Fudhuli Transactions: Potential Applications and Parameters

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Abstract: Tasarruf al-Fudhuli refers to transactions or contracts carried out by a person who does not have the authority or legitimacy to commit the transaction, and these contracts include exchange contracts such as sales, rent and services, or charitable contracts such as representation/wakalah, hibah, loans, guarantees, and so on. In the context of Islamic finance, although it is a type of transaction that is argued and debated by the jurists and fuqaha, some have begun to realize its great potential in keeping with current developments, especially in the field of Islamic banking and finance. Besides looking at Fudhuli in terms of its meaning and the Shariah rules that govern it, the main focus of this study is the discussion of its dhawahbit/parameters as it has its own risks associated with it compared to other established types of Islamic contracts. The study utilizes a full library research by analyzing scholar’s debates and their arguments on this kind of contract, the contract’s potential, followed by analyzing the parameters that should be adopted in operationalizing this contract together with the discussion on the issues of fudhulithat are relevant to current Islamic banking and finance operations. The results of this study show that the views that allow this contract has strong arguments, and that it has also been widely practiced outside of Malaysia, but is relatively new in Malaysia. While it is permissible, however, some parameters must be put in place so that it is not in conflict with Shariah, and comply with the Shariah requirement of each contract done on a fudhuli basis. There must also be an urgent and genuine need to do so, and not involve ribawi items that require immediate delivery of the asset, as well as the existence of a council or body that controls and monitors the process and implementation by the involved parties.

Keywords: Fudhuli, Khiyar Ijazah, Khiyar Syarat, Uqud al-Mu'awadah, Islamic Finance

1. Introduction

Islamic Finance is a financial system based on full compliance with Islamic law in the field of finance and economic activities, where it involves transactions such as sales, rentals, business partnerships and others. The system is also a system that is based on the prohibition of hazardous and harmful elements such as usury, gharar, maisir, oppression and others while at the same time promoting risk sharing, society driven business, well-being and benefits to individuals, society, natural environment and humanity as a whole (Uddin Md Akhter, 2015; Fatemah A. Al Maddah, 2017).

Since the main foundation of this system is based on trading and not based on borrowing and lending, there are several contracts that are mainly applied under this system such as sale contracts, rent and services, partnerships in business, agency, contracts for charitable causes, guarantee, loans, debt transfers and others. One of the contracts that exist in this system is tasarruf al-Fudhuli, which is a transaction that is conducted by those without authority and ownership in the transaction.

This study will attempt to analyse scholarly discussions on fudhuli transactions, its application in the current Islamic financial system, and its parameters.

2. Literature Review

Tasarruf al-Fudhuli is a topic that has been widely discussed by classical and modern scholars, where their discussion is largely about whether or not it is valid contract, the argument for each scholar’s view and the branches of law (furu’) related to it. The main classical books of the madhahib/schools of law such as Hasyiyah Ibn Abidin, Hasyiyah al-Dusukiyyah al-Dardir, al-Majmu’ by al-Nawawi, al-Mughni by Ibn Qudamah and other main references in each madhahib all have had a lengthy discussion on the issue. Tasarruf al-Fudhuli has also gained a legal position, especially in middle eastern countries such as Jordan, Tunisia, Syria, Iraq, Morocco and
others (Zainah Ahmad Kharisat, 2014; Zainab, M. M.n.d.; al-Zuhayli, 2002). Although it has been accepted outside Malaysia in the context of Islamic finance (AAOIFI), in Malaysia however, it has not been widely accepted. This may be due to the position of the Shafieschool of law which has a special status as the basis of Malaysia’s Islamic legal framework(Muhammad IkhasRosele et al., 1989), andaccording to the Shafieschool of law, this concept of \textit{tasarruf/fudhuli}is prohibited and a void contact (al-Nawawi, n.d; al-Sharbini, n.d.).

To date, manystudies have touched on this topic especially in Arabic-language materials such as the writings of Dr Khalid bin Abdullah with his work entitled \textit{Bai'Al-Fudhuli},Sheikh Qurrah(OSwicklung with the title: \textit{Al-Fudhuli} and its Current Application, Dr Abdullah bin Mubarak with his work \textit{Al-Fudhuli}n Buy and Sell (2013) and others.

As for current research in Malaysia, among available literatures on the topic such as the \textit{Wakalah} policy document issued by Bank Negara Malaysia in 2013, in which part of it explains the \textit{fudhuli} transactions and the ratification process. In addition, a study by Bank Negara Malaysia officers entitled \textit{Bai'Fudhuli as Ratification Mechanism}(2018) was conducted, which explained the concept and argument of \textit{fudhulitransaction}, in addition to its role as the instrument for ratification of the sale. AlsoISRA Research Paper title \textit{Tasarruf al-Fudhuli: Its Concept and Potential Application in the Islamic Banking Industry in Malaysia} (2016) where the main discussion of the paper is on the \textit{fudhuliconcept} and its potential application in Islamic banking operation. Thus, this paper will attempt to fill the gap in this topic by discussing on \textit{tasarrufal-fudhuli} from its definition and argument, in addition to the main focus of the writing on the aspect of parameters in the operationalization of the concept.

\textbf{Definition of Fudhuli Transaction}

\textit{Fudhuli} has two meanings, literal and technical.

\textbf{The Literal Meaning of Fudhuli}

The literal meaning of \textit{fudhuli} is one who engages in something that is not related to himself/not belong to him (Ibn Abidin, 2000), or something additional (Ibn Manzur, 1999).

\textbf{The Technical Meaning of Fudhuli}

In terms of technical meaning, \textit{fudhuli} is a person who performs a transaction or management of another person without the necessary permission under Shariah (Khalid Abdullah, 2020; al-Nawawi, n.d.; Ibn Abidin, 2000), oris a person who discharges (in the absence of any need or urgency) the affairs of others without being an agent or having a right to do so by virtue of Shari‘ah. The deal becomes subject to the rulings on the \textit{fudhuli}, even when the acts of a real owner makes him appear an agent (AAOIFI, 2010).

It is clear from the above definition that \textit{fudhuli} is the management of one's property without the consent of the rightful owner, or the transfer of some right or responsibility to another person before obtaining their consent. It occurs when a party makes a transaction without the consent of the owner. \textit{Fudhuli} occur because the person did not know that the contract was done on his behalf, and the party executing it had no authority and mandate to do so.

\textbf{Opinion of Scholars on Fudhuli Transactions}

In the Shariah rules of \textit{fudhuli} transactions, the fuqaha/scholars are generally divided into two main opinions:

those who accept the \textit{fudhulitas/tasarruf}transaction and those who reject it, as below:

\textbf{First opinion}

The \textit{Fudhuli} transaction is permissible and it depends on the consent and agreement of the owner or those who have the authority or power over it, and this is the opinion of Maliki and Hanafi schools of law, also the earlier opinion of the Shafie school of law (al-Shafie, 2001; Ibn Rushd, 1995; Ibn Qudamah, 1995; al-Dusuki, n.d.). The arguments used by this opinion are:

1) The permissibility of sale and trading in general, according to the word of Allah SWT which means:

\textit{....but Allah hath permitted trade and forbidden usury...} (al-Baqarah, 2:275)
The above verse clearly shows that all sales, including *fudhuli*, should be included in this permisibility, not to mention that the *fudhulit*ransactions are carried out by those who are fully qualified (al-Zuhayli, 2002).

2) The hadith of Urwah al-Bariqi RH where he had been appointed by the Prophet Muhammad SAW as an agent to buy a goat for one dinar, but instead he managed to buy two goats with the money; later, he brought one of the goats to the market and sold it for one dinar, and then he returned to the Messenger of Allah SAW carrying a goat as the duty was entrusted to him, and at the same time returned the money of one dinar. Prophet Muhammad SAW then prayed that whatever Urwah did in his transaction would be blessed (Bukhari, 2002; Abu Daud, 2009).

What is understood from the hadith above is that the *fudhuli* transaction is valid, as it was agreed on by the Prophet SAW, and the Prophet's agreement by virtue of *Iqra'/silent recognition* has the same weightage as his words and actions (al-Zarkasyi, 2007).

3) Some scholars use hadith narrated by Bukhari(2002) of the ancient folk tale recounted by the Prophet SAW about 3 men who were stuck in a cave when the door closed suddenly on them. They prayed to Allah SWT; the first man mentioned his kindness to both of his parents, and prayed to Allah SWT that if his kindness was sincere because of Him SWT, then he asked Allah SWT to open the door, to which the door opened slightly. The second man then told about how he avoided adultery out of fear of Allah SWT, and prayed for the cave to open if he was deemed sincere simply because of Allah SWT; again, the cave door opened a little. Finally, the third man mentioned his kindness by telling the story of a man who he hired as a worker, but the worker left him without taking the promised wage. The third man continued the story where he had cultivated the corn and it produced a lot so that he could buy a cow and its cowherd. It wasn't long before the worker came to ask for his corn again, but the third man told the worker to take the animals as well as the cowherd. At first, the worker could not believe it, but when it was explained to him, the worker believed and took his wages which had now become profitable assets. The third man prayed for the door to be opened if his practice was sincere and simply because of Allah SWT in investing another's property.

This is the focus of the argument by those who allow the *fudhilitasarruf*, where the Prophet SAW himself explained the matter, and it was clear that the man who had invested the property (corn) of another person without his consent and then only got permission when the worker returned. If it were not allowed, then The Prophet SAW would not have mentioned the story as a commendable action (in the opening of the cave, thus allowing the three young men to leave).

**Second opinion**

The law of sale and sale of *fudhuli* is prohibited and is an invalid sale, and this is the opinion of the latest Shafie (Qawalal-Jadid) school of law and also the opinions used in the Hanbali school of law (al-Rafi‘i, 1997; Ramli, 2003; Ibn Qudamah, n.d.).

The argument for this is the hadith of Hakim bin Hizam RA (Abu Daud, 2009) to which the Prophet SAW said:

*Don't sell what's not on your side.* (hadith no 3503)

There are also other hadith that mention the same prohibition (Abu Daud, 2009; Tarmidhi, 1976). Also the hadith on the prohibition of a sale that have element of *gharar (uncertainty)* (Muslim, 2006).

These hadith clearly show that a sale can only be made by the owner, and any sale not made by the owner has element of *gharar* thus is invalid and a void sale. They interpret the meaning of the hadith of Urwah al-Bariqi RH that it is in fact refer to a general *wakalah* agency, where the nature of general *wakalah* already cover whatever is good for the principal, thus all the hadiths are not in conflict with each other and do not in any way indicate the permisibility of *Fudhulit*ransactions (al-Zuhayli, 2002, al-Nawawi, n.d.).

**Causes of Difference of Opinions**

The source of the disagreement herewith it is appear to be because of difference of understanding on the above hadith, but in fact it has to do with differences of opinion in the application of the methodology of law/*Istinbat al-Ahkam* used in dealing with the ahadith, especially for the Shafie School of law and the Hanafi School of law. For the Shafie school of law, the opinion here (in rejecting *fudhuli* transaction) is in fact consistent with the principle held by them that the validity of a contract depends on the absence of restrictions...
and prohibitions (al-Nahy) on a contract, as well as the fulfilment of its tenets and conditions at the time of the contract is executed and not afterwards. In other words, for the Shafi`ischool, the deciding factor is at the time that the contract is executed, and they do not accept the ratification of the contract if it is done afterwards (Al-`Alla’i, 1982).

The basis of this opinion is the perspective of al-Nahy or the prohibitions that exist in the Shariah text, which for the Shafieschool of law, it would nullify the contract if it relates to the basics and core of a contract or if it is attached to the subject matter and becomes an essential and integral part of it; but if it is in contrast and not become essential part of it, then it would not cancel the akad/contracts and transactions (a-Shirazi, n.d; al-Asnawi, 1999; Ahmad Zakirullah, Ridzwan Ahmad, 2018). In the context of fudhulitransaction, it is clear that this is included in the prohibition since the ownership and the permission which is the core of any transaction does not exist during the contract.

This is in stark contrast to the methodology of law adopted by the Hanafi jurists, where they held the view that the akad can be improved and repaired/ratified later, just as prices, misunderstandings and the like. For the Hanafi jurists, in the context of sale contract for example, the tenet of sale is only sellers, buyers and goods. Anything other than these are not included in the pillar of sale, in the sense that the defect in the non-pillar does not invalidate the contract, where it can be ratified or repaired later, and in the context of the basfudhuli or tasarruffudhuli, it can be ratified with the consent of the owner that is obtained later (Babarti, n.d; Al-Samarqandi, 1984; Ibn Nujaim, 1997)

Also according to the Hanafi school of law, the prohibition in the above hadith is mujmal in nature - al-Mujmal is any statement or word whose meaning is not clear (al-Ghazali, 1997)because the sale in fact existed, yet it was denied by the hadith, and it is unclear whether the means of the prohibition of the hadith is to deny its existence or to reject the law and its legal effect. Hence, for the Hanafi school of law, it is categorized as mujmal, which does not invalidate what is forbidden and in our context, tasarruf-fudhuli (Zanjani, n.d; al-Sarakhsi, 1983).

However, for the Shafieschool of law, it is not indicated that Hakim bin Hizam's abovementioned hadith and other hadith fall under the mujmal category; where it is clear that when it is prohibited, it is automatically understood that it cannot be done, and it will not produce the required effect and legal implications (al-Shirazi, n.d; al-Zarkasyi, 2007).

**Strong Opinions**

Based on what has been discussed on the opinion of scholars on the issue of tasarruf-fudhuli, the strongest opinion is the first one – the view that indicates the legitimacy and permissibility of this kind of contract, as it is supported by the Islamic legal maxim which states that the use of one's speech is more important than leaving it (al-Suyuti, 1997) and the transaction of fudhuli is part of the use of conversation and speech, thus should be accepted. Likewise it may be beneficial and helpful to the owner or those upon whom the transaction is linked to in certain situations. In Islam, to assist someone in the matter of good is demanded and praised (al-Maidah, 5:2), and since fudhuli is also helpful to fellow Muslims, thus it is also included in the pronunciation of the al- Qur'an above (AAOIFI, 2010).

However, the study believes that this permissibility of fudhuli transaction should be done within a limited and controlled scope, since the arguments used by the proponents are also quite strong; this transaction comes with some associated risks and potential harm. Thus, it could be allowed with the parameters that will be discussed later.

**Potential Application of Tasarrufal-Fudhuli in Exchange Contracts (Mua‘ wadhah) and Charitable Contracts (Tabarru’at)**

Among the potential applications of Tasarrufal-Fudhuli in exchange contracts are:

**Sell and Buy**

Fudhuliin this context means those who sell on behalf of others without the owner’s consent, or buy on behalf of others without their consent, and in the context of Islamic banking today, fudhuli can be applied in the development of sale-based products such as tawarruq, and others.
The concept of Tawarruq means selling a commodity to one party and then reselling it to a third party for cash (AAOIFI, 2010). In the context of financing, fudhuli can be done when the bank performs a purchase transaction on behalf of the customer without their consent, where the bank acts as an agent to buy the commodity (from the bank as a seller), and then the bank on the capacity of fudhuli agent sells the goods on behalf of the customer to a third party. Through this process, customers will be able to obtain cash and in the long run bear the debt of buying commodities with a deferred price. In the context of fudhuli transaction in tawarruq contract, if he agrees, then he can accept the tawarruq made by the bank first, and if not then he can reject it as well, and the tawarruq transaction then falls under the bank’s own account and liability (Amir Husinet al., 2020).

In the absence of fudhuli that is through the ordinary process, the bank will sell the commodities to the customer, then on behalf of the customer will resell it to a third party for cash (Bank Negara Malaysia, 2018).

**Wakalah**

Wakalah refers to a contract where a party, as principal (muwakkil) authorizes another party as his agent (wakil) to perform a particular task on matters that may be delegated, with or without imposition of a fee (Bank Negara Malaysia, 2016), or a one-party representation transaction with another party to perform the duties and tasks required by Syarak, such as appointments to sell, buy, manage property and so on (AAOIFI, 2010).

Fudhuli in wakalah occurs when the party makes a wakalah transaction without the mandate and representation of the principal / owner at the time the aqad was executed, and then later obtained the consent, resulting in a valid sale transaction. Wakalah can be done either in absolute / general or specific scope / muqayyadah, and may also be paid or free (AAOIFI, 2010; Bank Negara Malaysia, 2016; al-Nawawi, n.d.). One of the most widely used types of wakalah in Islamic finance today is Wakalah bi al-Istithmar, a kind of wakalah which is intended for investment purpose (agency for investment) as applied by the Tabung Haji (2019), EPF-i, (2020), SSPN-i (2020) and others.

In the context of fudhuli, the company or institution that manages the investment will make the investment on behalf of the client without the consent of the customer at that time, whereby the consent will be obtained from the customer thereafter. If the customer agrees, then it is clear that the investment and all its profits belong to the customer from the time the investment agreement is made. If they do not agree, then it is considered to be under the responsibility of the institutions themselves (Bank Negara Malaysia, 2016; AAOIFI, 2010; al-Zuhayli, 2002).

Tasarrufal-Fudhulifor Charitable Contracts (al-Tabarru‘at)

Charitable Contracts/ Tabarru‘at are those whose purpose is not to seek profit, but rather to help and relieve those in need and in distress. Among the acts included under this type of agreement are loan, guarantee, hibah / grants, wills, wakalah (without fee) and others (al-Dusuki, n.d, al-Kasani, 2003; al-Hattab, 1995; AAOIFI, 2010).

In the application of fudhuli in these contracts, it is made by another person; for instance, a loan will be given without owner’s consent, a guarantee will be made without the guarantor’s knowledge, the hibah / gift without the owner’s consent, and so on.

3. Parameters / Dhawabi of fudhuli Transactions

As mentioned above, fudhuli is a type of transaction that scholars have argued regarding its permissibility as well as the risks associated to it. Thus, certain controls and parameters are needed in order to avoid those risks and to help in achieving its potential. Among the parameters of Tasarrufal-Fudhuli are:

**Must Fulfill the Terms and Conditions of the Contract if It Is Performed by the Owner Himself**

This condition must be observed by the person who performs the transaction of the fudhuli, in which the party to whom the contract is under his account must meet the terms and principles of the aqad, or in other words, he (the principal) may perform the contract by himself with no constraint from Shariah on it (Ibn Abidin, 2000; al-Zuhayli, 2002).

For example, the seller himself must fulfill the requirement of the contract that was performed by the fudhuli. If one of the parties does not have the legal authority, such as a seller who sells a person’s property while the
owner himself is among those who cannot deal for themselves such as children, then this transaction is invalid as the owner himself is not qualified to perform it. Another situation is if the fudhulii-wakalah does not fulfill the requirements to become an agent. This is because fudhuli is a form of representation / wakalah (al-Zuhayli, 2002); just as the principal must fulfill the requirements of wakalah then so must the representative. It is stated in the book Badai’ al-Sana’ie that "The fudhuli is like the wakalah that existed before" (al-Kasani, 2003).

It also applicable to other contracts that must comply with its tenets and conditions such as the terms of eligibility of the parties ('Aqidah), assets and payment(Mahal al-'Aqid), sighah (offer and acceptance) and others.

Must be in Existenceduring the Notification Period

When consent is given after the fudhuli transaction has been made, all parties involved, i.e. the fudhuli party, the party where the fudhuli contract is made on his behalf, and the goods, are all still there. If one of the parties is no longer there, where the goods are damaged, or one of the parties is dead, become insane and so on, then the fudhuli transaction is invalid (al-Sarakhsi, 2003, al-Zuhayli, 2002). This is because fudhuli is a form of management and it can only exist when all of the above elements exist; thus there is no management of something that does not exist (Babarti, 2003; Ibn Abidin, 2000).

However, this may depend on the type of fudhuli, whether it is general or specific. If fudhuli is general in nature, such as a person carrying out a tradingoriented business activities, although the goods that have been bought have already been transferred and disposed of, the fudhulihere is allowed, just as in the case of the hadith of Urwah al-Bariqi RH where he bought a goat (without the Prophet’s SAW authorization), then sold it (also without the Prophet’s SAW authorization). If it adheres to the above parameter where the item must still exist when requesting consent or ratification is being made than it is contrary to the hadith’s exposition, thus the hadith is interpreted as a generalfudhuli. If however fudhuli is specific to a particular task such as a fudhuli to purchase for example, the consent (of purchasing) must be obtained from the purchaser after the purchase transaction is done before the goods are resold to a third party, for example, to earn money from tawarruq transaction.

Looking at the current practise of tawarruq where the asset will be immediately disposed to the third party using dual agency, it is suggested that for tawarruq operations, the most suitable fudhuli is general fudhuli, as explained above, as to avoid the issue of not getting consent before selling it to the third party.

Must Not Be Performed For the Fudhuli Person Himself

This is also important parameter because fudhuli is doing something that does not belong to the fudhuli personnor has no power and mandate from Islamic point of view. If someone has done something for himself, such as a person who bought something for himself, then later finds himself unable to settle the sale price, so he makes it under tasarruf(fudhuli) by offering it to another party. This is not permissible because the goods had already been under his ownership. Thus, the transaction thereafter is no more than selling his own goods to another instead of placing it underfudhuli transaction. Sheikh Quradaqhi(2020) mentioned several issues relating to fudhuli, including what has been discussed just now:

"In this situation it is not possible for the bank to make a fudhuli transaction (accept the offer from the customer) as the contract has become legal on his (customer’s) own behalf and how can it be made fudhuli?"

It is clear from the text above that if something does not depend on the approval of the other party and himself fudhuli person has relied on himself, then the contract was perfected and the transfer of title was completed, therefore fudhuli is no longer applicable.

It is also clear that intention plays a role, where if there is intention to purchase on his own account and there is no obstruction, then the transfer of title is complete to the person, and fudhuli is no longer applicable and cannot be performed (Mohammad Mahbubi, A. et al., 2016).

Must Obtain Approval Thereafter For Ratification

This is the most important requirement in the fudhuliparameter, wherea fudhuli person /party who has done something without the consent of the other party should obtain approval following the execution of the fudhuli transaction.
If the consent is acquired, then the *fudhuli* agreement is valid from the date the contract was made and not from the date the consent was obtained. Its effect is considered to be a retrospective effect, as in the *Khiyar Option* rule, where in the case of the 3-day condition that if the sale occurred for example, then the buyer’s ownership commences from the contract and not from the expiry of the khiyar of 3 days. Without consent, this act of *fudhuli* is deemed void if it involves the rights of others such as the sale of other people’s property, or is considered legal and valid but is held solely by the maker of the *fudhuli* such as one who buys on behalf of another, does an investment on behalf of another, *hibah*, loans and so forth, and it will be the *fudhuli* person’s responsibility and his account for not getting the consent (Bank Negara Malaysia, 2016).

**Must be Executed by Different Parties**

One of the requirements of a sale contract is that it must be executed and conducted by a different party, or as the *fuqahā* jurist stern it as *ta’addud* *Tharafī al-‘Aqd*. Thus, both the seller and the buyer or their representative must not be the same person, and neither party in the sale contract is allowed to perform the duties or represent the other party, such as when the seller represents the buyer to perform the sale contract, and this principle is held by the Hanafi school of law which permits *tasarruf-fudhuli*. Even for the Shafieschool of law that prohibits *fudhuli* transactions, they also require the same, i.e. *Ta’addudTharafī al-‘Aqd*, (Ibn Abidin, 2000; al-Rafie, 1997; al-Sharbini, n.d.; AAOIFI, 2010; al-Zuhayli, 2002).

For Islamic banks who want to use *tasarruf-fudhuli* in their *tawarruq* operations, this idea must first be analyzed by looking at their current style of performing *tawarruq*. For the practice of *tawarruq* by some Islamic financial institutions that do not practice dual agency, there should therefore be no issue, and *fudhuli* can potentially be implemented, but for banks that use dual agency, there will be a Shariah issue where both sale and purchase will be executed by the same person – the bank - where the bank will hold two roles, i.e. as a seller and at the same time act as the buyer’s representative under *fudhuli* transaction.

It is clear that performing the *fudhuli* under this dual agency would lead to the contradiction of the above requirement, plus it will lead to merging of two different views, namely, the Maliki school of law which does not require the adherence of *ta’addudTharafī al-‘Aqd* (al-Lakhdmi, 2011) and the Hanafi school of law opinion that allows the *fudhuli* but at the same time requires a sale contract to be executed by different parties *thusta’addudTharafī al-‘Aqd* is required. In this situation, it is to be considered as a *talfiq* or incorporating ideas and views of different contradicting scholars into one single product (al-Zarkasyi, 2007). In this case, the bank’s Shariah advisor will need to decide whether such *talfiq* is permissible or not.

Based on what is understood from the guidelines issued by Bank Negara Malaysia on *Bai’al-Inah* and *Bai Bi Thaman Ajil*, it is clear that for banks who want to implement *Bai’al-Inah* sale in their products, it should follow the rules set by the al-Shafie school of law. This is because al-Shafie’s school of law which is the Shariah bank’s opinion must be satisfied (Bank Negara Malaysia, 2012), where it implicitly and implicitly rejects the combination of it with the opinions of other schools of law as they do not allow the sale of *Inah*. Therefore, in the context of *fudhuli*, since it is a kind of transaction and contract that is only allowed by a certain school of law, then it is entirely appropriate that these schools of law’s rules are observed, and it is not allowed to incorporate several opposing views and schools of law into one product.

However, looking at the opinion of the Maliki school of law, whose scholars also permit *fudhuli* and at the same time do not require *ta’addudTharafī al-‘Aqd*, based on this view it is possible to have *fudhuli* using the same person/dual agency. Besides it is also permitted by Bank Negara Malaysia (2016).

**Fudhulis not related to Ribawi Items**

Other parameter that should be adhered to in *fudhuli* transactions is to avoid any transactions that involve *ribawi* items such as gold, silver and currency, wherefrom a Shariah point of view, this transaction must be made in cash and with immediate delivery, and delay is unacceptable if the exchange is between the same type/basis (al-Nawawi, n.d.; AAOIFI, 2010).

For that reason, jurists clearly prohibit the *khayrSyarat* option of condition in the sale of ribawi, which was demanded for immediate delivery (*taqabud fi al-majlis*), nor is it allowed to have *Salam* contract on the ribawi goods if it involves the same categories - media of exchange category or food category (al-Mawardi, 1994; al-Samarqandi, 1984) and riding on this basis, *baifudhuli* should also not be allowed if it involves ribawi material with the same category/basis.
It should be mentioned here that in the opinion of the Hanafi school of law, although khiyar is not allowed in the sale of sarf currency, in fudhuli transaction, the khiyar of ijazah (option of consent) is allowed, where they say:

And so is the khiyar of Ijazah where the sarf/currency exchange takes place between the two fudhulipersons (seller and buyer) and when the news reaches one of them (principal) then khiyarijazah in baisurfafudhuli do not invalidate the sarf transaction because it is a kind of khiyar that permissible by the law, while the types of khiyar that invalidate the sarf is a khiyar of condition/khiyarsyaratononly...

Looking at this khiyarijazahit means delaying the sarf transaction, thus according to Hanafi jurist, al-Sarf in fudhuli transaction is allowed, just like khiyar al-Majlis. KhiyarMajlis is allowed in the sale of Sarf because both are still in the contract, thus not violating the requirement of immediate delivery in exchanging ribawi items of the same category/basis (Al-Mawardi, 1994). This is in contrast with the parameter required by Maliki school of law where according to their opinion, the fudhuiltontransaction in Sarf/exchange betweenribawi assets is not permitted and will lead to the dissolution of the contract/fasakh (Mawsu’ahFiqhiyyah Kuwaitiyyah, 1983; al-Hattab, 1995).

Here the issue of talfiq and combining two contradiction views in one product appears again, thusrequire Shariah advisors to decide on such kind of talfiq.

Appropriate Khiyaol Ijazah/RatificationPeriod

One of the things that must be observed in the fudhuli agreement to make it a permissible contract from a Shariah point of view is to have the agreement and consent of the other party wherea transaction was made earlier on his behalf within certain reasonable ratification period. With their consent, it will make the fudhuli transactionenforceable and have legal effect from a Shariah point of view, otherwise the contract of fudhuli will be void if the consent is not obtained from the owner, or valid yet under the fudhuli’s own account and responsibilities should the fudhuli agent not mention on his status as fudhuli person (AAOIFI, 2010). In the matter of the ratification period, it is very important because fudhuli has an element of gharar and therefore needs to be fixed in a timely manner to avoid more incidents of gharar that can invalidate the contract.

The Hanafi jurists held the view that the status of tasarruf al-fudhuli remains suspended until it is ratified regardless of how long the period extends. For Maliki jurists however, they divided the ratification timeframe into two scenarios. The second scenario is that the fudhuli sale is concluded in the owner’s absence. In this case, the owner is given one year to ratify the contract. If the period lapses without any decision, the absence of objection means that the contract is deemed concluded against the owner (al-Hattab, 1995), and for the purchaser that purchase goods from fudhuli seller, he has to bear all the expenses should he unaware the status of the transaction i.e. fudhuli transaction, which is depend upon the agreement of the owner (Mawsu’ahFiqhiyyah al-Kuwaitiyyah, 1983).

In terms of benefits and liabilities arising from the asset during this khiyar of Ijazah period, it follows ownership thereafter. This means that if there is consent then all benefits and liabilities will commence from the time the contract is executed (Ibn Abidin, 2000; al-Zuhayli, 2002).

Looking at the contradicting views between Hanafi and Maliki school of view on the period, it is recommended that the duration must take into account a reasonable period in getting the owners informed and obtaining their decision. This is also in line with the suggestion by some of the authors who are of the view that: “...though the Hanafi School provides absolute freedom to the rightful owner to ratify the contract at any point of time, the perpetual nature of the ratification period creates uncertainty for the third-party purchaser. He can never be certain of the ultimate status of his transaction. Accordingly, the authors prefer to adopt the Maliki view because it provides some degree of certainty on the enforcement of the contract whilst also providing protection for the owner’s right to ratify or reject the contract within a certain period of time” (p.14)

Dire Situation or Limited Scope Only

As mentioned above, tasarrufal-fudhuli should be done only when circumstances require it such a time factor that requires a quick decision, and the delay in decision-making may result in loss of opportunity or harm.
Fudhuli Transactions: Potential Applications and Parameters

It is like making an urgent decision in a critical situation (al-Zuhayli, 2002), for example where the management has to make an urgent decision without waiting for the approval of the shareholders or the board of directors, or a wife makes a quick decision that needs to be expedited without the consent of the husband, a doctor who has to make a critical decision, or buy the necessary medicine and equipment immediately and so on. Similarly, a partner may go ahead with a business activity without getting the partner's consent just so as to not to miss an opportunity (Mawsu‘ah al-Fiqhiyyah al-Kuwaytiah, 1983).

It can also be done if there is a prior agreement to financing, for example the sale of Murabahah li al-Amir bi al-Syira’/ Murabahah Purchase Orderer, yet given the time needed for preparation of documents, where it may take a longer time then it is permissible for the customer to continue the sale with the supplier on the basis of tasarruf-fudhuli, then sign the wakalah with the bank later to ratify the fudhuli transaction executed earlier (Qaradaghi, 2020).

One of the examples here is in the context of executing directives on Malaysian banks to implement a moratorium on customers for a period of 6 months starting from April 2020 to September 2020 (Bank Negara Malaysia, 2020) because of the Covid-19 pandemic. For long-term contract, it is not an issue for banks to carry out this order as the agreement has been agreed for a longer period, and at the same time bank can still charge profit through the tenure of moratorium. However, for short term financing such as in trade finance products like Revolving credit-i, Letter of Credit-i and so on, due to its short term in nature, it is a hindrance for banks to continue with the existing financing, and therefore requires another agreement and contract to justify the moratorium period while still charging the customers a reasonable rate of profit. At the same time, there is a constraint on the bank to obtain customer approval within a short period of time. This can first be done by tasarruf-fudhuli, followed by permission (ijazah) from the customer later.

Thus, the fudhuli-tasarruf should be limited in its use and should not be used solely in the pursuit of profit as it might lead a person to great risk. For example, a person may make a fudhulim investment with the confidence that the potential principal will later agree to invest. But, what might actually happen is that the consent cannot be obtained, and the principal rejects it, thus he/fudhuli has to endure it by himself, where in the worst case scenario, he might not have the sufficient fund to continue with the investment at his own account, causing him to incur loss or debt. It can also lead to other Shariah non-compliance such as not meeting the other parameters. Further, it can cause a negative relationship with both parties if an agreement is not reached. Sheikh Qaradaghi(2020) says:

_In my view, however, this concept (the application of fudhuli in the financial system) is a very limited exemption and within a very narrow scope, and needs to be approved by the Shariah advisory body or the implementing body of an institution._

4. Conclusion

Based on what has been discussed above, it is clear that Tasarruf/Fudhuli is a transaction recognized by Syarik. This type of transaction not only help to solve important issues quickly, but it can also provide opportunities that may require quick decision-making without the usual process and this can actually help fellow Muslims. However, there are risks that need to be considered, and it is possible for something to happen unexpectedly, such as being unable to get consent, and may possibly lead to loss if it is done greedily and excessively. In view of these harms, fudhuli should be carefully controlled within a number of parameters that must be adhered to in order to achieve its potential and to attain the benefit in this world and the hereafter.

References


