBD Debit Mastercard Terms and Condition, section, 9.1.). The customer is allowed to use the debit card within the spending limit and without exceeding the account balance as the customer's ownership ends when the bank's ownership begins (BIBD Debit Mastercard Terms and Conditions, sections, 4.2 and 7.2).

SB accepted certain rules leading to protecting the rights of the bank and customers for the debit card facility. For the former, the bank is authorized to cancel the debit card if the customer does not collect it within 30 days from the date the cardholder has been notified to collect the card. This discards the hanging liability placed upon the bank and the cost resulting from keeping the card in its possession. In the same manner, the bank is allowed to cease transactions if the account balance of the cardholder is inadequate, or the cardholder's account is closed (BIBD Debit Mastercard Terms and Conditions, Section 14.1). It also reserves the right to

⁸ According to article 2 (3) of the Bruneian Islamic Banking Order 2006, deposit denotes to any sum received by the bank on the condition that it will be repaid with or without interest.

⁹ The Act does not define the word "agency" per se. However, it defines the parties involved in the agency contract. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons while the principal is the person for whom such act is done, or who is so represented (Bruneian Contract Act, article 135).

withdraw the service without notice to the cardholder in the same cases and others such as breach of any material terms and conditions and default of payment of any other financing facility granted by the bank (BIBD Debit Mastercard Terms and Condition, Section 17.1). This is to avoid any probable overdrawn, loss, or criminal liability. In the legal sense, these actions are justified since, as previously mentioned, failing to perform a contractual duty by one party is a sufficient excuse for not performing the opposite duty imposed on the other party in a reciprocal contract.

For the latter, SB places a particular process aiming at proving the identity of the cardholder and averting fraud and impersonation. On this point, the customer shall sign at the back of the card upon receiving their card (BIBD Debit Mastercard Terms and Conditions, Section 3.1). The bank, in turn, shall provide the customer with a personal identification number (PIN) to avail of certain services related to the usage of the card, and a secure code to be sent via a short message to the customer's mobile phone number registered with the bank for purpose of online shopping (BIBD *Wakalah* Terms and Conditions of Deposit Products, section 5.3) (BIBD Debit Mastercard Contactless | Bank Islam Brunei Darussalam, 2022). This code can only be used once (BIBD Debit Mastercard Terms and Conditions, section 1.1). Furthermore, the bank may request the customer to provide their personal information and any document if deems necessary (BIBD Debit Mastercard Terms and Condition, Section 17.1 (g)). On top of that, the bank is permitted to reject or suspend any transaction suspected to be fraudulent, and block or limit the usage of the card at any ATM that the bank deems unsecured and/ or does not meet the security standards (BIBD Debit Mastercard Terms and Condition, sections 10.4 and 14.1 (b)). These arrangements meet with Bruneian law in two ways. In one way, they go side by side with the duty of the agent (the bank) to use all reasonable diligence in communicating with his principal (customer) and in seeking to obtain his instructions (Bruneian Contracts Act, article 167). In another way, they promote the duty of secrecy dropping on the bank (Bruneian Islamic Banking Order 2008, 58 (1)).

Just like *wakālah* deposit product, the bank shall send a monthly statement on all transactions conducted via the debit card during the month. Alternatively, the cardholder may check the updated passbook, IBs internet banking account, or mobile application (BIBD Debit Mastercard Terms and Conditions, sections 8.1 and 8.2). This lies within the legal duty of the agent (bank) to render proper accounts to his principal (customer) on demand (Bruneian Contracts Act, article 166).¹⁰

Likewise, SB permitted the use of the credit card facility as a method of payment for goods and services within the frame of *qard hassan* (benevolent loan), *kafāllah bi al-māl* (paid guaranty), and *wakālah bil māl* (paid agency) (Rani et al, 2020). Here, the bank obliges to pay the prices of the goods or services bought by the customer within the spending limit, while the latter undertakes to repay the agreed fund at a particular time and date and pay any charges in return for the credit card facility.

Because the credit card facility involves a financial obligation on the part of the cardholder to pay the fund owed, the bank is given several options to protect its rights of ownership if the cardholder defaults. It may debit the cardholder's account, or combine, set off, or consolidate any or all indebtedness on the card account with other accounts (BIBD Credit Card Terms and Conditions, sections 4.5 and 20.1). These options are also conferred by the banking law (Garnett v M'Kewan [1872] LR 8 Ex 10). Alternatively, the bank may withhold the credit card facility as a legal contractual defense pursuant to the principle of reciprocity mentioned above (BIBD Credit Card Terms and Conditions, section, 16.1 (a)).

All the measures arranged to secure the property of the cardholder under the debit card facility mentioned above are also applicable to this facility (BIBD Credit Card Terms and Conditions, sections 2.5, 3.4, 4.9, 12.1, 12.3, 15.1). To defend the rights of both parties on the deposit, the bank is enabled to refuse to give the card to a person other than the cardholder if it thinks that in releasing the card to such person the bank or the cardholder would incur, sustain, or suffer any loss or damages (BIBD Credit Card Terms and Conditions, section 2.7). This behavior goes hand in hand with the reasonable diligence required to be exercised by agents in law. However, the freedom provided for both debit and credit card holders to contract is not without restriction. The bank, unilaterally, may change the terms and conditions of both facilities on the condition that it gives reasonable notification to the cardholder (BIBD Debit Card Terms and Conditions, section 18.9 and Credit Card Terms and Conditions, section 18.1).

¹⁰ The duty to account is also imposed on the bank under the banking law (Arora, 1993).

4.1.2.2 Protection and promotion of the rights of the bank and customer under financing products

Aside from depositing products, SB respected the freedom of the bank and customers to involve in various financing products. These products include *arrahn* (Islamic pawnbroking), *mushārah mutanāqisah* (diminishing partnership), *murābahah* (cost plus profit sale), BBA, *tawarruq*, and *al-ijārah thumma al-bay'* (AITAB). The SB went a step further to define the ownership rights of the parties resulting in these products. Because these products, as opposed to depositing products charges the customer with considerable financial responsibility generating credit risk for the bank, the SB requires evidence of the customer's financial ability for providing these products. This includes, for example, the latest salary slip, salary or pension confirmation letter, or service contract.¹¹

Regarding Islamic pawnbroking, the customer acquires a right to receive the fund agreed upon by a contract, have the item pawned kept safe during the financing term, and regain possession of the pawned goods once the debt is paid off. The bank as a pawnbroker has a claim to a sum of money equal to the amount of fund, keeps the pawned goods, and the agreed charges for keeping them. For the protection of the rights of the bank, IBs may provide this product on the condition that the total funded amount is less than the market price of the pawned item by 20% (Ar-Rahn Micro Financing | Bank Islam Brunei Darussalam, 2022). This would guarantee the bank to recover an equal amount of debt.

When a customer's financing period matures, the customer has a right to receive a written notice to clear any outstanding balance. This serves the *maqṣad* of the explicit ownership in the manner that it alerts the customer that the payment of the debt falls due before moving further with redemption or lawsuit. In case of default, the bank is allowed to sell the pawned goods and recover the amount due to it, provided that the customer has consented to do so (Rani et al., 2020).

In relation to house financing, SB stated the rights of the bank and customer during the *mushārah mutanāqisah* agreement. Both parties share the ownership of a house under construction according to the ratio stipulated by *mushārah* contract. The customer is given the right to monitor the construction of the property and authorized to pay for maintenance of the house by way of *wakālah* (agency) contract. The bank is granted a right to a monthly rent including the price of the bank's share of the property upon leasing it to the customer via a contract of *ijārah* (lease) and *bay' bi thaman ājil* deferred payment sale. The customer possesses the whole house immediately after the payment of the whole share in view of the latter contract (Home Financing | Bank Islam Brunei Darussalam, 2022).

Targeting the *maqṣad* of explicit ownership, the bank requires the customer to submit the land title deed, house plan, and sale and purchase agreement between the customer and the owner of the property (Home Financing | Bank Islam Brunei Darussalam, 2022). This makes the subject matter of the contract clearly known to the bank and lends certainty to the contract as required by the law (Bruneian Contracts Act, article 30).

As for the BBA, it can also be directed to finance the customers whereby the bank acquires ownership of an asset sold by a third party upon the customer's request and then, resells the same asset to the customer for a deferred price who finally retransfers the property to the bank against the customer's right over a spot price (Rani et al., 2020). The SB make it clear that if the subject matter of the contract is land, the financing application should be in harmony with the Bruneian land code (Rani et al., 2022). Thus, the seller should prepare a memorandum of transfer (form D) which should be registered at the competent land office and witnessed by a land officer or magistrate (Bruneian Land Code Article 8, 9 (1), 23 (1)). This procedure serves as legal protection to the ownership of whoever party buys the land and is regarded as a notice to the public of the existence of the ownership rights over the land in compliance with the *maqṣad* of explicit ownership.

For *murābahah* (cost plus profit sale) contract, the customer involves in a BBA transaction with the initial intention to acquire the property. This intention shall be expressed in a written application describing the property required in detail to make it clear. Upon acceptance of the application, the bank issues a letter of credit guaranteeing the payment of the price and then transfers a sum amount equal to the price usually to a negotiating bank to conduct the payment. After receiving the property, the bank resells the property to the customer giving them a right to a property conforming to the agreed one, while the bank obtains a right to a price consisting of the property cost and profit to be paid in full during a specific term (Rani et al, 2020). To guarantee the customers' duty toward the bank to pay the price, the bank requires the customer to deposit an amount equal to the price before the issuance of a letter of credit (Trade Financing | Bank Islam Brunei Darussalam, 2022). In practice, the bank appoints the buyer/applicant as an agent to conclude the contract by himself. Hence, the

¹¹ Exception is made to students applying for education financing and short-term financing up to 6 months under *arrahn*-micro financing. See for example home financing (Home Financing | Bank Islam Brunei Darussalam, 2022).

customer takes the responsibility for obtaining conforming goods by themselves and not the bank (Trade Financing | Bank Islam Brunei Darussalam, 2022). It goes without saying that the customer becomes acquainted with the price, description, and condition of the goods on his own. This serves the purpose of the disclosure imposed on the bank under the principle of *amānah* (trustworthiness) and puts an end to any probable dispute between the bank and the customer on the goods purchased.¹²

With regards to *tawarruq*, the customer may involve in BBA with an intention to acquire liquidity. Here, the bank acts as an agent to sell the asset to another merchant at a cost price in exchange for agency fees on the grounds of the *wakālah* contract. Subsequently, the bank credit sum amounts equal to this cost price to the customer's account and, consequently, the customer owns it (Rani et al, 2020). In practice, the IB gives the customer the option to perform the contract either in a telephone call or in person (BIBD *Tawarruq* Transaction Terms and Conditions of Sale, section 7). The bank also undertakes to provide the customer with a confirmation notice attached to the contract. The significance of this confirmation notice is that it shows the particulars of the facility offered to a specific customer, for instance, the exact amount of the price for explicit ownership (BIBD *Tawarruq* Transaction Terms and Conditions of Sale, section 9).

Concerning AITAB, the parties may opt to lease a property bought by the bank to the customer for a specific period and then, sell it to the customer after the termination of the lease contract instead of selling it directly to the customer once received from the third party. Therein, the bank deserves a monthly rent during the lease period whilst the customer is entitled to *manfa'ah* (usufruct) over the property and gain full ownership by another contract of sale. Like BBA, the latter contract of sale should be separate from the former contract (the lease contract). In law, AITAB is equated with the hire-purchase agreement (Bruneian Hire- Purchase Order 2006, article 2 (1)). However, the latter usually imposes interest on overdue rentals.

For the protection of the wealth of the bank, the bank may require the customer to promise to buy the property in due course. The promise (*wa'ad*) shall be part and parcel of the initial contract of lease (Rani, et al.2020). This protects the bank from any attempt to renege on the commitment to buy the property by the customer. According to law, this promise shall take legal effect and the separate sale seems to be a contingent contract.¹³

The SB assent to several mechanisms providing a shield for the rights of the bank against the breach of the customer. One mechanism is that the bank may incorporate a term into the contract stipulating that if the customer fails to pay one or more monthly installment (s) or any fees or charges, or the customer becomes unable to pay any of them, all installments shall turn out to be payable in full immediately (BIBD *Tawarruq* Transaction Terms and Conditions of Sale, section 11) (Rani et al, 2020).

Another mechanism is that the bank may merge or consolidate any of the customer's accounts held to the bank against any liabilities or indebtedness owing to the bank, and the bank may set off or transfer any sum standing to the credit of all or any such account(s) towards the satisfaction of any of the customer's liabilities to the bank (BIBD *Tawarruq* Terms and Conditions of Sale, section 13) (Rani et al, 2020). A further mechanism is that the bank may require the customer to execute or cause to execute a security document which shall remain payable to the bank as long the price fully or partly is not paid by the customer (BIBD *Tawarruq* Terms and Conditions of Sale, section 5). One more mechanism is that the bank may refrain from delivering the asset bought to the customer until the price is fully paid (Rani et al, 2020).

Aside from these defense mechanisms, SB endorsed the right of the bank to be indemnified for actual financial loss due to the customer's default in payment of the debt through *ta'wīd* (compensation) clause (Rani et al, 2020). It applies to any financing products mentioned above. The compensation shall also cover any fees incurred by the bank to afford the facility such as takaful (insurance) contributions, the bank's processing fees, and stamp duty together with the fees required to enforce or protect the bank's rights such as the court fees (*Tawarruq* Terms and Conditions of Sale, section 14 (a) and (b)) (Rani et al, 2020). *Ta'wīd* clause is valid according to Bruneian law (Bruneian Contract Act, article 75).

The SB also recognizes the compensation made to recover the loss or damage that occurred against the customer by reason of the bank's misconduct, negligence, or breach of terms and conditions caused in the

¹² For the duty of disclosure is included in the definition of *murābahah* (Rani et al, 2020).

¹³ Article 32 of the Bruneian contracts Act defines the contingent contract as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. In AITAB, the contract of sale can be concluded only if the lease contract is terminated.

course of *wakālah* and *tawarruq* (BIBD Wakalah Transaction Terms and Conditions, section 2.2; BIBD Tawarruq Transaction Terms and Conditions of Sale, section 3 (e)). SB, go further, to agree with the right of the bank to publish the names of the defaulters in the newspaper as a penalty (Rani et al, 2020). In support of *maqṣad* of the explicit wealth, the bank can enforce these rights on the condition that it notifies the customer of the delay of payment (Rani et al, 2020). Again, the purpose of this notification is to warn the customer and press them to make the payment before instituting a claim against them.

4.2 Protection and promotion of the rights of the community

Apart from the rights of the bank and the customer, SB maintained the rights of the public over banking transactions for the sake of *maqṣad* of legitimate wealth. The public authorities whether they are police, public officers, or a court should be informed of any information relevant to the customer's deposit account, card account, or the cardholder's transactions upon request from such authority whenever this information is required for the purpose of investigation in relation to any offense or law enforcement (BIBD *Wakalah* Terms and Conditions of Deposit Products, section 25.1; BIBD Credit Card Terms and Conditions, section 19.1). Customer information may also concern the credit bureau for the purpose of preparing the self-inquiry report. Similarly, the Bruneian banking law affirms the same right (Bruneian Banking Order 2006, article 58 (2)).

Importantly, IBs are bound to pay zakat to the poor and needy and take charge of overseeing the computation and distribution of it (BIBD Annual Report 2020). This is in tune with the legal liability imposed on Muslim people including those who carry on an enterprise, like banks, to pay zakat (Religious Council and Kadis Courts, article 116. Article 236 (1)).¹⁴ Failure to do so will result in a penalty of a fine not exceeding \$8,000, imprisonment for a term not exceeding 2 years, or both (Syariah Penal Code Order 2013, article 236 (1)).

Moreover, SB honors the sovereignty of the state of Brunei Darussalam. In this sense, it admitted the right of the state to control the banking business by means of rules and regulations for the *muṣlahah 'āmmah* (Rani et al, 2020). Hence, laws such as company law and Islamic banking law should have a legal effect on private commercial activities in submission to the principle of the rule of law. Additionally, SB gives superiority to the laws of Brunei Darussalam over the agreement of the parties. Thus, it is of the view that terms and conditions should be governed and construed in accordance with the laws of Brunei Darussalam. It also closes the door against the bank as well as the customer from conducting illegitimate business. For example, according to the SB, IBs shall restrict the credit card to items that are not in violation of the Shariah penal law. By way of illustration, credit card facilities cannot be used for buying liquor, dating and escorting, and massage parlors under the codes 5921, 7273, and 7294, sequentially (Rani et al, 2020).¹⁵ For this reason, IBs will terminate this facility in the event the cardholder uses the card for such purposes (BIBD Credit Card Terms and Conditions, section 3.1). Such termination shall not absolve the cardholder from his liabilities and obligations towards the Bank (BIBD Credit Card Terms and Conditions, section 3.2). This seems to be reasonable action for the contract to be void in law (Bruneian Law of Contract Act, article 25). Another example is that liquid obtained by way of *tawarruq* by the customer cannot be used for such purposes (BIBD *tawarruq* Terms and Conditions of Sale, section 23).

Aside from the above-mentioned, SB admit the Bruneian court's jurisdiction over any dispute between the parties about the contract and their decisions. The same goes for the public official instructions/directions on banking products. Thus, the bank shall suspend any account in obedience to such decisions or instructions/directions (BIBD *Wakalah* Terms and Conditions of Deposit Products, sections 24.2 and 25.2 (ii); BIBD *Tawarruq* Terms and Conditions of Sale, section 25).

5. Conclusion

It can be concluded from the discussion above, that the SB in Brunei Darussalam significantly ensures the rights of the bank, customers, and community as prescribed by law. From a legal angle, the rights and the methods protecting and promoting them stated by the SB are in line with the Bruneian law with exceptions to the barrier it set on the liberty of the bank to deal with the conventional financial sector under bill payment facility. This is sensible given the fact that SB shall promote Shariah-compatible property for the *maqṣad* of legitimate wealth.

¹⁴ This liability applies also to Islamic banks (Islamic banking order 2008, article 24 (1) (b)).

¹⁵ The said goods or services are against articles 104 (4), 196 (1) and 68 (1) of the Bruneian Syariah Penal Code 2013.

Similarly, the SB made considerable effort to attain *maqāsid* al-Shariah. For *maqṣad* of circulation of wealth and establishment of ownership, it permits the bank, and the customer to exchange wealth under various bilateral agreements and enjoy the consequential title without prejudice to the *maqṣad* of legitimate wealth. The *maqṣad* of explicit wealth appears on actions requiring the parties to specify the contract particulars, keep and show records of transactions, and notify the customer of the due time of performance. The *maqṣad* of protection of wealth underlies the methods of keeping the communication between the bank and customer secret as well as the remedies provided for the former. The *maqṣad* of legitimate wealth is evident in the utmost respect given to both Shariah principles and laws of the country. However, the relationship between the bank and the customer, being an adhesion contract, tilts the balance of power between the two parties in favor of the bank. This is evident in the sole rights of the bank to terminate *wakalah* and to change the terms and conditions of the debit and credit card facilities. This deviates IBs from the *maqāsid* of circulation and ownership of the wealth.

The paper is based on the opinions expressly or impliedly revealed in the documented resolutions of SB and the terms and conditions of the products. Thus, future research can dig beyond the theoretical angle to investigate the role of SB in practice by following the empirical method. The research could also be potentially extended to other countries.

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