

# Problems of Take Over and Implementation of Contracts in Indonesian Sharia Banking

Fathor AS<sup>1,2</sup>, Fatimatul Fatmariyah<sup>1\*</sup>, M. Lathoif Ghozali<sup>3</sup>, Nadiyah<sup>1</sup>,  
Adityani Nur Witasari<sup>1</sup>

*1 Trunojoyo Madura University*

*2 Universitas Negeri Surabaya*

*3 Universitas Islam Negeri Sunan Ampel Surabaya*

*\*Corresponding author. Email: fatmariyahfatimatul@gmail.com*

## ABSTRACT

The purpose of the study is to know: 1). The takeover problem is based on MUI fatwa 31 of 2002, 2). Implementation of the contract in the takeover, 3). The suitability of the contract in takeover is based on MUI fatwas through literature research methods. Result 1). The takeovers carried out have different backgrounds, generally due to benefits, but the problems are: a). There are customer doubts about the contract and the legal dualism between PBI vs Fatwa; b). Not all alternatives to fatwa are used by SFI, c). there is a confusion of opinion so that new contracts appear different from fatwa, and d). Sharia aspects of takeover compliance are not by Sharia. 2). The implementation of the takeover contract from CFI to SFI is very varied partly according to alternative MUI fatwa, and 3). The contract used by Sharia banks in taking over based on the MUI 31 of 2002 fatwa is partly by the fatwa.

**Keywords:** *Sharia Bank, take Over, Contract.*

## 1. INTRODUCTION

The shift in the lifestyle of Indonesian people becoming aware of Sharia has influenced the development of the Sharia financial industry, especially the banking industry. This phenomenon requires Sharia banking to respond quickly and provide various forms of financial services that meet people's needs per Islamic law. The Indonesian people need debt transfer (Takeover) from conventional banks to Sharia banks. So, Islamic banking needs to adopt and provide this mechanism.

DSN-MUI, as a representative institution gathering together Muslim Theologian, scholars, and thinkers which until now has the mandate to determine whether transactions that occur in the Islamic economic system are halal or haram, has issued a fatwa related to the takeover of sharia banking as a form of solution for people who want to move their transactions to sharia financial institutions.

So, in fatwa Number 31/DSN-MUI/VI/2002, DSN-MUI said that takeover in Sharia involves transferring customer debt from conventional banks to Sharia banks (DSN, 2002). The customer stated in the DSN-MUI Fatwa is a (potential) Sharia Financial Institution customer who has credit (debt) to a Conventional Financial Institution to purchase assets and wishes to transfer his debt to a Sharia Financial Institution. In contrast, the asset in question is the customer's asset, which he bought through credit from a Conventional Financial Institution, and the credit financing still needs to be paid off (DSN, 2002).

Furthermore, this takeover mechanism must be by Islamic Sharia. Therefore, the takeover mechanism in Sharia banking is regulated in the DSN-MUI fatwa Number 31 of 2002. In its implementation, quite a few problems arise in carrying out the over, namely that banks do not understand how to determine a suitable takeover mechanism because there are too many rules from both Bank Indonesia (PBI) and the DSN-MUI fatwa or contracts that will be and are used by sharia banking are not by Islamic Sharia (Iskandar & Andira, 2018). There are gaps or contradictions in normative takeover between PBI vs. DSN-MUI Fatwa.

Based on these problems, this article aims to find out: 1). What problems occurred in the takeover of Sharia banking based on the DSN-MUI fatwa No. 31 of 2002? 2). How to implement the contract in takeover in Sharia banking based on DSN-MUI fatwa No. 31 of 2002, and 3). Is the contract used in a takeover by Sharia banking by DSN-MUI fatwa No. 31 of 2002?

## 2. RESEARCH METHODES

The method used in this research is library research, a series of activities relating to library data collection methods, reading and recording and processing library collection materials without needing field research (Zed, 2008). The approach used is qualitative-descriptive by emphasizing analysis of the process of inference and the dynamics of relationships between observed phenomena using scientific logic and producing descriptive data in the form of written words from what is observed (Azwar, 2010).

## 3 RESULT

The results of the search for various literature related to this research topic are presented in the form of a description as follows:

### 3.1. Take Over

One of the services in banking that customers need is debt transfer. Debt transfer in the banking world is given the term take over, take over in the English-Indonesian Dictionary means taking over (Echols & Sadily, 2007), while broadly, Muda (2003) defines take over as a takeover or within the scope of the company is a change of interest. In controlling a company, more broadly, Rochaety & Tresnati (2013) said that take over, apart from having the meaning of changing interests in controlling a company, also has another meaning, namely the takeover of a company by another company.

In the world of Sharia banking, the term debt transfer (take over) has been discussed in Bank Indonesia Circular PBI 17/10/PBI/2015 (Bank Indonesia, 2015b) and DSN-MUI Fatwa Number 31 of 2002 concerning Debt Transfer (DSN, 2002). *Debt transfer* is the transfer of customer debt from conventional banks/financial institutions to sharia banks/financial institutions (Bank Indonesia, 2015b; DSN, 2002). Apart from that, Adiwarmar Karim (2017) said that takeover is Financing arising from ongoing non-shariah transactions carried out by Sharia banks at customers' request. In the context of this topic, the takeover referred to is technically a debt transfer that can be carried out from a conventional bank to a Sharia bank and from a Sharia bank to another Sharia bank (Nurnasrina & Putra, 2018). However, in this article, the discussion focuses more on taking over from conventional to Islamic banks.

In carrying out a takeover, there are several schemes used. The takeover scheme explains how a debt transfer product works from a conventional bank to a Sharia bank, namely from the request for takeover until the customer pays the debt installments at the Sharia bank. In the DSN-MUI fatwa Number 31 of 2002, it is explained that there are several takeover schemes, namely: 1) The customer submits a request to the Sharia Bank to take over his debt at a conventional bank, 2) The Sharia Bank provides qardh funds (bailout funds) in the amount of the customer's debt. At a Conventional Bank, the customer signs a qardh contract; 3) A Sharia bank employee accompanies the customer to pay off the debt at the Conventional Bank with qardh funds; 4) The customer submits collateral in the form of gold to the Sharia Bank to be stored at the Sharia Bank, and 5) The customer pays rent/ ujah for the maintenance and safekeeping of collateral at Sharia Banks (DSN, 2002).

### 3.2. Take Over Agreement in PBI & DSN MUI Fatwa

In the Bank Indonesia Regulation (PBI) regarding takeover, it is stated in article 12 which explains that if the Bank provides credit or additional Financing (top-up) based on property that is still collateral from the previous Sharia KP or KP, the following provisions apply: a). Such additional credit or Financing (top-up) is treated as new credit or Financing; b). LTV Ratio or FTV Credit or Financing Ratio as intended in letter a refers to the LTV Ratio or FTV Ratio as intended in Article 6 or Article 9; and c). The amount of additional Credit or Financing (top-up) provided by the Bank must consider the debit balance of previous Credit or Financing that used the same collateral. Meanwhile, Article 13 states that in the case of a Bank providing Credit or Financing by taking over Credit or Financing from another Bank, the following provisions apply: a). Credit or Financing which is only intended for repayment of previous Credit or Financing at another Bank, is not treated as new Credit or Financing; or b). Credit or Financing accompanied by additional (top-up) is treated as new Credit or Financing as stipulated in Article 12 (Bank Indonesia, 2015b).

In principle, the credit/top-up financing regulations are no different from the old provisions. For regulations regarding credit/financing by taking over credit/financing from another bank (take over), if the credit/financing is only to pay off credit/financing at another bank, then the credit/financing is not treated as new credit. On the other hand, if the takeover of credit/financing is accompanied by an addition (top-up), then the credit/financing is treated as new credit (Bank Indonesia, 2015a).

Meanwhile, in the DSN-MUI fatwa 31 of 2002 concerning the transfer of debt, it is said that in carrying out a takeover in Sharia banking, there is Financing that must be spent in transferring the debt, and the Financing issued must go through a contract mechanism that is by Islamic Sharia. The contracts used in takeover vary greatly, and each contract has conditions that have been determined in the Sharia Banking Product Codification (Karim, 2017), more specifically in the DSN-MUI fatwa Number 31 of 2002 (DSN, 2002) reinforced with appropriate guidelines with Islamic teachings, namely:

Word of Allah SWT, QS. Al-Maidah (5):1:

يأيتها الذين آمنوا أوفوا بالعقود

"O Believers! Fulfill those aqads..."

Word of Allah SWT, QS. Al-Isra' (17):34

وأوفوا بالعهد، إن العهد كان مسءولا

"...and fulfill your promise: indeed, you will be held accountable for your promise."

Word of Allah SWT, QS. Al-Baqarah (2):275:

وأحل الله البيع وحرم الربا

"... and Allah has permitted buying and selling and prohibited usury..."

The word of Allah SWT regarding the command to help each other in positive actions, including QS. Al-Ma'idah (5):2:

وتعاونوا على البر والتقوى ولا تعاونوا على الإثم والعدوان، واتقوا الله، إن الله شديد العقاب

"...and help you in (doing) virtue and piety, and do not help in committing sins and transgressions. And fear Allah. Indeed, Allah will be very severe in punishment."

Fiqh Principles:

الأصل في المعاملات الإباحة إلا أن يدل دليل على تحريمها

"All forms of muamalah are permissible unless a reason forbids it,"

DSN-MUI emphasized that the provisions intended in the fatwa are: a). Debt transfer is the transfer of customer debt from conventional banks/financial institutions to sharia banks/financial institutions; b). Al-Qardh is a loan agreement from Sharia Financial Institution to a customer with the provisions that the customer is obliged to return the principal of the loan he received to Sharia Financial Institution at the agreed time and method of return, c). Customers are (potential) Sharia Financial Institution (SFI) customers who have credit (debt) to Conventional Financial Institutions (CFI) for asset purchases, who wish to transfer their debt to Sharia Financial Institution, and d). Assets are customer assets purchased via credit from Conventional Financial Institutions, and the credit payments have not been paid in full (DSN, 2002).

This fatwa also states that the contract can be carried out through four alternatives, as stated in the DSN-MUI fatwa Number 31 of 2002.

Alternative I. SFI gives qardh to customers, customers sell assets to SFI, SFI sells in murabahah the assets that belong to them to customers, and Fatwa No. 19/DSN-MUI/IV/2001 concerning al-Qardh and Fatwa No. 04/DSN - MUI/IV/2000 concerning Murabahah also applies to the implementation of debt transfer financing as referred to in alternative I.

Alternative II. SFI purchases some of the customer's assets with CFI's permission, so in this way, there is syirkah al-milk between SFI and the customer regarding these assets. The portion of assets purchased by SFI is the portion of assets equal to the customer's debt (remaining installments) to CFI. SFI sells in murabahah part of the assets that belong to it to customers, with payment in installments, and fatwa No. 04/DSN-MUI/IV/2000 concerning Murabahah also applies in the implementation of debt transfer financing as referred to in alternative II.

Alternative III. In arranging to obtain ownership of assets, customers can enter into an Ijarah agreement with SFI by DSN-MUI Fatwa number 09/DSN-MUI/IV/2002; if necessary, SFI can help cover customer obligations by using the al-Qardh principle by the Fatwa DSN-MUI number 19/DSN-MUI/IV/2001. The Ijarah agreement must be separate from the provision of bailouts. The amount of compensation for Ijarah services may not be based on the amount of bailout provided by SFI.

Alternative IV. SFI provides cards to customers. The customer sells assets to SFI. SFI leases the assets that belong to it to customers with the al-Ijarah alMuntahiyah bi al-Tamlik agreement. Fatwa No. 19/DSN-MUI/IV/2001 concerning al-Qardh and fatwa No. 27/DSN-MUI/III/2002 concerning alIjarah al-Muntahiyah bi al-Tamlik apply in the implementation of debt transfer financing in alternative IV.

So, it can be concluded that the types of contracts contained in the DSN-MUI fatwa number 31/DSN-MUI/VI/2002 regarding takeover are 1). Qardh Agreement, 2). Murabahah Agreement, 3). Syirkah Al-Milk Agreement, 4). Ijarah Agreement, and 5). Akad al-Ijarah al-Muntahiyah Bi al-Tamlik (IMBT). These types of contracts in implementing takeover cannot stand alone but must be combined by the choices, as stated in the DSN-MUI fatwa above. In short, the alternative combination of contracts based on the DSN-MU fatwa is 1). Qardh and Murabahah contracts, 2). Syirkah Al-Milk and Murabahah Contracts, 3). Qardh and Ijarah contracts, and 4). Qardh Agreement and Ijarah Muntahiyah Bi al-Tamlik (IMBT) (Saraswati & Hidayat, 2017).

## 4. DISCUSSION

### 4.1. Take Over Problem

Takeover carried out by customers has different backgrounds. However, in general, it is caused by customers feeling disappointed, and customers are worried about the uncertainty of the number of installments at conventional banks, the increase in installments that must be paid, and the customer's desire to get an additional ceiling amount from the loan. Previously (Maulida et al., 2021)(Naingolan, Yunita, 2018), besides that, customers feel that they get many benefits when taking over from a conventional bank to a Sharia bank, there is education on the importance of transactions according to Sharia economic principles which can bring benefits, justice, and peace of mind, straightforward requirements, no penalties, and cheap installments (Mustofa, 2019), another reason customers switch to Sharia banks is that customers want Financing based on the sharia system, easily accessible to the public, the process is fast, administration and insurance costs are cheaper so that customers are interested in switching to Sharia Banking (Juliana et al., 2019). It means the customer's motivation for taking over to a Sharia bank is the many benefits they feel.

However, despite the many benefits experienced by customers when taking over from a Sharia bank, there are quite a few problems that occur in carrying out the take-over, meaning that, on the other hand, the take-over still needs to be improved. The takeover problem, based on several research shows that 1). The public's low understanding of contract law has led to narrow and wrong interpretations of contracts (Saraswati & Hidayat, 2017), 2). There is a legal dualism between PBI vs DSN-MUI Fatwa, which sometimes invites conflict, 3). Not all alternatives in the DSN-MUI fatwa regarding debt transfer are used in debt transfer transactions carried out by Sharia financial institutions, 4). The fatwa issued by DSN-MUI needs more depth. The laws and procedures for implementing takeover have resulted in much debate, such as the syirkah al-milk wa Al-Murabahah agreement for residential Financing. The party who refuses thinks that a contract is a hybrid contract, whereas for the party which allows the contract, it is not a gharar contract, and the agreed agreement and conditions are explicit. The ease with which Fatwas can also be issued results in SFI using the fatwas of these contracts for their interests by combining independent contracts into one new contract, such as the hawalah wal al-murabahah contract, which becomes a new contract as a combination of the hawalah and murabahah contracts. The hawalah wa almurabahah contract is not a type of multi-contract in the DSN fatwa regarding debt transfer. The lack of depth in this fatwa has resulted in confusing thoughts and opinions by practitioners so that new contracts emerge that are not by Sharia that occur in the field (Ruchhima & Lahuri, 2019); apart from that, because DSNs ijthihad in producing Sharia products is not sufficient a priori by relying on the book - classical books that are very normative, but must also rely on the economic demands/needs of modern financial markets (Faizi & Shuib, 2021), 5). Most of the fatwas issued by the DSN-MUI emerged due to the pressure of SFI practitioners to provide legality for the Sharia financial institution products they were developing without looking in detail at the violations of Sharia law that would occur in the field, and all fatwas have an essential sharia basis. The same argument as the basis for the adoption of the fatwa shows that the fatwa issued by the DSN MUI is not detailed and lacks depth regarding the law that has been established (Munthe, 2016), 7). The Sharia compliance aspect of takeover financing at Sharia banks is not by Sharia principles, namely the need for clarity in the initial Financing taken by customers at conventional banks. Because if the initial credit taken from a conventional bank is a KPR, the clarity of the withdrawal of funds is unclear whether the funds are for initial construction or renovation. That is where bank doubts occur (Iskandar & Andira, 2018).

### 4.2. Implementation of the Agreement in Take Over

The implementation of the contract in the takeover, which is included in the hybrid contract model, really needs to be well understood regarding the concept, theory, and basis; the aim is so that all Sharia economic stakeholders will not experience errors and fatalities so that it can cause harm, difficulties and setbacks for Islamic finance and banking industry. All parties interested in Sharia economics are required to understand and apply this concept. So, all parties related to Sharia economics and finance are obliged to understand this theory and practice correctly and well (Arafah & Hamdani, 2018), as in Indonesia, it has been stated and issued a fatwa by the DSN-MUI, one of which is the DSN-MUI fatwa Number 31 of 2002 concerning Take Over.

Based on DSN-MUI fatwa Number 31 of 2002, several types of contracts can be used to carry out takeovers. The alternative variations determined by DSN-MUI must be adjusted to the type of transaction that will be taken over. These various alternatives make it easier for customers and banks to decide on the type of Financing and contract to use. In terms of Sharia, the types of syirkah al-milk, murabahah, qardh, ijarah mutaniya bi al-tamlikitu contracts that have been used by Sharia banking are in accordance with Sharia which avoid usury and gharar (Mustofa, 2019).

In its implementation, the contracts used in the takeover from CFI to SFI vary significantly according to customer needs and banking policies. Based on a study of several research results, it was found that all alternative models have been implemented by Islamic banking in carrying out a takeover.

The implementation of the take-over agreement based on the DSN-MUI fatwa Number 31 of 2002 is demonstrated by several research results from Saraswati & Hidayat (2017) and Mas'ud (2020), which show that the take-over process carried out by Sharia banks to conventional banks uses the syirkah al-milk system. , then provide Sharia financing products to customers with ba'i murabahah contracts. Furthermore, Saraswati Hidayat (2017) found that Islamic banks have offered alternative combination contracts as stated in fatwa 31/DSN-MUI/VI/2002. Huda & Zakiyah (2020), in their research results, show that the provision of qardh services in taking over customer principal debt and the most suitable alternative to be implemented in take-over Financing is the third alternative, even Juliana (Juliana et al., 2019) in her research shows that the contract used in sharia banking is murabahah and qardh contracts. Fitri & Akbar (2021) found that debt transfer uses alternative 1 of the DSN-MUI fatwa Number 31 of 2002. It means that in implementation, it is empirically found that many Sharia banks and customers use contracts by DSN-MUI fatwa number 31/DSN-MUI/VI/2002 concerning debt transfer.

Apart from that, there is a take-over mechanism different from the DSN-MUI fatwa regarding the transfer of debt. The mechanism used outside of this is caused by various things, including the confusion of thoughts and opinions by practitioners, resulting in the emergence of new contracts that are not by Sharia; research by Juwita Anggraini & Mardiah (2016) found that the contract design used by Sharia Banks was Hiwalah and Murabahah contracts based on PBI no 17/10/PBI/2015 for take over Financing. In their research, Maulida et al., (2021) show that Sharia Banks use a mutanaqisah musyarakah agreement in terms of takeover. Likewise, the fact of Nurnasrina & Putra (2018) is that the transfer of debt from conventional banks to sharia banks can be done with the provisions as regulated in the DSN MUI fatwa No.12/DSN-MUI/IV/2000 concerning Hawalah, even Ulul Azmi Mustofa & Sari (2021) said that the implementation of debt transfer in resolving debts uses a multi-service ijarah contract. There is no qardh contract at the beginning of the settlement or repayment of the customer's remaining debt to the previous Bank

### **4.3. Compatibility of the Take Over Agreement with the DSN-MUI Fatwa**

DSN-MUI fatwa number 31/DSN-MUI/VI/2002 regarding the type of contract for taking over is clear, namely 1). Qardh Agreement, 2). Murabahah Agreement, 3). Syirkah Al-Milk Agreement, 4). Ijarah Agreement, and 5). The al-Ijarah al-Muntahiyah Bi al-Tamlik (IMBT) contract, which in its implementation is carried out by combining the contracts in the various alternatives provided, namely 1). Qardh and Murabahah contracts, 2). Syirkah Al-Milk and Murabahah Contracts, 3). Qardh and Ijarah contracts, and 4). Qardh Agreement and Ijarah Muntahiya Bi al-Tamlik (IMBT).

Sharia banking has implemented various alternatives based on the DSN-MUI fatwa number 31/DSN-MUI/VI/2002, such as the findings of Mustofa (2019), which states that the types of contracts from the DSN-MUI state that syirkah al-milk, murabahah, qardh, ijarah Muntaiya bi al-tamlikitu is by Sharia which avoids usury and gharar. Furthermore, Adiwarman Karim (2017) stated that Qardh contracts and murabahah contracts have been implemented in Islamic banks. Likewise, research by Iskandar & Andira (2018) found the fact that the contracts provided by Sharia banks were qard contracts, murabahah, and IMBT contracts by the DSN-MUI fatwa regarding takeover, and the findings of Fitri & Akbar (2021) showed that the debt transfer mechanism uses alternative 1. However, in other realities, there are still banks who make mistakes in implementing their contracts, and only some alternatives in the DSN-MUI fatwa on debt transfer are used in debt transfer transactions carried out by customers and Sharia financial institutions (Ruchhima & Lahuri, 2019)

Many problems caused the DSN-MUI fatwa not to be adequately implemented, including 1). The dualism of Sharia banking law, namely PBI vs DSN-MUI Fatwa, 2). The lack of depth in the fatwa issued by the DSN-MUI resulted in practitioners' confusing thoughts and opinions, resulting in new contracts that were not in accordance with Sharia in the field (Ruchhima & Lahuri, 2019), 3). Sharia compliance aspects of takeover Financing at Sharia banks are not by sharia principles (Iskandar & Andira, 2018).

Some research shows inappropriate contract patterns based on Ulul Azmi Mustofa & Sari (2021) findings, which found that there was no qardh contract at the beginning of the settlement or repayment of the customer's remaining debt to the previous Bank. Juwita Anggraini & Mardiah (2016) found that the design of the take-over financing contract used by Syariah Banks using Hiwalah and Murabahah contracts, and the findings of Nurnasrina & Putra (2018) showed that the transfer of debt from conventional banks to sharia banks was carried out with the provisions as regulated in DSN-MUI fatwa No.12/DSN-MUI/IV/2000 concerning Hawalah, as well as findings (Wahab, 2020) show that the multi-contract model in the musyarakah mutanaqishah contract on the iB Muamalat KPR product at Bank Muamalat Indonesia Tbk Surabaya Mas Mansur uses two contracts separate, namely the Musyarakah and Ijarah contracts. It is adjusted to the DSN-MUI fatwa no. 72 of 2008 concerning musyarakah mutanaqishah, No. 08/DSN-MUI/IV/200 concerning Musyarakah and 09/DSN\_MUI/IV/2000 concerning Ijarah.

Based on the findings above, there are banks that comply and those that do not comply or misinterpret the DSN-MUI DSN-MUI fatwa Number 31 of 2002 concerning Debt Transfer. Suppose Sharia banking has established the DSN-MUI fatwa as the basis for the technical operations of Sharia banking. In that case, Sharia banking will inevitably comply, submit, and implement the fatwa properly and correctly so that the aspect of Sharia compliance in Sharia banking can be more accountable. Supposedly, the fatwa that DSN-MUI has issued is better than the resolution of the Sharia Advisory Council (SAC) of the Central Bank of Malaysia, where the SAC needs to convey clear rules and procedures in issuing sharia decisions. The decision was challenged in court (Asni & Sulong, 2018). However, deviations from the DSN-MUI fatwa by Indonesian Sharia banking are understandable; this is, of course, because there are various regulations from different institutions, namely BI and DSN-MUI, which can be confusing, and besides that, because SDI Sharia banking does not fully understand the substance related to sharia compliance and constrained by the quality of SDI in banking.

Based on the analysis results, it is known that customers and Sharia banks use various types of contracts to take over. The types of contracts used are by the DSN-MUI fatwa number 31/DSN-MUI/VI/2002, but there are also sharia banks that use the DSN fatwa -MUI but outside fatwa number 31/DSN-MUI/VI/2002 concerning debt transfer. There is even Sharia banking, which is clearly outside the DSN-MUI fatwa.

## CONCLUSION

Based on the background, research objectives, and results, it can be concluded that: 1). Problems in carrying out take over include: a). There is customer doubt due to the narrow and wrong interpretation of the contract and the legal dualism between PBI vs Fatwa, b). Not all alternatives to the DSN-MUI fatwa regarding debt transfer are used by Sharia financial institutions; c). there needs to be clarity in practitioners' thoughts and opinions, resulting in new contracts that are not by Sharia, and d). The Sharia compliance aspect of taking over Financing at Sharia banks is not by Sharia principles; 2). The contract implementation used in taking over from CFI to SFI varies according to customer needs and banking policies, and all alternatives have been implemented by Sharia banking in carrying out the takeover. However, Sharia banks still need to use these alternatives in carrying out takeovers, and 3). The contracts used by Sharia banks in carrying out takeovers based on fatwa no.31/DSN-MUI/VI/2002 are primarily in accordance. However, there are still Sharia banks that use contracts that do not follow the fatwa

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