COMBINATION OF CONTRACTS IN ISLAMIC FINANCE: A SYNTHESIS

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Abstract

Combination of contracts is a fusion of two or more contracts in a single arrangement by contracting parties to achieve a specific objective. It has been widely used in Islamic finance for many purposes such as product development and risk management. Nevertheless, combination of contracts encounters some problematic issues since there are three aḥādīth (Prophetic traditions) that prohibit the combination of two sales in one sale, a loan and a sale, and two transactions in one transaction. Although many studies have been undertaken, they remain inconclusive on the interpretation of the aḥādīth since scholars rendered various opinions on them. This has resulted in some perplexity among scholars and practitioners in their discussion of and employment of the concept of contract combination in Islamic financial transactions. Hence, this paper aims to revisit the issue and attempts to synthesise and consolidate all the opinions discussed by various scholars. To achieve this aim, the paper employs a qualitative research methodology, whereby it analyses secondary sources, namely classical and contemporary literature on fiqh (Islamic jurisprudence). The paper finds a strong basis for the conclusion that the interpretation of the aḥādīth can best be related to contractual stipulation—which means the execution of the first contract is dependent on the execution of the second contract, or vice versa. Contractual stipulation is not totally prohibited in combination of contracts so long as it is coherent with the legal requirements of the combined contracts and preserves the rights of the contracting parties. This paper also finds that most

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contracts which are combined are nominate contracts having specific requirements that must be honoured. If one contract is dependent on another, it may lead to ribā (interest) or gharar (uncertainty); hence, the contracts should be separated. The findings of this paper are especially useful for practitioners who aim to employ the concept as a product development tool or for other purposes in Islamic financial transactions.

Keywords: Islamic finance, combination of contracts, contractual stipulation, two sales in one sale, two transactions in one.

I. INTRODUCTION

Combination of contracts is not a new term in Islamic finance. Many instruments and products of Islamic finance have been developed using this concept. It is deemed useful as it enables the development of new products with complex features and structures which meet the needs of contemporary clients of Islamic finance. An example of contract combination can be found in the *ṣukūk al-ijārah* structure, which uses not only the *ijārah* (lease) contract but also the *bayʿ* (sale) contract and the concept of *waʿd* (unilateral undertaking). These contracts are reengineered in a structured arrangement, called a sale and lease-back. This arrangement is structured not for the purpose of the lessor leasing his asset but to raise funds by first selling the asset and then leasing it back to finance the activity or project planned by the lessor-cum-developer. This is clearly different from the classical understanding of the *ijārah* contract.

Although it has been widely used in Islamic finance, the combination of contracts encounters some problems owing to three *aḥādīth* (Prophetic traditions) in which the Prophet (SAW) prohibited the combination of two sales in one sale, a loan and a sale, and two transactions in one transaction (Ḥammād, 2005; al-Umrani, 2005). A literal interpretation of the *aḥādīth* may frustrate any attempt to combine Sharīʿah contracts in Islamic finance. In this respect, classical and contemporary scholars as well as fatwa institutions have provided various interpretations of these *aḥādīth* that result in different

understandings and ways of implementing the concept in Islamic finance. For instance, some scholars argue that contractual stipulation is generally allowed in the combination of contracts whereas others contend that it should not be part of the combination of contracts. If these opinions are not consolidated, they would probably cause misperceptions and misunderstanding among practitioners (Elgari, 1997; Ḥammād, 2005, al-Umrani, 2005, SAC of BNM, 2010).

Therefore, this paper intends to revisit the concept of combination of contracts and its issues from the Sharīʿah perspective. The discussion is divided into six sections. Section II discusses the definition of combination of contracts from the different perspectives of scholars. Section III explains the origin of the theory of combination of contracts, while section IV examines the arrangement of combination of contracts. Section V discusses the application of combination of contracts in *ṣukūk* structures. Section VI concludes the discussion and provides some recommendations.

II. DEFINING COMBINATION OF CONTRACTS

Various terms are used in Arabic for the concept of combination of contracts. The closest translation would be *ijtimāʿ al-ʿuqūd*. Related terms include *al-ʿuqūd al-murakkabah* (compounded contracts) and *al-ʿuqūd al-mujtamiʿah* (consolidated contracts). These terms do not seem to be different from each other; they refer to the same meaning—two or more contracts being arranged together. However, some scholars have attempted to differentiate between them (Elgari, 1997; Ḥammād, 2005; al-ʿUmrānī, 2005). Meanwhile, various English terminologies have been assigned to the term such as multi-contracts, consolidation of multi-contracts, hybrid contracts, complex contracts, compounded contracts, contractual amalgamation, and contractual fusion (Sharif, 2005).

Classical scholars did not define the concept of combination of contracts per se; they explained it through examples and forms of combined contracts. Only recently, did modern scholars attempt to define it. For example, Ḥammād (2005) defines *al-ʿuqūd al-mujtamiʿah* as mutual consent between two parties to enter into an agreement that constitutes two or more contracts. This arrangement

can be accomplished through the combination of similar contracts that have similar legal effects or through opposite contracts that have conflicting legal effects. In this arrangement, the obligations of similar or opposite contracts that are combined, and the rights and commitments arising from the agreement as a whole, are regarded as the effects of a single contract (Ḥammād, 1997). In this respect, Ḥammād (1997) also argues that *al-ʿuqūd al-murakkabah* has a similar meaning to *al-ʿuqūd al-mujtamiʿah*.

In the same vein, another scholar, al-ʿUmrānī (2005), refers to combination of contracts as a collection of multiple commercial contracts which is regarded as a single contract with a single effect. He likewise explains that it can be formed by combining contracts that have similar legal effects or combining contracts that have opposing legal effects. An example of a combination of similar contracts with similar legal effects would be two *murābaḥah* (mark-up sale) contracts. One combination of contrary contracts with different legal effects would be *al-ijārah thumma al-bayʿ* (hire then purchase). Each of the contracts—sale and lease—has a different legal status. *Ijārah* must be contracted first before the second contract of *bayʿ* to ensure that the legal effects of both contracts are achieved (al-ʿUmrānī, 2005).

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (2010) defines the combination of contracts similarly to Ḥammād (1997) and al-ʿUmrānī (2005). It explains that the combination of contracts is a process that takes place between two parties or more and entails the concurrent conclusion of more than one contract. Combination of contracts may take the following forms:

1. A combination of one or more contracts, without imposing a condition on any of them.
2. A combination of one or more contracts, with the imposition of conditions on some of them, one upon another, but without prior agreement.
3. A combination of one or more contracts, subject to prior agreement, but without imposing any conditions.
4. A combination of multiple contracts having different legal consequences that will be known in the future.

Elgari (1997) and Arbouna (2007), on the other hand, explain that combination of contracts is an agreement between two or more parties to conclude a deal involving two or more contracts that have distinct features and legal characteristics. Each of the contracts in the combination has its own characteristics and pillars, legal effects, obligations and rights, and is not subject to partition and separation. This structure is known in the classical *fiqh* literature as *ijtimāʿ shayʾayn fī ṣafqah* (combining two things in one transaction) (Arbouna, 2007; al-Sharbīnī, 1997: 2/31; al-Nawawī, 1991: 3/60). This combination is specifically arranged to achieve the objectives of the contracting parties; and if the contracts were separated, the arrangement and the objectives of combination would not materialise. An example is the combination of a sale contract and an *ijārah* contract by agreeing to lease one of the assets and sell the other to the lessee in one transaction. By doing so, the seller is adjusting possible losses that might arise in the sale of the asset from the rentals in the lease contract by combining these two contracts in one transaction (Arbouna, 2007).

In sum, we may conclude from the above discussions that combination of contracts is a process of combining two or more contracts in a single arrangement, where the contracts combined may have different legal consequences. Each contract must be honoured in terms of its requirements in order to prevent the combination from being declared as null and void. This definition is similar to the concept of *al-ʿuqūd al-mujtamiʿah* proposed by Elgari (1997). The purpose of combination of contracts is to achieve certain intended objectives such as to mitigate risk and alleviate the difficulty of contracting parties transacting multiple contracts.

III. THE ORIGIN OF COMBINATION OF CONTRACTS

The origin of combination of contracts can be traced back to the sources of the Sharīʿah, namely the Qurʾān and Sunnah (Prophet's teachings). The Qurʾān provides an example of combination of contracts involving debt and mortgage. It states: "O you who believe, when you deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing" and

"if you are on a journey and could not find a scribe, a pledge with possession may serve the purpose" (Qurʾān, 2: 282). The two verses deal with two transactions; the first refers to a deferred settlement, and the second involves a *rahn* (pledge) as the security for the debt settlement of the first transaction (Abū Sulaymān, 2004). However, the verses of the Qurʾān only provide a general principle that one may combine contracts to achieve a specific purpose.

The Sunnah provides further details through more examples on the combination of contracts, as discussed in the following sections.

a. Two Sales in One Sale

The first *ḥadīth* states that the Prophet prohibited two sales in one sale.[1] Many interpretations of the above *ḥadīth* have been deduced by Sharīʿah scholars. Their views can be summarised into three opinions.

i. Gharar, Ribā and Taraddud

The first opinion is related to *gharar* (uncertainty) of the price, *ribā* (interest) and *taraddud* (hesitation). According to the Shāfiʿī School, *gharar* of the price happens when a person sells an item with two prices, cash and deferred payment, but the contracting parties disperse without stating which of the prices they have agreed to (al-

1 This *ḥadīth* was narrated by Abū Hurayrah (may Allah (SWT) be pleased with him) and transmitted by Muhammad Ibn ʿAmru ibnʿAlqama. Various scholars, as asserted by al-Sanʿani (2000), namely Aḥmad, al-Nasaʾi, al-Tirmidhī and Ibn Hibban, have classified this *ḥadīth* as *ḥasan* (an accepted *ḥadīth*).
There are three other versions of the *hadīth*, which bring the same meaning of the prohibition of two sales in one sale. The first *hadīth* was narrated by Abū Hurayrah (RA), and transmitted by Ibn ʿAlqama. The *hadīth* is as follows: "whoever makes two sales (conclude) in one sale for him (will end up) the lower of the two sales (is lawful) or he would be charged *ribā* (increase)". This *hadīth* was also verified as *ḥasan* by Abū Dawud (al-Shawkani, 1982: 5/172). The second version of the *hadīth* was narrated by ʿAbd Allah IbnʿUmar ibn al-ʿAs (may Allah (SWT) be pleased with him). "The Prophet (SAW) said, "Procrastination (the delay) in repaying debt by a wealthy person is an injustice and so, if your debt is transferred from your debtor to a rich debtor, you should agree and do not sell two sales in one sale". The third version of the *hadīth* is also derived from ʿAbd Allah IbnʿUmar ibn al-ʿAs (may Allah (SWT) be pleased with him): "the Prophet (SAW) prohibited two sales in one sale, sale and loan, profit without bearing any risk and selling something that is not in one's hand" (al-Qurahdāghī, 2000; al-ʿUmrānī, 2005).

Shirāzī, 1983: 1/89; al-Nawawī, n.d.: 9/412; al-Nawawī, 1991: 3/60; al-Sharbīnī, 1997: 2/31). *Gharar* is clearly seen as the two parties do not specifically express the agreed price. Consequently, this would lead to indeterminacy (*jahālah*) of the price (Mālik, 1997: 2/512; Ibn ʿAbd al-Barr, 1986: 2/366; Ibn Juzay, n.d.: 1/221; Ibn Qudāmah, 1981: 6/333). It has been clarified in the Islamic law of contract that any contract must avoid the element of uncertainty in the subject matter (*maʿqūd ʿalayh*) and the price (*al-thaman*). However, if the two parties determine the agreed price before the conclusion of the contractual session, then the contract would be valid (al-Dardīr, n.d.: 3/58; Ibn ʿAbd al-Barr, 1986: 2/740; Ibn Rushd, 1996: 2/153-154; al-Bājī, 1913: 5/40).

The indeterminacy of price as explained above may lead to legal disputes. Ibn Rushd (1996: 2/185-187) has clarified this issue as follows: A seller says to a buyer, "I sell to you this product for a cash price of 10 dinars, or 20 dinars if you defer the payment," and either one of the prices is binding. After that they disperse without specifying the price that they have agreed on. This situation results in ignorance of the price since there are two prices in one transaction that are not determined by the parties. In this regard, Shāfiʿī scholars rendered three rationales for the prohibition, namely, uncertainty (*gharar*), indeterminacy (*jahālah*) and lack of consistency in the contract (al-Shirāzī, 1983: 1/89; al-Shirāzī, 1994: 1/267; al-Nawawī, n.d.: 9/412; al-Nawawī, 1991: 3/60; al-Sharbīnī, 1997: 2/31). This was also supported by other schools, namely, some Ḥanbalīs (Ibn Qudāmah 1981: 6/333), Mālikīs (Ibn ʿAbd al-Barr, 1986: 2/366; Ibn Juzay, n.d.: 1/221; Ibn Rushd, 1996: 2/133), and Ḥanafīs (al-Sarkhasī, n.d.: 13/8; al-Kāsānī, n.d.: 5/158; Ibn al-Humām, n.d.: 6/410), which regard the ambiguity and uncertainty (*gharar*) of the price as the reason for the prohibition.

Besides *gharar*, some Ḥanbalī, Mālikī and Ḥanafī jurists added *ribā* as another reason for the prohibition of two sales in one sale (Wizārat al-Awqāf, 1983: 9/269; Ḥammād, 1997: 470-485; Ḥammād, 2005: 13-25; al-ʿUmrānī, 2005: 69-75; Arbouna, 2007). The association of *ribā*, as asserted by al-Shawkānī (1982), can be found in two other narrations of the *ḥadīth*. The first states, "Whoever makes two sales in one, he must choose the least advantageous one; otherwise, it is usury (*ribā*)." The second states, "Two transactions

in one transaction are *ribā*," (al-Shawkānī, 1982: 5/171-172; Wizārat al-Awqāf, 1983: 9/269). In this respect, both *ḥadīth*s carry the same meaning, that of a person selling an item with two prices, where the first is a lower price for spot payment and the second is higher due to deferral. For instance, a seller says to a buyer, "I sell this item for 1000 in cash or for 2000 if the payment is made after a year." In this case, al-Shawkānī (1982) contended that either the buyer/seller would end up with the commensurate amount of 1000, or he would commit *ribā* if he accepts the increased amount of 2000.

Besides *gharar* and *ribā*, the Mālikīs, according to al-Shawkānī (1982: 5/171-172), prohibited two sales in one sale because it makes for indecisive transactions (*taraddud*). This is because the price and the subject matter are inconclusive in the contractual session. For example, a seller says to a buyer, "I sell to you, for one dinar, this cloth or this sheep," i.e., the buyer may choose either one. In this sale, the seller did not determine which item is to be sold and, as such, the transaction would be void due to the uncertainty. However, the transaction is permissible if the sale is not binding yet, so the buyer can choose the item he likes (Wizārat al-Awqāf, 1983: 9/269-270).[2]

ii. Contractual Stipulation

The second opinion on the prohibition of two sales in one sale refers to contractual stipulation. It means the execution of the first contract is contingent on the execution of the second contract or vice versa. This type of transaction is regarded as falling under the rubric of combined contracts due to the existence of two contracts which are linked to one another. The contracting parties include the stipulation

2 The views of the other schools of thought are as follows: the Ḥanafīs relate the prohibition of the sale to two ambiguous prices made for one item. For example, a seller says to a buyer, "I sell to you this item for 1000 dinars in cash or for 2000 dinars in deferred payment", and the seller does not determine the agreed price (al-Shawkani, 1982: 5/171-172; Ibn al-Humām, n.d.: 6/81; Wizārat al-Awqāf, 1983: 9/269-270). This transaction is voidable and the remedy for the contract is eliminating the ambiguous price, i.e. to determine and choose one of the prices, cash or deferred payment (Ibn al-Humām, n.d.). However, for the Shāfiʿīs (al-Shirāzī, 1983: 1/83 & 267; al-Nawawī, 9, 412; al-Nawawī, 3, 60; al-Sharbīnī, 1997) and Ḥanbalīs (Ibn Qudāmah, 1981; al-Mardāwī, 1980), they agree that the absence of option is the reason for the prohibition and argued that the transaction is void and cannot be remedied (Wizārat al-Awqāf, 1983).

in order to ensure a more conclusive bond between them. In this respect, the Shāfiʿīs (al-Shāfiʿī, n.d.: 3/91; al-Shirāzī, 1983: 1/89 & 267; al-Nawawī, n.d.: 9/412; al-Nawawī, 1991: 3/60; al-Sharbīnī, 1997: 2/31), Ḥanafīs (al-Sarakhsī, n.d.: 13/16; al-Kāsānī, n.d.: 5/158; Ibn al-Humām, n.d.: 6/410), some Ḥanbalīs (Ibn Qudāmah, 1981: 332-333; al-Mardāwī, 1980: 4/350; al-Buhūtī, n.d.: 3/193), and some Mālikīs (al-ʿArabī, 1934: 5/239-241) argue that this type of contract is void. They give three reasons for the prohibition: one party exploits the need of another for his own interests, the existence of *gharar*, and finally *ribā* (Wizārat al-Awqāf, 1983: 9/271; Arbouna, 2007).

The element of exploitation exists when the seller sells an item at a price higher than the market price because he knows the buyer is in dire need of the item. However, this does not sound very realistic unless the seller has a monopoly. In a free market, the buyer will simply look for a better price. It would be more realistic if the buyer takes advantage of a seller who is so sorely in need of money right away that he is willing to sell at a loss. Meanwhile, *gharar* exists because the linkage of one contract to another injects uncertainty into the dependent contract. Its conclusion depends on the execution of the other contract. If the buyer could not fulfil the stipulated condition, then the first contract could not be concluded. As such, the transaction is regarded as uncertain, which is prohibited. From another angle, the transaction is regarded as containing *ribā* if the seller stipulates benefits in the contract in addition to the price. This can be illustrated as follows: A seller says, "I hereby sell you my house for RM 500 on condition that you sell me a piece of land for RM 1500". In this regard, the stipulated condition is regarded as a benefit to the seller, although the transaction is undertaken through a valid sale transaction (al-Shāfiʿī, n.d.: 3/91; al-Shirāzī, 1983: 1/89 & 267; al-Nawawī, n.d.: 9/412; al-Nawawī, 1991: 3/60; al-Sharbīnī, 1997: 2/31).

The above opinion was also supported by contemporary scholars; for instance, al-Qurahdāghī (2000: 353-354), who opines that the meaning of one contract is stipulated in another contract of the *ḥadīth* of "*bayʿatayn fī bayʿah*" is equivalent to the meaning of the *ḥadīth*, "It is prohibited [to stipulate] two stipulations in a sale". The stipulation can be seen in the transaction of "two sales in one sale," and "two transactions in one transaction", which consist of two prices, namely deferred and cash price that are tied together in a single deal. As a

result, the transaction is considered void due to the prevalence of ambiguity in the prices. Overall, he concludes that the reason for the prohibition is that the sale consists of uncertainty and the absence of essential information (al-Shawkānī, 1982; al-Qurahdāghī, 2000).

iii. Bayʿ al-ʿĪnah

The third opinion on the *ḥadīth*, as interpreted by some Ḥanbalīs (Ibn Taymiyyah, 1987: 28/74; Ibn al-Qayyim, n.d.: 3/261-262) and some of the Mālikīs (Mālik, 1913: 2/512; Ibn Rushd, 1996: 2/186), is that the transaction is tantamount to *bayʿ al-ʿīnah* (sale and buy-back) contract. This can be illustrated by the following: Aḥmad sells a house to Borhan for RM 100,000 where Borhan pays the price in a deferred payment. After that, Borhan is required to sell back the house to Aḥmad for RM 80,000 in cash. According to the scholars, this transaction is void due to its similarity with *bayʿ al-ʿīnah* (Wizārat al-Awqāf, 1983: 9/271; Ḥammād, 1997: 481-482; al-ʿUmrānī, 2005: 86-91). Nevertheless, according to Ibn Rushd (1996: 2/186), the Shāfiʿīs and Ẓāhirīs rejected the interpretation of the *ḥadīth* as referring to *bayʿ al-ʿīnah*, as the text of the *ḥadīth* does not specify any legal proof (*dalīl*) related to *bayʿ al-ʿīnah*. The *dalīl* is too general to infer any conclusion of the prohibition, since there is no further *ḥadīth* from the Prophet (SAW).

b. Loan and Sale

The Prophet (SAW) was reported to have prohibited a loan and a sale (*salaf wa bayʿ*) in a narration on the authority of ʿAmr ibn Shuʿayb.[3] There are two explanations of the *ḥadīth*. First, it is interpreted as a sale which is stipulated in a loan. This means that in order for someone to borrow a sum of money, the borrower must purchase something from the lender. Second, it is interpreted as a loan which is stipulated in a sale. In contrast to the first meaning, in order for the seller to sell something to the buyer, the purchaser is required to borrow some amount from the seller (Ḥammād, 2005).

3 It was verified by al-Tirmidhī, Ibn Khuzaymah, and al-Hakim as *ḥadīth hasan* (an accepted *ḥadīth*) (al-Sanʿani, 2000: 5/38-39; Aḥmad Ibn Hanbal, 1993: 11/132; al-Tirmidhī, n.d.: 2/535; al-Nasa'i, 43; Mālik, 1997: 657; Abu Dawud, 1949: 5/144; al-Shawkani, 1982: 5/179; Ibn al-ʿArabi, 1934: 5/241).

Many scholars opined that both transactions are invalid. For example, according to Ḥammād (1997), many Shāfiʿī scholars said that the loan given is regarded as an 'unknown benefit' to the seller and the involvement of a sale contract in the arrangement is only considered a legal stratagem (*ḥīlah*) for which the lender acquires an extra benefit in his favour. This is also regarded as exploitation and manipulation of the borrower by the seller (Ḥammād, 2005: 14).

The general aim of the Sharīʿah is to ensure justice in a transaction. However, if there is a condition, such as, 'I will purchase a house from you for 100 (dirhams) on the condition that you lend me an amount of 100 (dirhams),' the condition is regarded as involving uncertainty and ignorance (al-Muzanī, 1906: 2/206; Ḥammād, 2005; al-Māwardī, 1993: 56/431; Ibn Rushd, 1996: 153-154). According to al-Māwardī (1993: 56/431), when a loan contract is stipulated in a sale contract, the seller will enjoy a composite price: the monetary price and the benefit gained from the stipulated condition. If the condition is unfulfilled, then the benefit of the loan will not be realised. This benefit is 'unknown', and its negation makes the price of the contract unknown, which renders the contract invalid (al-Māwardī, 1993: 5/35; 6/431). Ibn Qudāmah (1981: 4/235 & 6/437) also agrees that the stipulated loan in the sale contract is an attempt by the seller to increase the price of the subject matter through added benefits for himself. The seller seems to force the buyer to fulfil the condition in order for him to sell an item to the buyer or to give a loan to the borrower (in the case sale is stipulated in the loan contract). If the buyer could not pay cash, he may ask for deferment, which can be a reason for the seller to increase the price. If such increment is for the sale contract, then the price is considered a deliberate attempt to provide compensation (*ʿiwaḍ*) through a loan (*qarḍ*), which is automatically considered *ribā*.

Al-Nawawī (1991: 3/62) also concurs that the *ḥadīth* refers to a sale that is stipulated in a loan contract or a loan that is stipulated in a sale contract. On the other hand, Ibn al-ʿArabi (1934: 3/62) asserts that the combination is prohibited due to price ignorance, in which the probability that the contract will be concluded is also ambiguous, if one of the contracting parties does not commit to fulfil the condition. He also added that the Ḥanafīs consider the transaction as void as it only gives benefit to one party, which may lead to potential exploitation of the needs of others. This can be observed when the buyer needs

to undertake a purchase or fulfil other requirements outside of the contract before he could conclude that particular contract.

According to al-Sharbīnī (1997: 2/56), a stipulation that gives benefits to any party in the transaction is considered a monetary compensation or payoff for the exchange. This can be explained as follows: A seller said to the buyer, "I will sell this house to you, provided I stay here for one year". He regards the condition of staying for one year as implied monetary compensation for the house. Furthermore, it can also be regarded as a combination between a lease and a purchase contract. The stipulation of staying for one year is considered as a payoff to the buyer. As such, if the seller stipulates such a condition, it is as if the seller has asked a second price for the house; and it is deemed *ribā*. It can also be regarded as a loan of a tangible asset (*iʿārah*). If a loan is stipulated in the contract as *ʿiwaḍ*, then it is *ribā*, since the Prophet (SAW) prohibited the combination of sale and loan contracts in a single deal. From the foregoing discussions, it can be inferred that if the combination is concluded between a sale and a lease contract without any stipulation in the arrangement, the combination is a permissible contract. This is due to the fact that the counter-values (price and subject matter) are clearly stated, where the seller shall take the price either in instalments or in a lump sum.

In the same vein, Ibn al-Qayyim (1949: 5/106) concurs that the transaction can be associated with *ḥīlah* for the seller to compensate the loan given. This can be illustrated as follows: Aḥmad gives 1000 dinars as a loan to Ibrahim. At the same time, he sells one article, which has a market value of only 800 dinars, at a mark-up price of 1000 dinars. At the time of payment, Ibrahim is required to pay a total amount of 2000 dinars to Aḥmad: 1000 dinars as the price of the article and 1000 dinars as repayment of the loan. In this respect, the amount of 200 dinars (representing the difference between the market value and the selling price of the article) is regarded by Ibn al-Qayyim, as *ribā*, since the transaction is undertaken to legitimise that value. The combination is regarded as a synthetic or cosmetic arrangement (*ḥīlah*), which does not have any purpose in terms of economic substance except to legalise the increment or benefit enjoyed by the seller. Similarly, Ḥammād (1997: 470-485) also agrees that it is prohibited to combine a loan and a sale in a single transaction due to it being a legal subterfuge (*ḥīlah madhmūmah*).

The legal ruling of the above is also applied to the prohibition of combination of non-exchange contracts with exchange contracts (*ʿuqūd al-muʿāwaḍah*). For instance, it is prohibited to combine a loan with a forward contract (*salam*) or a money exchange (*ṣarf*) or a lease. This is due to the fact that most features of these contracts are similar to a sale contract (see also al-Qarāfī, n.d.: 3/226; al-Ḥaṭṭāb, 1978: 6/271; Ibn ʿAbidin, n.d.: 5/41; Ibn Juzay, n.d.: 1/248; al-Shirāzī, 1983: 1/304; Ibn Qudāmah, 1981: 2/124; al-Buhūtī, n.d.: 3/317).

In addition, the legal effects of the contracts are contradictory to the loan contract. A loan is a non-exchange, benevolent, or non-pecuniary contract where the repayment of the loan must be equal to the amount borrowed. A loan is classified as an act of generosity from one party to another. The lender also has a right to take a mortgage (*rahn*) from the borrower to ensure the repayment of his debt back (al-ʿUmrānī, 2005). A loan is different from exchange contracts, which involve compensation (*ʿiwaḍ*) in the exchange.

However, Sharīʿah scholars disagreed about the permissibility of combining a loan with other non-exchange or trust contracts; for instance, combination of a loan with *mushārakah* or *muḍārabah*. According to al-Sarkhasī (n.d.: 13/8), if one gives 1000 dirhams to his partner on condition that half of the amount is a loan and the other half is a capital contribution for partnership, the combination is valid (Ḥammād, 2005). However, it was argued by al-Misri (2002) concerning the combination between a loan and silent partnership, if the profits assigned or stipulated exceed what the capital provider deserves, then it is regarded as an invalid combination. This is because the profit gained is considered as compensation for the loan. This possibility makes the combination of a loan with *muḍārabah* tantamount to a loan that accrues benefits, which is prohibited under Islamic commercial law (al-Misri, 2002; Arbouna, 2007).

From the foregoing discussions, it can be concluded that the reason for the prohibition of stipulating a sale in a loan contract or vice versa is because the combination is regarded as a means to increase the original amount of the loan. The condition is also considered as an extra advantage that benefits the lender (Arbouna, 2007). The prohibition is not only restricted to the stipulation of a sale in a loan contract but also to other contracts which share similar attributes to the sale and loan contracts respectively. As the sale is a type of exchange contract and the loan is a type of non-exchange contract,

it is prohibited to stipulate an exchange contract in a non-exchange contract or vice versa. Therefore, exchange contracts such as *ijārah*, *salam*, *istiṣnāʿ* and *murābaḥah* cannot be stipulated in non-exchange contracts such as loan (*qarḍ*), gift (*hibah*), safekeeping (*wadiʿah*) and guarantee (*kafālah*).

c. Two Transactions in One Transaction

The Prophet (SAW) was reported to have prohibited two transactions in one transaction (*ṣafqatayn fī ṣafqah*) (Ibn Hajr ʿAsqalani, 1908: 4/234; Aḥmad Ibn Hanbal, 1993: 4/398). According to Wizārat al-Awqāf (1983: 27/42), the phrase '*ṣafqatayn fī ṣafqah*' refers to *bayʿatayn fī bayʿah*. Al-Shawkānī (1982: 5/171-172) concurs that the meaning of 'two transactions in a single transaction' is equivalent to 'two sales in one sale'. He observes that this interpretation is also advocated by the Ḥanbalīs and Shāfiʿīs. However, a second opinion considers the term *ṣafqah* to be more general than a sale or exchange transaction; it includes all contracts such as marriage and manumission of slaves (Wizārat al-Awqāf, 1983: 27/40). Ibn al-Qayyim (1949:5/152) also stresses that the *ḥadīth* means two sales in one sale. However, he then specifies that the *ḥadīth* of two sales in one sale is similar to the *bayʿ al-ʿīnah* structure. He states, "If one combines two deals in one deal, his intention is to sell a dirham in cash for a deferred dirham along with an increment." In other words, it is equivalent to the *bayʿ al-ʿīnah* arrangement. Furthermore, he elaborates that when one combines two transactions (cash and deferred) in one transaction, as mentioned above, he has no right to any cash in excess of the spot sale's price. If he takes more than that, it is equivalent to *ribā*.

d. Synthesis

The understanding of the abovementioned three *ḥadīths* is very important in order to infer and extend the original rule to new cases in the contemporary practice of Islamic finance through the method of *qiyās* (analogy). Accordingly, in order for the *ʿillah* (legal cause) to be effective, it must be ascertainable and definite. An ambiguous *ʿillah* is not acceptable as an effective cause to deduce a new case as valid or invalid (Hasan, 1992; Hallaq, 1989).

From the foregoing discussions, the first interpretation of the *ḥadīth* on combination of contracts is related more to the issue of uncertainty and ignorance in the expression of the seller and buyer in the contractual session regarding the subject matter or the exchange prices. Therefore, the *ʿillah* for the prohibition is the ambiguity of expression concerning the subject matter and price.

Such ambiguity is unlikely to transpire in the modern practice of Islamic finance since most agreements are concluded in well-defined documents. This is different from the classical times when verbal expressions, rather than precise written records, dominated exchanges. If an oral agreement is used, the contracting parties may suddenly change their agreement, and dispute may arise among them in the absence of clear documents to substantiate their conflicting versions of what transpired (Souaiaia, 2006). Thus, classical jurists emphasised that the exchange must be undertaken promptly and every pillar must exist in the contractual session in order to avoid any dispute in the future. However, in the context of Islamic finance, the approach may be different because most of the Islamic financial transactions are well documented, governed, scrutinised, approved, and regulated by the authority. Therefore, such issues will not arise. Contractual documentation is an important parameter as it provides security and protection to the contracting parties by spelling out their rights, obligations and responsibilities. This security enables them to seek legal protection in case the outcome of the contract is not realised as agreed upon (Rosly, 2010).

The second interpretation of the *ḥadīth* is related to a stipulation in the contract. It means the execution of the first contract is subject to the execution of the second contract, or vice versa. The contract is suspended since it cannot be concluded if one of the contracting parties is incapable of fulfilling the stipulation. According to the principles of the Islamic law of contract, each contract must be concluded independently such that it does not depend on any condition to make it legally valid except stipulations that are aligned with the requirements or legal effects of the contract. Any stipulation against these principles causes the combination to be a void contract.

The third opinion on the *ḥadīth* is associated with *bayʿ al-ʿīnah* (al-ʿUmrānī, 2005; al-Islambuli, 2003). The relationship to *bayʿ al-ʿīnah* contract prevails if the second sale is stipulated in the first sale.

The mutual reliance between the two contracts creates a relationship such that the execution of the first sale is dependent on the execution of the second sale. This stipulation is void in the Sharīʿah (Rahman, 2010).

Regarding the second *ḥadīth*, which prohibits 'a loan and a sale', most Sharīʿah scholars agree that this combination is prohibited because it is a *ḥīlah* to circumvent the prohibition of *ribā*. The legal ruling of the *ḥadīth* has been extended to other combinations of contracts with similar inherent features to those of loan and sale contracts respectively (al-ʿUmrānī, 2005).

Meanwhile, for the third *ḥadīth* relating to 'two transactions in one transaction', most Sharīʿah scholars agree that its meaning is identical to 'two sales in one sale' (Ibn al-Qayyim, 1949: 5/106; al-Shawkānī, 1982: 5/152). However, the term *ṣafqah* is more general than a sale contract, which means the ruling of the *ḥadīth* extends to all other exchange contracts. Hence, the *ʿillah* for the prohibition of combining two transactions in one transaction is similar to the first *ḥadīth* (Wizārat al-Awqāf, 1983/27/40).

Based on the above, it is argued that the best interpretation of the prohibition by the Prophet (SAW) in combining two sales in one sale, a loan and a sale, and two transactions in one transaction is more correct if it is related to the stipulation of one contract to another contract rather than to the ambiguity of subject matter and price. As mentioned above, the ambiguity of the counter-values mentioned in the classical examples is unlikely to happen in contemporary times. This is because most contracts are designed with specific contractual documentation with the input of solicitors who understand the legal issues. Normally, the contracting parties will determine the terms and conditions agreed to be included in the contract. In addition, after the conclusion of a transaction they are provided with the relevant legal evidence such as an invoice and a copy of the contractual agreement for the transaction. If they are not satisfied with the terms of the contract, they can renegotiate within the stipulated times agreed in the contract.

Furthermore, a combination of contracts which falls under the interpretation of the prohibited *ḥiyal* (legal stratagem) is one that is similar to a *bayʿ al-ʿīnah* arrangement that links one contract to another. This is prohibited under the Sharīʿah since it negates the

legal requirements specific to each of the combined contracts. Thus, if a seller states that his offer to sell an asset to the purchaser can only be executed when the purchaser leases his house, the arrangement is void. This is because the condition stipulated by the seller is beyond the legal requirements of a sale contract, which only needs an offer and acceptance, subject matter and price for its conclusion.

IV. THE ARRANGEMENT OF COMBINATION OF CONTRACTS

There is another issue discussed by scholars which concerns the form of arrangement that can take place in the combination of contracts. Various opinions have been rendered; however, it is observed that they remain inconclusive regarding which arrangement of combination of contracts is allowed under the Sharīʿah.

Ḥammād (2005), for example, argues that combination of contracts can take place in many forms and arrangements. One example is two objects of sale for one consideration; for instance, sale of a house and a car together for 2000 dinars. Another example would be the purchase of a piece of land and the lease of a car for one month for a combined price of 1000 dinars. In both examples, only one price is mentioned for the objects being transacted. On the other hand, the transactions could also be concluded at two different prices: a house sold at 1000 dinars and a one-month car rental fee at 200 dinars.

Combination of contracts can also be in the form of stipulation of a condition requiring another contract. For instance, one person tells another, "Sell your house to me for 10,000 dinars on the condition that I will lease an asset from you for two years for 1000 dinars".

Another form that is permissible is for the contracts to be effected in a sequence such as a lease ending with purchase (*al-ijārah al-muntahiyah bi al-tamlīk*) and diminishing partnership (*mushārakah mutanāqiṣah*) where each contract is concluded separately (Ḥammād, 2005).

Ḥammād (2005) then explains that contract combinations cannot accept separation because separating them would nullify the objective of the agreement. For example, a letter of credit used in an import

or export agreement includes agency, guarantee and loan contracts. Each element cannot be separated as the objective of the letter of credit would not be achieved. He explains that the element that binds the combination of contracts can be a contractual stipulation. The execution of one contract depends on the execution of another contract in that particular combination. If the stipulation is not executed, then the objective of the combination may not be achieved. Furthermore, all the legal effects and consequences of the contracts combined are regarded as one contract. Nonetheless, he agrees that the stipulation which binds two contracts in the combination is permissible to the extent that it does not negate the rights and obligations of the contracting parties or the inherent requirements of the contracts involved.

Al-ʿUmrānī (2006) agrees with the proposition of Ḥammād (1997, 2005). He furthermore opines that combination of contracts has the following characteristics. First, combined contracts must have two or more contracts in one transaction. Second, there must be a connection (*rabṭ*) between the contracts by utilising stipulation (*sharṭ*) in the contract to ensure that the objectives of the combined contracts are achieved. Therefore, if a combination of contracts has no connection in terms of a stipulation in the arrangement, it cannot be subsumed under the definition. Third, a combination of contracts can be moulded through stipulation of one contract in another (*ishtirāṭ ʿaqd fī ʿaqd*) or by simply consolidating two or more contracts in one contract (*ijtimāʿ ʿaqdayn fi ʿaqd*) without any relationship (al-ʿUmrānī, 2005). Fourth, the legal effects (*muqtaḍā al-ʿaqd*) of the combination must be regarded to have a similar effect to a single contract. In this respect, he may assume that combination of contracts is regarded as a new contract which has one effect. Finally, other arrangements, such as multiple contracts (*ʿuqūd mutaʿaddidah*), recurrent contracts (*ʿuqūd mutakarrirah*) and intertwined contracts (*ʿuqūd mutadākhilah*) are excluded from the definition of combination of contracts.[4] He argues that these categories of contracts are excluded because they are only an addition or continuation of the conditions in

4 Multiple contracts refer to combination of various contracts, which have different legal effects; recurrent contracts represent a combination of contracts that has similar legal effects; intertwined contracts refer to a combination of two contracts in which every contract has its own distinct legal effects (al-ʿUmrānī, 2005).

a contract, or the parties to the contract, the price, the object, or the contract itself. However, combination of contracts is not an addition or extension of the elements but, rather, a combination of multiple contracts that have a single legal effect in a single arrangement (al-ʿUmrānī, 2005). From the discussions, it seems that the definition of multiple and intertwined contracts have similar meanings to contrary contracts, which refer to the same thing, namely a combination of contracts that have different legal effects.

Another form of combination of contracts which can take place is recurrent contracts, which refers to a situation that probably has two stipulations, two different contracting parties, two different prices, or two different subject matters. In this respect, Arbouna (2007) argues that recurrent contracts do not fall under the rubric of combination of contracts, as the term 'recurrent contracts' is more general than 'combination of contracts' (*ijtimāʿ al-ʿuqūd*). Recurrent contracts are different from combination of contracts in that the former comprises two different contracts and leads to one result. He understands that recurrent contracts involve the quoting of two or more prices (*tafṣīl al-thaman*) in one deal, one of which is for spot payment and the other is for undivided assets to be paid in the future. The contracting parties disperse without the buyer choosing a particular price or stating acceptance of one price (Arbouna, 2007). However, according to him, the permissible combination that was allowed by the Prophet (SAW) is an agreement between two parties to conclude a deal involving two or more different contracts which have distinct features and legal consequences that aim to form a viable investment product. In this case, all effects, obligations and rights created by the combined contracts are viewed as inseparable obligations, not subject to partition. However, he did not mention what type of element can bind the combination that makes it not subject to partition, either through stipulation or other contractual form such as promissory undertaking (*waʿd*). He seems to agree that a combination of contracts cannot be separated, which is similar to the position of Ḥammād (1997, 2005) and al-ʿUmrānī (2005).

Furthermore, AAOIFI (2010) also takes a similar position as Ḥammād (2005), dividing the arrangement of combined contracts into four categories. First, the consideration (price) can be delivered in a lump sum, for example, "I sell a house and a car for 1000 dinars".

Second, the consideration can be delivered in separate amounts, when someone says, "I sell you this house for 500 dinars and this car for 500 dinars," provided each party knows the exact amount that will be rendered and which price for which contract. Third, one of the combined contracts may stipulate a condition linking one contract to another. For example, "I will sell my house to you for 10,000 dinars, on condition that you rent the house out to me for two years for 1,000 dinars per year." Finally, a combination of contracts that forms an exhaustive contractual statement comprising a number of successive parts and stages, which finally lead to the realisation of the desired objective of the contracting parties (AAOIFI, 2010). However, what makes the difference between AAOIFI (2010) and Ḥammād (1997, 2005) is that the former stipulates that the contracting parties could impose stipulation from one to another in combination as long as the stipulation does not make one contract dependent upon the other contract, whereas the latter seems to have a liberal position on contractual stipulation in combination of contracts.

As we have argued above, Elgari (1997) obviously differentiates between compounded contracts and combination of contracts. According to him, the arrangement of both contracts should be concluded separately, as each contract has different legal requirements. However, in some cases a transaction can combine multiple contracts in one deal. In such a case, the arrangement is not known anymore as a combination of contracts but as a normal nominate contract that has been established in the Sharīʿah. This can be best illustrated in the case of entering a paid washroom. The payment covers the consumption of water, electricity, cleaning service, tissue, hand dryer and soap. The lump sum payment is made because it is very difficult for the keeper to calculate each unit and multiply it with the amount used by the client. However, the keeper could also separate the contracts by allowing free entrance, but charging the client for the tissue. Thus, it is pertinent for the contracting parties either to combine the contracts in one arrangement to achieve a specific purpose or to separate the contracts. The client can choose to pay the entrance fee so that he enjoys all the services by a lump sum payment, or pay individually for each service used. If the client pays everything in a lump sum payment, then it is not known as a combination of contracts but as a normal lease contract. However, if he separately pays each of the

costs, then this transaction is known as combination of contracts in which each contract must be concluded separately in order to honour its legal requirements.

V. PROJEK LINTASAN SHAH ALAM *ṢUKŪK* (PLSA): A CASE STUDY ON COMBINATION OF CONTRACTS

This *ṣukūk* is chosen as a case study since it employed a combination of contracts as its main underlying structure. The *ṣukūk* has been approved by the Sharīʿah committee of the project and successfully launched in the market to raise funds for developing a highway project in Malaysia.

The *ṣukūk* was issued in October 2008 by Projek Lintasan Shah Alam (PLSA), a company owned by Projek Lintasan Kota Holdings (Prolintas) and Island & Peninsular. The obligations of PLSA were to undertake the design, construction, management, operation and maintenance of the 14.7 km Lebuhraya Kemuning-Shah Alam (LKSA) highway on a build-operate-transfer (BOT) basis. Under the government concession agreement, PLSA received the right to demand, collect and retain toll for its benefit, from all classes of vehicles that use the highway. RHB Islamic Bank (RHB Islamic) and RHB Investment Bank (RHB Investment) were appointed as the joint principal advisors and joint lead arrangers for the *ṣukūk* issuance.

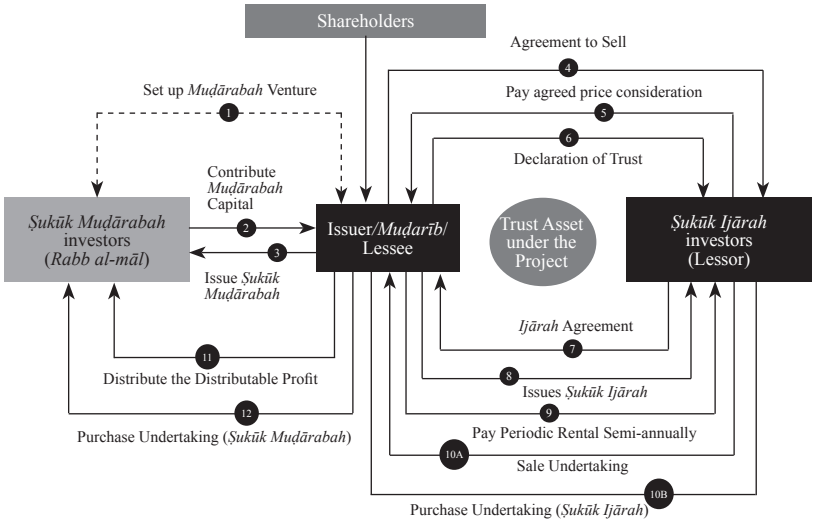
To raise funds for the construction and development of the project, PLSA issued two sets of *ṣukūk*, one based on *muḍārabah* and the other on *ijārah*. *Ṣukūk al-muḍārabah* amounting to RM 415 million were issued with a tenure of a maximum of 29 years and the proceeds were used to construct the highway and for working capital needs during the operation stage. The *muḍārabah* component of the financing formed a joint venture between PLSA and the investors (*ṣukūk* holders) in the toll-road project, in which the former acted as the manager (*muḍarīb*). Participation as *rabb al-māl* (capital providers) in the project entitled the *ṣukūk* holders to receive profit distribution depending on the performance of the project.

PLSA also invited other investors to become financiers in the project based on the principle of *ijārah mawṣūfah fī al-dhimmah* (forward lease). *Ṣukūk al-ijārah* worth RM 330 million with a

maturity of 19 years were issued by using the toll road that will be developed (future asset) as the underlying asset. The asset was held by Amanah Raya Trustee (ART) which represented the investors for their interest in the asset. As such, the investors only held beneficial ownership in the asset, which restricted them in dealing with the assets as prescribed in the terms and conditions of the agreement (Securities Commission, 2004). Under the *ijārah* agreement between the investors and PLSA, the investors leased the trust asset to PLSA in return for periodic rental payments. By using the principle of *ijārah mawṣūfah fī al-dhimmah*, the rental payments started from the beginning of the construction period. The rental payments included the amortised capital component so that at the end of the lease period the toll road was transferred back to PLSA at a nominal value of RM1.

Figure 1 below shows the structure flow of the PLSA *ṣukūk*.

Figure 1: *Ṣukūk* Structure of PLSA



Source: Abdul Mutalip & Jamaludin (2008)

It is observed that the structure was quite complex with multiple contracs being used, combining three nominate contracts (i.e. *ijārah*, *bayʿ*, *muḍārabah*) and one unilateral undertaking (i.e. *waʿd*) in a single arrangement. It should be noted here that a single arrangement does not mean a single transaction. A single arrangement may contain a few transactions, and each transaction is undertaken separately to comply with Sharīʿah requirements. The main purpose of arranging multiple contracts in a single arrangement is to alleviate some costs, such as legal and documentation costs and save time for all parties in order to prepare all transactions in accordance with the Sharīʿah.

An example where multiple contracts were applied in the structure was in the *ṣukūk al-ijārah*, which combined three contracts in a single arrangement, namely *ijārah*, *bayʿ* and *waʿd*. The first transaction began with *bayʿ* whereby the issuer is required to first sell the asset, which is a highway that will be developed, to the investors. The investors then leased back the asset to the issuer, where the latter is required to pay rental fees semi-annually. In order for the issuer to acquire back the asset, the investors undertake a *waʿd* (promise) to sell back the asset and the issuer promises to buy it back. All these transactions must be undertaken separately in order to avoid any Sharīʿah issue. It is forbidden to combine a sale and purchase contract with an *ijārah* contract in one transaction as it would fall under the prohibition of two sales in one sale.

VI. CONCLUSION AND RECOMMENDATION

From the foregoing discussion, combination of contracts can be defined as a process of combining two or more contracts in a single arrangement whereby the contracts combined may have different legal consequences. Although there are many interpretations of the three *ḥadīths* relating to 'two sales in one sale', 'a loan and a sale', and 'two transactions in one transaction', the appropriate meaning for this context is contractual stipulation. This refers to the enforcement of one contract based on the enforcement of other contracts. The main reason for its prohibition is that the execution of a contract in the Sharīʿah is free from any tying element, which means its enforcement does not rely on the enforcement of other contracts.

This paper found that contracts in a combination should be separated in order to preserve the legal requirements of each of the combined contracts. This is owing to the fact that most combined contracts are nominate contracts which have different legal consequences and requirements. Furthermore, some of these contracts have contradictory features, characteristics and obligations, such as a loan contract and a sale contract. If they are combined, the combination may cause some Sharīʿah problems. It would be possible to separate them individually and to retain the features of the contracts in the original form in order to achieve at least some of the objectives of the combination. Although there are arguments that stipulations can be included in combination of contracts, it is observed that the stipulations that are allowed under the Sharīʿah are only stipulations that are consistent with the legal requirements of the contracts combined and that preserve the rights of the contracting parties; otherwise, the combination is void.

In order to preserve the interests and rights of the contracting parties involved in the combination, other techniques are normally employed in practice such as *waʿd* (a unilateral promise), *hāmish jiddiyah* (security deposit) or *ʿurbūn* (earnest money). The use of these instruments is permissible under the Sharīʿah as long as they do not impede the legal consequences and requirements of the respective combined contracts. These external techniques should not be combined together in the combined contracts; they must be concluded in a separate session.

It is also observed that, although the concept of combination of contracts has been extensively used in Malaysia, the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) (2010) has not issued any specific resolution on the concept. Hence, it is recommended that the Council consider a specific resolution on combination of contracts which addresses the definition, parameters, features of combinable and non-combinable contracts, and Sharīʿah issues. This resolution would guide practitioners to use the concept in Islamic finance.

Finally, from the case study presented, it is observed that combination of contracts has been used in the structuring of *ṣukūk* to raise funds for project financing. The PLSA *ṣukūk* structure involved combination of many contracts in a single arrangement. Each contract

was, however, concluded separately in order to avoid any Sharīʿah issues. It must be noted that once a contract in the arrangement is linked or connected to the other contract, it may fall under one of the prohibited *ḥadīths*, as mentioned above.

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