

Beneficial Ownership: To What Extent It Complies with *Shari'ah*?

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Abstract

This paper is a preliminary research on studying the application of beneficial ownership in Islamic financial products. It aims at investigating the meaning of beneficial ownership and its recognition in the *Shari'ah* perspective. This paper starts with identifying the meaning of *milkiyyah* (ownership) and its characteristics in the Islamic law and followed by the discussion on beneficial ownership from legal perspective. The study emphasizes on the historical and theoretical aspects of beneficial ownership. It then critically elucidates the meaning of beneficial ownership and its use in commercial transaction as to ascertain whether its use is in compliance with the requirements of ownership in *Shari'ah*. Analysis is done via the method of *takyif fiqhi* (*fiqh* characterisation) on the use of beneficial ownership. Some *Shari'ah* issues would be examined carefully by comparing the views of classical jurists and then supported by modern jurists. Finally, the study suggests that the beneficial ownership should be considered as real ownership since it is exclusively used in registration and legal documentation because *Shari'ah* has allowed the transfer of ownership based on a sole basis of contract.

Keywords: beneficial ownership, *milkiyyah*, Islamic finance, contract, law

1. Introduction

The Islamic finance market has witnessed tremendous growth during the last few years. It is believed that *Shari'ah*-compliant assets worldwide reached approximately \$1.4 trillion at the end of 2011 and are likely to continue growing in the coming years (Standard and Poor's Ratings Services, 2012). This immense growth in recent years has been driven by the needs of individuals, governments and corporations for better alternatives to conventional finance.

The government of Malaysia has vigorously promoted the growth of Islamic finance for its local markets (Ariff & Rosly, 2011; Balala, 2011). However, the process requires effort and attention when structuring financial products and services. The techniques and processes employed to develop these products must comply with *Shari'ah* principles and concepts. The principles presented within the spectrum of *Shari'ah* are not only directly demonstrated through their transactions but in the extent of its comprehending the *Maqasid al-Shari'ah*.

It has been a long-standing criticism that Islamic financial products resemble conventional financial ones (Ayub, 2007; Beck et al., 2010; Dusuki & Abdullah, 2011). One of the criticisms relating to *Shari'ah* that have been hotly debated is the recognition of beneficial ownership in financial structuring and mechanics. This has been argued as a violation of the concept of ownership as envisaged in *Shari'ah*, which in turns, contradicts the *Maqasid al-Shari'ah* (Al-Amine, 2011).

This issue has become apparent because Islamic finance is also required to observe similar regulatory and legal frameworks applied to conventional finance. This poses a challenge to Islamic finance to operate within the *Shari'ah* framework. This paper elucidates the meaning of beneficial ownership in Islamic finance within the purview of the *Shari'ah* framework. In order to this, it will address the question to what extent the beneficial ownership is claimed to be in conformity with the *Shari'ah* requirements of ownership? The paper begins with an explanation of the concept of ownership from the *Shari'ah* perspective. It is followed by an analysis of the meaning of beneficial ownership as intended in the Common Law, and its use in commercial transactions. Subsequently, this paper discusses *takyif fiqhi* (*fiqh* characterisation) in relation to beneficial ownership.

Henceforth, an analysis is made on certain *Shari'ah* issues that may arise from the use of beneficial ownership.

2. Ownership in Shari'ah: An Overview

Ownership, etymologically, is known in Arabic as *milkiyyah* (ملكية) or *milk* (ملك), which signifies holding a thing and the ability of exploiting it (Fairuzabadi, 1953). Ibn Manzur (1956) mentions that the terms *malk*, *mulk* and *milk* refer to the state of containing a thing, and the ability to dominate and dispose of. Sometimes the word *milk* is used to connote the property itself, which is owned and controlled by a person (Al-Muslih, 1988).

Technically, it can be defined based on different ways of understanding, i.e. (i) ownership can be understood as a legal nature of something that has a consequent effects, (ii) ownership can also be seen as a relationship between an owner and the owned property, and (iii) ownership can be defined by looking at its legal effects on the owned property. Table 1 below illustrates the differences of the technical meanings of ownership (*milkiyyah*) as articulated by jurists in the Islamic *fiqh* literature.

Table 1. Technical meaning of ownership from *Shari'ah* perspective

Scholars	As legal nature (<i>haqiqah shari'yyah</i>)	As legal relationship (<i>alaqah shar'iyyah</i>)	By looking at its legal effect (<i>ala asas dhikr mawdu'ih</i>)
Hanafis			
Ibn al-Humam			√ (<i>qudrah ala al-tasarruf</i>)
Ibn Nujaym			√ (<i>qudrah ala al-tasarruf</i>)
Sadr al-Shari'ah		√ (<i>ittisal shari'iyy</i>)	
Malikis			
Al-Qarafi	√ (<i>hukm shar'iyy</i>)		
Ibn al-Shat			√ (<i>tamakkun al-intifa'</i>)
Shafi'is			
Al-Subki	√ (<i>hukm shar'iyy</i>)		
Abu Shuja'		√ (<i>ikhtisas</i>)	
Hanbalis			
Ibn Taymiyyah			√ (<i>qudrah ala al-tasarruf</i>)

According to the Hanafis, ownership is “a legal ability (or authority) given originally/primarily to a person that allows him or her to dispose of a property except if there is a legal impediment” (Ibn al-Humam, n.d & Ibn Nujaym, 1968). Some Hanafis (Sadr al-Shari'ah, n. d.: v. 2, p. 196) define it as “a legal relationship between a person and a thing which gives him an absolute freedom to dispose of it to the exclusion of everyone else”. Al-Qarafi (1998: v. 3, p. 208), a prominent scholar of Malikis views it as “a legal ruling (i.e. authority) over an asset or usufruct given to someone that allows him to benefit the owned item and to accept compensation of it as well”.

Al-Subki (1991: v. 1, p. 76) opines that ownership is something immaterial (*amr ma'nawiy*), where he defines it as “a legal ruling over an asset or usufruct given to someone that allows him to benefit from it and to accept compensation of it as well”. Some Shafi'is such as Abu Shuja' has defined it as ‘*ikhtisas*’ or a legal exclusivity over a useable item (Al-Muslih, 1988). An eminent scholar of Hanbalis, Ibn Taymiyyah (2002) defines it as “a legal ability justifying the right of disposal of the asset”.

From the above, one could suggest that under the *Shari'ah* law, the ownership basically refers to four important attributes:

- i. A legal and exclusive relationship between a person and a thing (Note 1). Such thing could be a tangible asset (*a'yan*) or intangible asset (*manafit*).
- ii. The main purpose of its exclusivity is vesting the owner to process the use of the owned thing and to dispose of.
- iii. The ability of using and disposing of the owned thing could be hindered by legal impediment.
- iv. The ability of using and disposing of could be given primarily (*ibtida'*) or secondarily through agency (*wakalah*).

Hence, the ownership, as generally accepted, is an exclusive relationship between the owned object and its

owners, which gives the owner the right to deal with what he owns in any way that is not legally forbidden.

3. Beneficial Ownership from the Common Law Perspective

Historically, the origins of the concept of beneficial ownership can be traced back to the English law specifically the English Trust Law from the 12th to 13th century. This was recognized by many researchers such as Cervantes (2009) and, Weeghel (1998). They observed that the term is perceived as an opposite of the concept of legal ownership. In point of fact, it arises from the principle of equity as opposed to the Common law (Brown, 2003; George, 1999).

Brown (2003), for example, while examining the concept of beneficial ownership in the Income Tax Act of Canadian Law, suggests that the terms beneficial owner, beneficial ownership and beneficially owned are developed from the law of equity. This is true because the history of trust in the UK was developed from the principle of equity which brings about the concept of equitable remedies (Note 2), defenses and causes of action. Brown (2009) continues to say that originally, the common law adopted the view that ownership was indivisible. However, equity allows the division of ownership into legal ownership and beneficial ownership.

Equity is a system of law that has its root in the English law and applied in the Malaysian law. According to Black (1968: 198) equity denotes ‘*the spirit and the habit of fairness, justness and right dealing which would regulate the intercourse of men with men*’. It is derived from the Latin term *Acquitas* (equality). When law causes hardship and injustice, equity comes to assist the law to reach as near as possible natural or ideal justice. In other words, common law is a set of law that is commonly used and recognized in a society, while equity is used when there is a lacuna in the common law. The law of equity has brought the words “beneficial owner”, “entitlement”, or “interest(s)”, implying the notions of a fiduciary obligation.

In the history of a legal system, equity is a body of rules governed by the Court of Chancery (Note 3) prior to the existence of Judicature Act 1873 (Martin, 2001). It was initially presided over by Lord of Chancellor and soon afterwards by the Court of Chancery, which was different from the Court of Common Law. Equity was believed to be more harmonious as opposed to the Common law in providing fairness and justice by ensuring its rules were in compliant with current needs of a particular society (MLJ, 1990). Historically, before the arrival of Normandic to England in year 1066, the law was governed by the customary practice. During that time, the King had full authority in administering law matters. The most significant implication of the arrival of Normans was the introduction of the Common law system. The King’s Court (*Curia Regis*) (Note 4) was established to hear cases that brought in based on the principles of the Common law.

Nonetheless, the administration of the law was still labelled as weak and rigid. This was due to several defects of the common law. For instance, an injured party could only sue at the Common law if his complaint came within the scope of an existing writ (Note 5). The scope was very narrow, and subsequently some people were not be able to take legal actions in obtaining their rights (Rashid & Hingun, 1999). In other words, justice was not achieved due to such defects. In such situations, it was a practice of aggrieved citizens to make an appeal or petition to the King for assistance. Since the petitions had increased, the King passed on them to the *Curia Regis* and a committee was set up to hear the petitions. The hearings were chaired by the Chancellor. By the 15th century, the Chancellor began to hear petitions on his own and after that the Court of Chancery was established and became an institution independent of the King. The law that used by the Court was called equity.

Originally, the term beneficial ownership can be found in the agreement of land’s sale in the Common law countries. Kryzhanovskaya (2012) points out that it was used to distinguish between two legal owners, namely the beneficial legal owner and the non-beneficial legal owner. It seems that both were legal owners where the former was the one who can benefit from it, while the latter did not. In the legal tradition of the common law, the function of ownership was divisible into different people. From this, the terms nominee, legal owner and beneficial owner arose. In line with this, the concept of beneficial ownership was applied in the law of equity where reference is made to equitable or beneficial ownership as opposed to legal ownership.

Generally, the meaning of legal ownership is akin to the meaning of trustee in trust law. According to the English law’s tradition, a trustee is the legal owner of the trust property. However, when beneficial ownership is applied outside of the scope of trust law, then an accurate interpretation becomes problematic in the common law countries such as Malaysia. (Note 6)

It is very important to note here that beneficial owner generally has the most ownership’s attributes, but he does not have the legal title. Hence, what is the purpose of not giving a legal title to beneficial owner? This study addresses this issue and examines whether the use of beneficial ownership is in line with the *maqasid al-Shari’ah* in the Islamic commercial contracts (*uqud al-muamalat al-Islamiyyah*). Therefore, a *takyif fiqhi* or

fiqh characterisation of using beneficial ownership concept is used in this article. In this regards, it is very pertinent to examine the existence of beneficial ownership in commercial transactions before making a *takyif fiqhi* upon the concept.

4. Beneficial Ownership in Commercial Transactions

Generally, commercial transactions in Malaysia are governed by the English law and not by the Islamic law. Even though Islam is considered a religion of state in the Federal Constitution, it does not consider Islamic law within the meaning of the word law. In other words, the intention in making Islam as the official religion of the Federation is primarily for ritual and ceremonial purposes. However, this does not mean that Islamic law is completely discarded as the Federal Constitution provides that certain aspects of Islamic law are applicable to persons professing to the religion of Islam.

According to the Federal Constitution, it appears that the position of Islamic law does not cover any Islamic commercial transactions. The power to legislate on matters pertaining to Islamic law lies with the State Legislatures subject to the Federal law. Matters concerning commerce and trades including banking and finance are placed under the Federal List and not under the State List.

Therefore, there have been disputes between Islamic law as practised in Islamic finance and English law. A lot of works, meetings, discussions and seminars have been organized in developing *Shari'ah*-compatible law to support its implementation and, documentation, and settle disputes. For example, Bank Negara has set up a Law Harmonisation Committee to address several concerns of the disputes in Islamic finance that occur between Islamic law and English law (Law Harmonization Committee Report 2013). However, there are still areas that need to be tackled. Since the governing law in Islamic commercial transaction is English law, then the law must also be made *Shari'ah*-compatible.

According to the Report made by the Law Harmonisation Committee, beneficial ownership is defined as “*a person who enjoys the benefits of land ownership even though the land title is in another's name*”. The definition indicates that beneficial ownership is mainly related to land matters. There are 5 main issues that have been identified as relevant to Islamic finance (Note 7). One of them is the issue of recognition of beneficial ownership. The Committee has produced some recommendation with regard to the issue. More specifically, the Committee has recommended to expand the concept of trust caveat under section 332 and 333 National Land Code (NLC) as an alternative instrument to reflect beneficial ownership as it is able to serve as a notice to the world that the caveator has an interest in the land.

However, from the *Shari'ah* perspective, more importantly is that the utilisation of the concept of beneficial ownership should be analysed first. As such, this would be conducted via the method of *takyif fiqhi* or *fiqh* characterisation. In doing so, one should distinguish between movable property and immovable property (Note 8). Any commercial transactions dealing with both types of properties are governed by a number of different acts. (Note 9) Hence, this paper shall analyse beneficial ownership according to both types of property.

4.1 Movable Property

According to Black's Law Dictionary, Edition 9th, movable property can be defined as “property that can be moved or displaced, such as personal goods; a tangible or intangible thing in which an interest constitutes personal property; specifically anything that is not attached to land as to be regarded as a part of it as determined by local law”. Under the definition of “Islamic leasing business”, IFSA 2013 provides that movable property includes any plant, machinery, equipment or other chattel attached or to be attached to the earth or fastened or to be fastened, permanently or otherwise, to anything attached to the earth. In a simple meaning as stated in the Interpretation Acts 1948 and 1967, it means all property other than immovable property.

In Malaysia, there are two main legal acts governing any commercial transactions of movable property, namely Sale of Goods Act 1957 (SOGA) and Contracts Act 1950 (CA). It is worth to note that SOGA does not govern immovable property where SOGA has defined goods as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (Note 10).

Under the SOGA, S. 4 (1), a contract of sale of goods is defined as a contract whereby the seller transfers the property in goods to the buyer for a price. This means that transfer of ownership is the very objective of the sale contract. The ownership of the goods is transferred to the buyer for consideration. For example, Ahmad agrees to transfer the ownership of his car to Bakar. Thus, Bakar has to pay RM 10000 for a price of the car. This is a simple sale contract through which the ownership passes to the buyer. However, the issue that arises is when the ownership is passed from the seller to the buyer? Is there any transfer of title (i.e registered ownership) or

registration of the ownership?

Generally, in the Common law as stated by Childs (1914), the ownership of specific goods in a deliverable state is passed to the buyer when the contract is made, provided the contract is not conditional; and this results in the ownership even though the price has not been paid nor the goods delivered. The same principle has been clearly mentioned in the SOGA where Sec. 21 provides: “*Where there is unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods or both, is postponed*”. For example, a buyer agrees to buy goods on credit. The property in goods passes immediately to the buyer when the contract of sale is made, even though the payment is postponed.

Similarly, according to SOGA, Sec. 19 (1), in the sale of the specific goods or ascertained goods, the property in goods is transferred to the buyer when the parties intended to it to be transferred. Sec. 19 (2) clarifies that the intention of the parties could be determined by conduct or circumstances.

It is important to mention that in movable property transaction, there is no need for registration except in the case of sale of vehicle because it involves the specific act, i.e. the Road Transport Act 1987. It clearly defines registered owner as the person registered as the owner of a motor vehicle. Sec. 7 (1) states that no person shall possess or use a motor vehicle unless that vehicle is registered in accordance with this part. Furthermore, if the contract is hire-purchase, then it relates to the Hire-Purchase Act 1967 (HPA) (Rusni Hassan et al., 2012).

As for other than vehicle, there is no registration of ownership needed. Thus, a question arises how to recognize the ownership of a property in a commercial transaction. In practice (Note 11), typically there are certain documents involved in a transaction of movable property. These documents are typically used to ensure to whom the ownership of the property goes. Two documents are mainly used, namely, Delivery Order (D/O) and Invoice. Both are issued by the owner that intends to sell his/her property. Once the buyer has signed the acceptance of the D/O, it means that the title of the purchased property is passed on to the buyer although the transaction is by credit. In the case of sale by credit, the ownership is considered transferred, but the buyer assumes the indebtedness of the payment. However, some transactions are made conditionally by inserting terms and conditions. For example, the transfer of legal ownership shall be made upon the full payment of the price or upon the settlement date. In this situation, the purchaser is normally considered a beneficial owner of the property.

It can be said that under the Malaysian law system, any commercial transaction that involves movable property, there are two main legal acts governing the transaction, i.e. Contracts Act and Sale of Goods Act. Whilst the former provides general provisions on designing a contract including sale, the latter is a specific act for a sale contract of movable property. As for the transfer of ownership, in practice, there is no registration of the ownership required (unless in the transaction of selling and buying vehicle). However, beneficial ownership could exist in the situation where the sale contract is made by credit and there is a specific term in the agreement providing the transfer of ownership shall be made upon the settlement of the full price. In this circumstance, the ownership of the purchaser can be claimed as a beneficial ownership (Note 12). Equally, when the delivery of the goods is being postponed, the ownership is still regarded as transferred. The purchaser can be considered the beneficial owner from the legal perspective.

4.2 Immovable Property

Immovable property is legally known as real property or realty which is defined by Childs (1914) as *land or things therein, or annexed therein, the space above the soil and certain interests in any or all of these*. Typically, this property cannot be moved such as land, building, house and anything attached to land (Awang, 1994).

In Malaysia, there are three main special legal provisions that govern any commercial transaction relating to the land, namely, National Land Code 1965 (NLC), Contracts Act 1950 (CA) and Law of Equity. It is worth noting that NLC is based on the Torrens System, which is a registration system. However, Sabah and Sarawak are still using the system derived from the English law of England known as Law of Conveyance. (Note 13)

The implication of the difference between Peninsular and East Malaysia can be best seen in the effect of transfer of ownership. Under the NLC, the transfer of ownership of land would be completely done via registration at the Land Office. As for Sabah and Sarawak, it can be proven by a memorandum of transfer and not by registration. Essentially, NLC emphasises the aspect of land's registration of title in Malaysia. This is clearly stated in S. 89 (a) NLC:

89. Conclusiveness of register documents of title

Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence-

(a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor;

This special law also introduces the concept of indefeasibility of title, which lies in the registration and conclusive evidence can be drawn from it. It is stated in Sec 340 (1) of NLC:

The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible

This is central to the system of registration of dealings under the Torrens System (Note 14). The question arises whether beneficial ownership can be recognised as complete ownership under the NLC as it only recognises registration system. In other words, it can be said that NLC does not recognise the concept of beneficial ownership.

For example, one has bought a piece of land and paid the full price, but the title of the land still remains under the name of the seller. This is because registration of the title typically would take time to be complete. In this situation, one may ask whether NLC recognises the purchaser as the real owner of the land although the title of the land is still yet to be registered under his name. What is the legal provision that can be used in order to determine the ownership of the purchaser over the land?

In this regard, the answer lies in the use of law of equity because NLC does not recognise the concept of beneficial ownership. However, equity may be applied to NLC especially when it comes to the commercial law. When the legal title has not been transferred to the new owner (i.e. the purchaser of the land), then what is the status of the beneficial owner from the legal perspective? In this situation, the concept of bare trust is applicable. George (1999), in his book, claims that bare trust can be regarded as a remedial device and an applicable concept in the land law in Malaysia.

The concept of bare trust is built on the rules of equity. Bare trust comes into existence once a valid contract for sale is concluded without delivery of possession and/or transfer of title in the formal sense. Thus, the vendor becomes in equity a trustee for the purchaser and holds the estate as long as the title is not passed on the purchaser (Rashid & Hingun, 1999). To conclude, when a purchaser performs whatever is necessary to affect the transfer of ownership (paid the full price/did instrument of transfer), he is then the beneficial owner, while the seller becomes a bare trustee till the title has been registered.

5. *Takyif fiqhi* of Beneficial Ownership in Commercial Transaction

From the discussion above it can be said that beneficial ownership in commercial transaction is applicable in movable property as well as immovable property. Both are governed by different legal acts as mentioned above. Before analysing the *fiqh* characterisation (*takyif fiqhi*) on the concept of beneficial ownership in commercial transaction, an explanation on the principle of transfer of ownership in Islamic law of sale contract (*aqd al-bay'*) is very noteworthy.

In Islamic law, every sale contract will involve transfer of ownership. This idea is unanimously agreed and shared by Islamic scholars of all *madhahib* as stated by al-Kasani (Note 15) (1986), Ulayyash (Note 16) (1989), al-Nawawi (Note 17) (2002) and Ibn Qudamah (Note 18) (1985). It should be noted that Islamic law does not distinguish the sale of both movable and immovable property. Both have to comply with the rules of *aqd al-bay'* (sale contract) as dictated by *Shari'ah*. Al-Nawawi (2001), a noted scholar of Shafi'is, confirms that the property of the object of sale, whether it is movable or immovable, is passed on as soon as the contract of sale has been concluded. In other words, the ownership is immediately transferred upon *ijab* (offer) and *qabul* (acceptance). Hence, both seller and buyer must perform their contractual obligations where the former shall deliver the object of sale, while the latter must pay the price of the object.

However, it is important for a buyer to take possession (*qabd*) of the object of sale. The *qabd* is central to the sale contract since it is prohibited for a person to sell what he does not possess (Lahsasna, 2014) where it can be in the form of actual or constructive possessions. It is also important to determine the liability of the underlying asset due to damage and loss. As long as the object of sale in possession of the seller, the risk of loss is his responsibility. Al-Nawawi (1991) asserts on this crucial rule and explains:

للقبض حكمان . أحدهما : انتقال الضمان إلى المشتري . فالبيع قبل القبض من ضمان البائع ، ومعناه أنه لو تلف انفسخ العقد وسقط الثمن

Meaning: "There are two rulings triggered by *qabd* (possession); the first one is the passing of *daman* (liability) to the buyer. The object of sale falls under the liability of seller before possession takes place. This implies that if the object is destroyed, the contract will be revoked and the price is dropped".

In fact, the offer and acceptance (*ijab* and *qabul*) can be expressed verbally or by other means that convey the consent of the contracting parties. It is not necessary to be documented and written unless for the purpose of registration and security. However documenting the contract is considered a recommended act in Shari'ah.

Thus, an analysis on *takyif fiqhi* of beneficial ownership in both movable and immovable property will be based on this Shari'ah principle, i.e. the transfer of ownership is affected by the *ijab* and *qabul*. The discussion on the *takyif fiqhi* is as follows:

5.1 *Takyif fiqhi* of Beneficial Ownership in Movable Property

Movable property in Islam is known as *mal manqul*. It is a property that can be moved from one place to another and it can be destroyed. Normally, movable property will perish after being consumed (Awang, 1994). In term of *takyif fiqh* of the use of beneficial ownership for movable property, it should be highlighted that there is no expression and statement of beneficial ownership in both main governing laws, i.e. SOGA and CA. Both laws only focus on the contract or agreement itself. Generally, the ownership is considered transferred upon the making of the sale contract, which is an offer and acceptance. This can be inferred from Sec. 21 SOGA where it clearly states: "... the good passes to the buyer when the contract is made". This statement is consistent with the Shari'ah law. In fact, in the Common law, a contract law permits the transfer of property ownership on the sole basis of an offer and acceptance. This principle of transfer of property ownership in the Common law is derived from the Islamic law. This idea is best understood from the comprehensive seminal work conducted by Makdisi (1998) when he proposes that the origins of the Common law may be found in Islamic law.

However, in practice, sometimes the price is postponed or the contract is made by credit. In this situation, the transfer of ownership is considered to have occurred, but it creates indebtedness upon the buyer. With regard to the ownership transfer, sometimes the contract is being stipulated with certain conditions such as a condition of the settlement of the full price. From the legal perspective, if the contract is conditional upon the settlement of the full price, then it can be said that the contract only gives rise to beneficial ownership. (Note 19) After the full price is paid, legal ownership shall be transferred to the buyer.

According to *Shari'ah* law as discussed earlier, the ownership is deemed transferred when the contract is made. Therefore, if the payment of the price is deferred, the ownership should be fully transferred. In addition the beneficial owner/buyer is restricted from the disposal of the asset to a third party. The question arises when the contract only gives rise to beneficial ownership. Therefore, it is important to critically evaluate the substance of beneficial ownership through the method of *takyif fiqhi*.

Based on the analysis over the Shari'ah texts, there are four inter-related concepts, i.e. *rahn*, *khiyar naqd*, *bay al-wafa'* and *shurut taqyidiyyah*. The comparative discussion of these concepts will be divided into three parts for the *khiyar naqd* and *bay' al-wafa'* is elaborated together for their similarity.

5.1.1 Analysis of the *rahn* Concept

As mentioned earlier, giving the beneficial ownership instead of legal ownership somehow indicates that the sold good has been pledged by the purchaser to secure the full payment. This type of transaction can be equated to the contract of *rahn* (pledge). The question that could be raised here is whether the ownership of the pledge is transferred or not. What are the legal effects of a contract of sale, when the sold good has been pledged?

According to the Shari'ah texts, in *rahn*, the owner, i.e. the pledger cannot sell the pledge except with the permission of the pledgee because the seller has a right over the property. Besides that, the Shafi'is and Hanbalis maintain that the ownership of the pledged property and its benefit belong to the pledger (buyer). Accordingly, the pledgee cannot benefit from the pledged property (Abozaid & Saleem, 2013; Al-Zuhayli, 2002). It is not permissible to pledge other's property without his permission.

According to the *maqasid* point of view, the delivery and receipt of pledged property should not be viewed in a ritualistic manner. Essentially, the main objective of pledged property is to provide insurance to the pledgee, who is thus empowered to extract the debt owed to him from the pledged property. In this regard, al-Zuhayli (2002) views that contemporary civil legal provisions to establish a legal mortgage of some property by announcing it and documenting it with legal authorities accomplish similar effect of the contract of *rahn*.

Thus, the modern use of beneficial and legal ownerships in legal documentation may replace the type of receipt required in classical jurisprudence, if the purpose of using this modern term as an insurance against a debt. Furthermore, the legal owner is considered a trustee, and this can be equated to the original ruling of pledgee in classical fiqh.

In the discussion of *bay al-taqsit* (sale contract via instalment), the sixth session of the Islamic Fiqh Academy of

OIC has resolved:

لا يحق للبائع الاحتفاظ بملكية المبيع بعد البيع، ولكن يجوز للبائع أن يشترط على المشتري رهن المبيع عنده لضمان حقه في استيفاء الأقساط المؤجلة.

Meaning: “There is no right for a seller to maintain the ownership of the good after the contract of sale is made, but it is allowed for him to stipulate a condition on the buyer to pledge the good with him to secure his right in claiming the deferred price”.

5.1.2 Analysis of the *khiyar al-naqd* and *bay wafa'* Concept

Since there is a similarity and overlapping relationship between *khiyar al-naqd* and *bay al-wafa'*, this analysis on the *khiyar naqd* will be done together with *bay al-wafa'*. According to some scholars, *khiyar naqd* is considered a kind of stipulation made by the contracting parties in a sale contract (Abidin, 1966; Al-Zuhayli, 2002). *Khiyar al-naqd* is approved by Abu Hanifah and his two disciples (Muhammad and Abu Yusuf) on the ground of *istihsan* (juristic preference) for fulfilling the needs of public (Al-Zuhayli, 2002).

The two forms of *khiyar al-naqd* are as follows:

The first form: A seller says to a buyer, “I sold to you this item on the condition that if the payment is not being made up to a certain period, then the sale contract will be void”. This is similar to the concept of *khiyar al-shart*.

The second form: A buyer says to the seller, I bought this item from you at a certain price on the condition that the contract will be void, if you pay back the full price within a certain time period”. This form of *khiyar al-naqd* is similar to the *bay al-wafa'*. Therefore, some Hanafis classify *bay al-wafa'* to be under the *khiyar al-naqd*.

The issue in question is what are the effects of this stipulation on the sale contract from the perspective of ownership in the Islamic law? The Hanafis scholars have discussed this sale extensively. There are three general positions on this matter. Despite their differences, they agree on its permissibility due to people’s need (Abozaid & Saleem, 2013). Some Hanafis view that in *bay al-wafa'*, the buyer will become the owner of the item and can use the property as well as benefit from it until the seller repurchases it for the same price.

Some of the Hanafis, however, argue that this contracts is a voidable (*fasid*) sale, thus both the seller and buyer may cancel it, while some have contended that it is not a sale, rather a mortgage. As such, there is no transfer of ownership of the property to the buyer-cum-lender. Accordingly, the buyer cannot use and benefit from it unless he receives permission from its owner.

Meanwhile, a third position suggests that *bay' al-wafa'* is a contract by itself; having shared features of both sale (*bay'*) and mortgage (*rahn*). As stated by Ibn Abidin (1966), al-Zayla'i confirms that the preferred fatwa in Hanafi's school of thought is that *bay' al-wafa'* is a valid sale because some of its effects and rulings are present such as the permissibility of benefiting the sold object. The only restriction is that the buyer cannot sell it to a third party.

In other words, the sale has effectively transferred the “beneficial ownership” of the property to the buyer, though the “legal ownership” of the property remains with the seller. This view is reflected in Articles 118 of the *Majallah al-Ahkam al-Adliyyah*. Interestingly, this later view on the true character of *bay al-wafa'* resembles the popular type of modern Islamic securities issuance, i.e. *Sukuk ijarah*. In *Sukuk ijarah*, the issuer will first sell its asset to the investors, and receives the cash money. Then, the investors lease the asset back to the issuer and at the same time, promises to buy back the asset from the investors. In practice, the first sale contract will only transfer the beneficial ownership. Therefore, the investors cannot sell the asset to third parties.

5.1.3 Analysis of the Al-Shurut Al-Taqyidiyyah

In *Shari'ah*, if the purchaser who is the beneficial owner can utilise his/her property in the sense that he/she may dispose of the good, the beneficial ownership is deemed as good as true ownership. The right to sell is one of the *muqatadayat al-bay'* (implications of sale contract). If the purchaser is not able to resell his purchased property, then this is considered a restriction on ownership. Whether or not *Shari'ah* acknowledges this restriction, one must look into the details as discussed by *fuqaha'* under the issue of *taqyid al-milkiyyah* (restriction on ownership) or *al-shurut al-taqyidiyyah*.

Literature discussion conveys that the issue of restriction of disposal of the owned asset is debated by the classical *Shari'ah* scholars. This issue is peculiar in the contract of transfer of ownership such as sale contract. Generally, the views of the scholars in this issue can be summarized into three major opinions (Al-Abadi 1974):

The first view: A majority of *fuqaha'* believes that it is completely prohibited to stipulate a condition to restrict from the disposal of the purchased asset. This view relies upon the narration that the Prophet (pbuh) has

prohibited a sale with a condition (Al-Buhuti, 2003; Al-Nawawi, 2001; Ibn Qudamah, 1985). Furthermore, stipulating a restrictive condition is not in line with the *muqtada al-aqd* (the original implication of the contract).

The second view: The view of some Malikis (Ibn Juzayy, n.d.) and one opinion attributed to Ahmad which was favoured by Ibn Taymiyyah (1995) is that it is permissible to stipulate a condition of restriction of disposal provided that it is a minor restriction. This view is based on the *qiyas* (analogy) by equating this stipulated condition with the permissibility of exempting certain benefits of a purchased good by an agreed condition as clearly shown in the hadith Jabir (Note 20). Ibn Taymiyyah (1995), a prominent Hanbali scholar, explains in his fatawa:

وجماع ذلك أن الملك يستفاد به تصرفات متنوعة، فكما جاز بالإجماع استثناء بعض المبيع، وجوز أحمد وغيره استثناء بعض منفعه، جوز أيضا استثناء بعض التصرفات

Meaning: “The gist of such is that the ownership essentially grants various kind of disposition. Since there is a consensus that it is permissible to stipulate an exemption of certain goods and as Ahmad and others have allowed stipulating an exemption of certain benefit of goods, then he has also allowed excluding certain disposal acts.

Moreover, minor restriction should not be considered harmful or causing damages to the purchaser since it is not a total interdiction. However, this restriction could be beneficial for him especially when there is a harmful consequence if the condition is absent.

The third view: Ibn Shubrumah is of the view that it is permissible to stipulate all types of *shurut* (conditions). Hence, it is allowed to completely restrict the purchaser from disposing of the asset (Al-Karkhi, 1989). This is a liberal approach where it also relies on the hadith of Jabir and some hadiths that permit stipulating *shurut* such as the hadith: “Muslims are bound by their stipulations”.

Perhaps, it can be said that there is a generally accepted principle in Shari’ah allowing a person to be an owner of a property, but without the right to dispose of it via sale or gift. This principle is well-known in the *waqf*. According to the Malikis, the property of *waqf* is owned by the *waqif* (founder), but he is not allowed to dispose of this property via sale or gift (al-Dalw 2009).

From the abovementioned, it can be said that the original ruling of the ownership should not impose any restrictions on the owner. However, according to the second view, the purchaser can be restricted from disposing the purchased good provided that the restriction is not excessively imposed on him. Nevertheless, permitting the total restriction would be consistent with the view of Ibn Shubrumah. Perhaps, Ibn Shubrumah did not intend that the parties in the contract may freely stipulate such a condition. At least, his view should be construed as an opinion that can be practiced when the *maslahah* requires such a condition. In other words, the motivating factor for such restriction should be legally valid and legitimate from the Shari’ah perspective. The *maslahah* for creating such a condition could be solely for the benefit of the contracting parties or third party.

Interestingly, this view could also be understood from the statement attributed to Ibn Taymiyyah (1995):

فإذا كان الملك يتنوع أنواعا وفيه من الإطلاق والتقييد ما وصفته وما لم أصفه : لم يمتنع أن يكون ثبوت ذلك مفوضا إلى الإنسان يثبت منه ما رأى فيه مصلحة له ويمتنع من إثبات ما لا مصلحة له فيه . والشارع لا يحظر على الإنسان إلا ما فيه فساد راجح أو محض . فإذا لم يكن فيه فساد أو كان فسادا مغمورا بالمصلحة لم يحظره أبدا

Meaning: “If the ownership can be diversified according to its types such as absolute and restricted ownership as what I have mentioned and what I haven’t mentioned, then it is not prohibited that creating such a condition is the right of a person, whereby he can stipulate it whenever he sees a *maslahah* for that thus, it is prohibited to create such when the *maslahah* is not there. The Shari’ah does not prohibit a person to do something except things that have excessive or pure *fasad* (harm). If there is no harm or the harm is overwhelmed by the *maslahah*, then the Shari’ah law will never prohibit it.

5.2 Takyif fiqhi of Beneficial Ownership in Immovable Property

Immovable property in *Shari’ah* is known as *mal aqar*, which can be defined as every property that cannot be moved from one place to another such as land and building (Badran 1973, Awang 1994). It is worth to note that there is no difference between sale of movable property and immovable property except in the form of *qabd* (possession). Thus, the earlier discussion is also applicable for immovable property.

In terms of *qabd*, it can be defined as *hiyazah* (controlling) and *tamakkun* (having the power or ability) (*al-Mawsu’ah al-fiqhiyyah*, 1994). In general, the jurists have categorised *qabd* into two forms: *qabd haqiqi* (actual/physical possession) and *qabd hukmi* (constructive possession). Furthermore, they have differentiated between the ways of *qabd* for movable property and immovable property.

Basically, the scholars have unanimously agreed that the *qabd* for movable property is effective when the buyer receives or takes the goods with his hand upon paying the price especially for the small goods such as watch and clothes. This is called in fiqh as *tanawul bi al-yad* (taking by hand). Al-Sharbini (1997) states:

وإن كان المنقول خفيفاً، فقبضه بتناوله باليد

Meaning: "If the movable property is light, then its possession is done via taking by hand". The same intent has been shared by al-Buhuti (2003) where he views:

ويحصل القبض فيما يتناول، كالجواهر والأثمان بتناوله، إذ العرف فيه ذلك

Meaning: "The possession would be achieved for things that can be taken by hand such as gems and money as a customary practice".

As for immovable property, the *qabd* should be done through *takhliyyah wa tamkin* (i.e. granting the purchaser access to the goods without any hindrance and restrictions). They only differ in regard to the certain conditions. The *takhliyyah wa tamkin* is usually exemplified by giving a key (in the case of house). Al-Sharbini (1997) says when clarifying the *qabd* of immovable property:

وقبض غير منقول من أرض وشجر ونحو ذلك بالتخلية لمشتري، بأن يمكنه منه البائع ويسلمه المفتاح

Meaning: "And the possession of immovable property such as land, trees and the like would be done through *takhliyyah*, i.e. granting the purchaser access to the goods by giving the key".

Giving a key is only an example for taking possession in the past. The way of *qabd* actually should be determined by the *urf* (the custom). Therefore, the scholars have classified *qabd* under the legal maxim:

كل اسم ليس له حد في اللغة، ولا في الشرع، فالمرجع فيه إلى العرف

Meaning: "Every name which is not defined literally or technically in Shari'ah will be dependent upon the *urf* (custom)" (Ibn Taymiyyah, 1995).

It is for this reason that possession of things has differed in accordance with the nature of things and differences among people with respect to things (AAOIFI, 2008).

In analysing the *takyif fiqhi* of beneficial ownership in immovable property, it is very important to look into the scope of transactions as provided in the law. There are three main laws that govern the immovable property in Malaysia, i.e. National Land Code 1965 (NLC), Contract Acts 1950 (CA) and Equity.

NLC only concerns with two things in any transactions with respect to the land, the use of instruments; the registration of those registrations in accordance with the Sec 292 of NLC. NLC does not concern itself with the significance of the contract, but it is actually governed by the Contract Act.

Historically, the practice of registration of land ownership in Islam was essentially for the purpose of taxation (Awang 1994). In Islam, registration is not a compulsory. Instead, it is a highly recommended act in order to secure the ownership of a person. However, registration can be considered crucial in the modern time, especially when a very large sums of money is involved. It is more effective in providing evidence of each party's rights and obligations. Hence, it could be changed from being a recommended act to a mandatory one based on *maslahah* due to the changing attitudes of mankind. It can prevent and resolve future disputes that may arise from any transactions.

As discussed earlier, legal ownership in immovable property means a registered ownership (Note 21). However, if the contract has been executed between a seller and buyer, ownership is deemed transferred though the legal title still remains under the seller's name. The buyer is considered a beneficial ownership based on the law of Equity. Nevertheless it is recommended for the buyer to register his name to protect his right over the property.

Thus beneficial ownership is recognized as a true ownership in Shari'ah. If the beneficial owner is restricted from certain rights over his property, then the three *takyif fiqhi* as stated in movable property are applicable to immovable property as well.

From the above mentioned, it could be concluded that the transfer of ownership in Islam immediately occurs once the offer and acceptance have been signed. Moreover, this principle is also shared by the Common law, which actually inherited it from the Islamic law. Historically, the emergence of the beneficial ownership was because of the transaction involving a transfer of ownership of immovable property (*mal aqar*) whereby the property (i.e. the land) became a trust in the hand of a transferee. In current practice, however, the beneficial ownership is used in the transaction of selling and buying a land when the title has not yet been registered under the new owner (i.e. purchaser). In line with the concept of bare trust, although the original owner (i.e. seller) still holds a legal title of the alienated land, he is only regarded as a trustee. This suggests that the beneficial owner is

the real owner. From the legal perspective, it is called beneficial owner because the registration of the title is not being done while the contract is already settled and signed. The trust in the concept of bare trust is actually a constructive trust.

Therefore, since beneficial ownership is could be real ownership, then its use in financial products should be scrutinised carefully. Legal implications of *milkiyyah* as required in Shari'ah must be reflected in the beneficial ownership. Hence, in general, the beneficial ownership is used only for the purpose of registration, but its application in Islamic financial product must be evaluated based on a case by case basis.

6. Conclusion

Based on the above discussion, it can be said that the emergence of the beneficial ownership is because of the transaction involving a transfer of ownership of immovable property (*mal aqar*) whereby the property (i.e. the land) becomes a trust in the hand of a transferee. It also relates to the historical development of equitable principle in law, and specifically what is embodied in the trust law. Thus, originally, the term "beneficial owner" was used in the context of sale of land. Nevertheless, the scope of its use has been widely implemented which includes movable property.

In the context of finance including Islamic finance, the term "beneficial ownership" is not only exists in dealing with land, rather it also involves sales of commodities and vehicles. In the land matters, beneficial ownership comes into the picture when the real owner is still in the process of registering the ownership in the land office. However, in the case of Islamic finance, it is still ambiguous and vague. Thus, it needs to be re-evaluated in order to identify whether it fulfils the characteristics of *milkiyyah* as required by *Shari'ah*. In addition, the application of beneficial ownership in the Islamic finance should be critically analysed based on a case by case basis, simply because contracts underlying the Islamic financial products differ from one to another.

Hence, in general, it can be said that beneficial ownership could be recognised as real ownership provided that it fulfils the required characteristics of *milkiyyah* in Shari'ah because *Shari'ah* has allowed the transfer of ownership based on a sole basis of contract. This view can be considered as more harmonious provided that all the documentation and agreement of the contract made are in accordance with the *Shari'ah* rulings.

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Notes

Note 1. Exclusivity refers to the right of the owner to exclude others from posting claims to similar use rights on specific property. This is what has been termed by scholars as "*ikhhtisas hajiz*" (al-Qudsi, al-Khafif & al-Zarqa).

Note 2. According to Wikipedia, "equitable remedies are judicial remedies developed by courts of equity from about the time of Henry VII to provide more flexible responses to changing social conditions than was possible in precedent-based common law".(see more details in http://en.wikipedia.org/wiki/Equitable_remedy). The remedies are considered as the remarkable contributions of equity because it is the '*add on*' of the legal remedies. They aim at enforcing rights and their common features are discretionary depending on the inadequacy of common law remedies (Rashid & Hingun, 1999).

Note 3. Chancery is synonymous and interchangeable with equity (Black, 1968).

Note 4. *Curia regis* is a Latin term meaning "royal council" or 'king's court". It was the name given to councils of advisors and administrators who served early French kings as well as to those serving Norman and later kings of England (Wikipedia, 2014). It was also known as Aula Regis from which all the Courts of Justice have emanated (Osborn, 1927).

Note 5. Writ is "a document in the King's name and under the seal of the Crown, a Court or an officer of the Crown, commanding the person to whom it is addressed to do or forbear from doing some act". An original writ was anciently the mode of commencing every action at Common law (Osborn, 1927).

Note 6. There used to be difference between common law and equity. Common law was regarded as technical and rigid but equity was not. Equity was the moral element, the 'moral curtain' of the law. Equity followed the law. Today, the two concepts could be considered fused and the latter has been accused of being rigid as the

former (see. Andrew Grubb (1983), Review of J. D. Heydon, and R. P. Austin 'Cases and Materials on Equity and Trusts' The Cambridge Law Journal, 42, pp. 159-161).

Note 7. This issue has been raised by *Jabatan Ketua Pengarah Tanah dan Galian* (JKPTG) in the Consultation Paper (CP) on Review of the National Land Code 1965 where it covers 4 parts with 21 issues and 31 questions.

Note 8. Basically, according to the English law, property was classified into real property (realty) and personal property (personalty). Real property, theoretically, and in most cases actually, is immovable and permanent; while personal property, on the other hand, theoretically, and in most cases actually, is movable and temporary (Childs, 1914).

Note 9. Interview with Mr. Aminurasyed bin Mahpop, Faculty of Law, UKM on 3rd Sept 2014.

Note 10. The followings are excluded from being goods under the SOGA, namely land, actionable claims and money.

Note 11. Interview and discussion with Mr. Aminurasyed bin Mahpop, Faculty of Law, UKM on 3rd Sept 2014.

Note 12. Interview with Nik Mohd Radhia, an advocate and solicitor at Messr ALDA SHUKRI KHAIRI & ASSOCIATES on Sept 17, 2014.

Note 13. Interview and discussion with Mr. Aminurasyed bin Mahpop, Faculty of Law, UKM on 3rd Sept 2014

Note 14. This can be seen from then case *Teh Bee v K Marithamuthu* [1977] 2 MLJ 7. In this case, Ali Ag. CJ (Malaya) has decided that registration is everything under the Torrens System and it was regarded as a conclusive evidence in land matters.

Note 15. He mentions that sale contract is a contract of exchange, i.e. transfer of ownership for another's transfer of ownership and delivery for another delivery (*عقد معاوضة تملك بتمليك وتسليم بتسليم*). See al-Kasani, *Bada'i al-sana'i*, vol 11. p. 198.

Note 16. Ulayyash notes that the reason for including the phrase "without consideration" in the definition of hibah because to exclude sale contract since it is a contract of transfer of ownership with consideration. See Ulayyash, *Minah al-jalil sharh mukhtasar al-khalil*, vol. 17, p. 93.

Note 17. al-Nawawi defines sale contract as the exchange of property for another property or the like for transferring ownership (al-Nawawi, *al-Majmuk*, vol. 9, p. 149).

Note 18. Ibn Qudamah defines sale contract as the exchange of property for another property for taking ownership (تملكا) and transferring ownership (تمليكا). (Ibn Qudamah, *al-Mughni*, vol. 6, p. 5).

Note 19. In Islamic finance, this is usually being practiced such as in treasury products involving selling and buying commodities. Thus, in legal documentations of such products, under the title transfer, there will be a condition states: "the beneficial ownership of the Commodity shall be deemed to have been transferred to you upon acceptance of this Seller's OfferOn the Settlement Date, we shall transfer legal title of the Commodity to you and this will reflected in the Commodity Account.

Note 20. Jabir bin Abdullah narrated that he was once travelling on his camel which had become so slow that he intended to get rid of. The Prophet passed by (after Jabir told him the story), and poked the camel with his stick, and asked Jabir to ride it again. The camel was much faster that it had ever been before. The Messenger of Allah then said to Jabir, "Sell it to me for one *uqiyah* (ounce) of gold." Jabir said, "No". He again said, "Sell it to me for one *uqiyah* of gold". Jabir says, "I sold it for one *uqiyah* and stipulated that I should ride it to my house". When we reached (Madinah) I took that camel to the Prophet and he gave me its price. I returned home but he sent for me (and when I went to him) he said, "Do you think I asked you to reduce the price to take your camel? Take your camel and your money it is all yours". Agreed upon and this is Muslim's version.

Note 21. According to the Public Ruling published by Inland Revenue Board of Malaysia or LHDN, legal owner is defined clearly as the person whose name is registered or documented as proof of ownership. For land asset, legal owner is the person whose name is on the land grant.

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