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28 January 2013

Online at <https://mpra.ub.uni-muenchen.de/43991/>
MPRA Paper No. 43991, posted 28 Jan 2013 17:30 UTC

Dispute between Bank and Customer in Bai Bithaman Ajil (BBA)”

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ABSTRACT

This paper discusses the issue and dispute in Bai Bithaman Ajil (BBA) which ended in court cases. It attempts to define the issues and dispute that rise in the practice of BBA and the practical case of BBA in the context of Malaysia and Shariah perspective in regards to BBA practices. Critical analysis from the existence literature is employed to answer the objective of the paper.

It shows that the dispute happened due the customer has less understanding regarding the contract in BBA. The court cases that occurred between the bank and the customer were always won by the bank because the bank has more legality and the judge won the bank in order to maintain the good image of Islamic bank in the eye of public.

Keyword : BBA, Shariah, Bank , Customer, Financing

I. Introduction

1.1. Background

A huge interest in Islamic finance based for this current decade in the world particularly in the Muslim countries, has leads to the tremendous progress in Islamic Financial Industry. This phenomenon is not restricted to Muslim Countries, but it is emerging and spreading wherever there is Muslim Community even though in non-Muslim countries. Nowadays many people are no longer seek the wish to maximize profit only, however there is shift of people’s will to ethical system to fulfill their desire of religiosities’ aspects.

Malaysia as one of the Muslim countries also showed the positive development in this sector. Some Islamic financial products have been created and applied well in this country in accordance with the Shariah principle. The most preferred kind of Islamic financing in Malaysian Islamic Banking Industry is Bai'Bitsamanil Ajil (BBA), due to the easiness compare to other products. However it is also considers as the most debated type of facility in terms of its validity and Shariah-compliance.

BBA is a sale contract which is the payment of the price is deferred to a certain time in the future date with pre agreed payment period. This financial concept has broadly used for many purposes namely home financing, vehicles, education financial package, corporate financing and many more. On the other hand, in the practice, not all of the financing provided by Islamic Bank is well organized in the process of repayment by customers, since they faced the difficulties in discharge their obligation, thus it creates customer's default payment. These cases lead to the dispute between Islamic bank and the customers, and many of the cases were finally end in the court.

1.2. The Objective of the paper

This paper is aim to elaborate the following questions

1. Issues and dispute that rise in the practice of BBA
2. The practical case of BBA in the context of Malaysia and Shariah perspective in regards to BBA practices

1.3. Methodology

Critical view from the existing literature namely journals and research paper will be employed in this paper as methodology. Observation of current condition will be used to complement as a way to response for the objective of the paper.

1.4. Structure of paper

The remaining section of this paper will be structured as follows:

Section two will elaborate the issue rise in BBA transaction and dispute on BBA in case of default payment. **Section three** comprises of the practical case of BBA namely court cases occurred in Malaysia. **Section four** covers the main issues in the practice of BBA in Malaysia from Shariah perspective. **Section five** will sum up the result in the paper. Lastly **bibliography** provides a list of all sources employ as reference materials during the writing process

II. Issue and Dispute in Bai Bithaman Ajil (BBA)

Introduction

As a way to achieve human justice and religious purpose, many Islamic instruments are offered to the customer. The main purpose is to avoid activities which prohibited in the Shariah. However in the practice there are many things which contradict with the teaching of Islam. This section will discuss the issue rise in BBA and the dispute on BBA in the case of default payment.

2.1. Issue on BBA

BBA is the popular instrument in South East Asia countries namely Malaysia, Indonesia and Brunei. Even though this case have shown to be quite unsatisfied for the customers and bankers which then lead to the dispute cases. The question is then, why such an Islamic financing raise disputes whereas it supposes to promote fairness between the parties involved. From the customer's perspective, firstly, they usually not convince when it comes to early redemption or in the event of default. In these matters, with the same APR, BBA contract always brings the customer to end up with a higher financing balance at any certain time if

compare to the conventional loan with the same monthly payment. Like the case faced by Affin Bank vs. Zulkifli Abdullah.

Secondly, when there is default payment, the ownership of the asset remained hold in the bank side as the financier; there are no transfer of ownership by proportionately percentage according to the amount that have been paid by the customer. Thirdly, the price of the assets, particularly the balance of financing at any point of time often exceeds the original price of the asset compare to other Islamic product like MMP (Musharakah Mutaqisah) which is the combination between the Partnership and Ijarah. Critically, the global Fuqaha specifically Shariah scholars in the Middle East diverged of the BBA with regard to the prohibition of interest contract as stated in the guideline from the council of Islamic Ideology (Pakistan) that *“However, although this mode of financing is understood to be permissible under the Shariah, it would not be advisable to used it widely or indiscriminately in view of the danger attached to it of opening a backdoor for dealing on the basis of interest.”*

Furthermore, dissatisfaction from the Banker’s point of view, the BBA fixed financing mode triggers the problems of liquidity management due to the charge of funds especially the deposit rate is determined based on floating rate at the same time, its income decide predominantly based on fixed rate Murabaha and Ijara contracts whereby the rate is unchanging. The divergence in the rate during the installment periods become serious concern for the banks. Usually, the Islamic Bank would substitute its fixed rate Murabaha case flow for floating rate cash flow to match its cost structure.

Presently, one of the improvement methods to BBA is by allowing the rate to be based on variable rate. In addition, BBA has converged to the conventional mode where the computational formula is similar to its counterpart where the profit rate tracks the market interest rate (Meera 2005). Instead of imposing the interest to the customers, Islamic Banks charge a profit rate which is reliant on the rate of market interest. And according to Azhar

(2011), in practice, Islamic and conventional Bank is alike as the purchasers buys the property first and then look for financing. The transactions seem to be look like a loan rather than a sale. This presumption was confirmed by the case of *Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* (1996) where the presiding judge thought that there was no intention of the parties (customer and bank) to effect the transfer of the property, and that it was merely a device to facilitate the BBA transaction.

One thing that should be distinguished is that the profit derived from the deferred payment in loan basis is prohibited as this consider as Riba. However, this transaction in the trading based is allowed by majority Muslim Jurist. Some supporting ideas of taking profit upon the deferred payment in the sale and purchase contract are as follow :

1. Price will possibly rise due to its deferred payment.¹
2. The deferment for some period of time has a value in the price.²
3. Five which is paid in cash is equal to six which is paid on deferred.³
4. The period is part of the price.⁴
5. This is the evidence that the period of time in sale and purchase has its portion in the price; and it is permissible for sale and purchase contracts.⁵

2.2. Dispute on BBA in case of default payment

The problematic arise in BBA cases that lead to the dispute are due to the bank making a claim for the full sale price as stipulated in the property sale agreement (PSA) because the bank have a legal right as noted by High Court Judge Datuk Rohana Yusuf. The bank's agreement that comes first to the court should be respect and implement the clear written term of the contracts and should not interfere with the intention of parties by imputing any other term. As long as the parties involved agreed to the price as stated in the PSA, the defendant is under a legal obligation to pay the full sale price, irrespective of when a breach occurs.

For most cases attracted much public attention is that the way how the bank practitioner calculated the outstanding amount to be repaid by borrower who had defaulted on their BBA contract. The amount has been designed by Banks up to the full periods of the contracts even though the borrower may have defaulted only a few years or months during the financing period. According to the judge, Abdul Wahab, the courts accepts the banks as the owner or became the owner under a novation agreement, then the sale become bona fide sale to the customer. The selling price as one of the debated subject matter was interpreted from the agreement of BBA contracts. Consequently, the bank is the owner of the property by a direct purchase from the vendor or by a novation from its customer.

In brief, most of the dispute cases that pass to the court were won by the Bank. Thus before the contract signed by both parties, the customers have to see clearly and ensure the understanding to avoid any dispute in the future.

III. The Practical Case of BBA

Introduction

The purpose of Islamic economic and finance is to provide human justice and prevent things which are prohibited in Shariah namely riba (usury), gharar (uncertainty) and maisir (gambling). Moreover, there are many Islamic instruments which provide benefit for the bank and the consumer and Bai' Bithaman Ajil (BBA) is one of those instruments. Under the Shariah principle, BBA facility is sale transaction which involves a deferred payment arrangement.

Malaysia as the center for Islamic finance was the first country that implemented BBA. Although there were many scholars against this system, BBA initially was applied in home financing. After the instrument has been implemented, in practice there were many court cases occurred in BBA transaction. The dispute between the bank and the consumer

happened because of several reasons such less comprehension regarding Islamic economic between the consumer and the Bank. This section will analyze two court cases that occurred for BBA in Malaysia namely Dato' Haji Nik Mahmud bin Daud versus Bank Islam Malaysia Berhad and the second one is Affin Bank Bhd versus Zulkifli bin Abdullah.

3.1.Court Cases of Dato' Haji Nik Mahmud bin Daud versus Bank Islam Malaysia

Berhad

The case of Dato' Haji Nik Mahmud bin Daud versus Bank Islam Malaysia Berhad represents the earliest case of dispute between the customer and Islamic banking under the concept of BBA which occurred in 1998. The customer alleging the bank because the instrument executed for the transaction were null and void, and there were no transfer of ownership in the lands concerned.

The court was not in the favor of the customer but won the bank side. By doing this, the court was aim to save the bank because if the court won the customer's side, the bank would not able to recover the profit under BBA. Moreover, it would also jeopardized the industry for Islamic bank and financial institution in Malaysia particularly BBA, because this instrument was considered to be the most preferred type of Islamic financing in Malaysia at that time.

3.2.Court cases of Affin Bank Bhd versus Zulkifli bin Abdullah

On the other hand, there was a court case Affin Bank Bhd versus Zulkifli bin Abdullah in 2006. The cases won by the bank and the customer had to pay the remaining installment.

This case occurred due to default payment of installment before the end of tenure in the form of home financing facility. In the transaction this incident is considered as part of the sale price or the bank selling price profit margin for the unexpired tenure of the facility.

Under BBA agreement, the customer bought the a house for a sum of RM 346,000 and the loans was to be repaid over an 18 year tenure or 216 monthly installments and charge was registered against the title. At the end of December 1997, the defendant resigned from the agreement at his request, the loan facility was restructured and the bank selling price of the house was RM 992,363.40, payable over a period of 25 years. There was no fresh set of documents was executed. After making several payments in total of RM 33,454.19 and the last was in June 2001, the defendant defaulted again. The two actions were filed, namely an order for sale and an order to recover such sums in the event of a deficiency in the proceeds of sale.

The above information shows that the bank did not elaborate the detail of the contract to the customer, which made the customer need to pay more due the Bank restructured the loan facility. The customer had less legal power.

3.3. Economic Implication from BBA court cases

As we can see from the above court cases, both cases won by the bank. The judge intentionally won the bank side in order the bank to cover for its profit. Further, by winning the bank side in these cases, the bank will gain positive image from the economic side and in the public eye.

The purpose of the customer deal with Islamic bank through BBA instrument in order to avoid conventional bank which contain interest and religious purpose, and avoid riba which is prohibited in QS Al-Baqarah. However in the practice of BBA due to less comprehension in the customer side regarding the agreement in BBA contract, the customer

loss the case and receive the burden by paying the remaining installment. Further, the customer has less legality to sustain his right.

Islamic finance and banking is still a young industry in the global market and it is still in the process to be better in the image of the public. If the judge won the customer, the public trust for Islamic bank will be decline and it will be difficult for Islamic institution in the future to offer and promote other Islamic instruments.

In brief, knowledge for Islamic economic and finance should be convey to public in order to avoid legal trick from the banking institution. And also there should be NGO who stand on customer's side regarding legality in the Islamic instrument agreement.

IV. BBA from Shariah perspective

Introduction

BBA is a sale contract which is widely used not only in Malaysia but also in other countries such as Pakistan and Indonesia. It has been practiced by almost all financial institutions in Malaysia since it was implemented by Bank Islam Malaysia Berhad (BIMB) in 1983 (Razak el al,2008). This section will discuss the Shariah perspective in term the concept of BBA and the main issue rise in the practice of Malaysian BBA

4.1. The Concept of BBA according to Shariah

It's very important to explain the different between the BBA, what is practice now by the Malaysian financial institutions, and the original concept of BBA or what is similarity to other instrument namely Al- bay al muajal, Bay' al nasiah and Al bay' bi al taqsit' Al-bay' al muajal literally mean.

According to Kameel (2005), BBA is a sale contract which provides the buyer the benefit of a deferred payment, whereby the deferred price of the sale object carries an

additional profit. It is an extension of the murabahah (cost plus) contract, whereby the goods exchanged is delivered” straight away but the sale price (with profit) is paid in installments, over a long period. However the Murabahah itself being generally for short periods and it used to be called Al bai almu’jl, which has been allowed and proven by all scholar or mazahhib.

The principles that been allowed by Hanafi, Shafiai, Maliki and Hanbali are the price must be fixed and the duration of payment or period of payment any difference in the price or the period makes it invalid. For example if the price for the good is said to be RM 1000 now and there is an agreement in which the buyer must make the payment (RM 1100) in six months and if in one year the payment will be increased to RM 1200¹.

From the definition of BBA, there are two constituent that exist in BBA; first al-Bay’ (sale) which is the main component in the contract exchanges the transfer of ownership of the commodity for a price. Second, Tajil al thaman (deferment payment) depend on agree period. Moreover there are two more component added in recent transaction which are Al-Murabahah (cost plus profit) and Al-taqsit(payment in installment)².

4.2. The Transaction of BBA according to Shariah

Theoretically, in the contract of BBA, the bank sells the house to the customer at a mark-up price, whose content consists of the cost price plus a profit margin the bank wants to make over a specified financing period, say 20 years. Thus the contract of BBA should be only between the bank and the customer. The contract of BBA must not include the sale contract between the developer and the bank. In order to validate the contract, the bank must

¹ <http://www.hablullah.com>

² Ahmad Tarmidzi. Bay’ Bithaman Ajil(BBA) in Housing Financing as Implemented By Malaysian financial Institution: A Criticle Analysis of Its Procdures and Application From the Fiqh Point of View.IIUM 2007

separate the contract with the developer to claim ownership of the house first, then resale it to the customer³.

Financing documentation shall be prepared and completed earlier for the disbursement of the financing amount. For instance, if the customer has purchased the house from a developer and the Sale and Purchase Agreement (SPA) between the two parties has been completed. The SPA requires customer to pay 10 percent of the total selling price to the developer. When the customer pays 10 percent to the developer he becomes the beneficial owner. Then customer ready to sign Property Purchase Agreement (PPA) wherein the bank buy the house from the customer for the intention of right away selling the same to the customer upon deferred under Shariah principle. Then the parties shall right away completed Purchase Property sale (PPS) to reflect the act of reselling the same property to the customer upon deferred payment which includes bank's profit margin. PSA has added more responsibilities on the customer to the extent that the bank is free from all risks whatsoever.

From the above structure, one may recognize which type of contract that is. It's the Bay'al inah contract from the Fiqh view. All the jurists including Malikies, Hanafi's, and Hanbali are in the opinion that this kind of act (contract) is forbidden, except Al Shafi and Al Tahri. There are some of the temporary scholars such as Ahmed Al Salus that believe that the Shafi's concurred on the validity of the sale not the permissible, and they provide evidence that cheating is haram. However in the practice when cheating is involved in sales, the contract is still valid⁴

The element of khiyr-al'Ayb in BBA financing (the option of defect) has become and issue in this transaction, whereas it is a significant element in a sale contract. They found that

³ Rosly, Saiful Azhar, and Mahmood Sanusi. "The Role of Khiyar Al-'Ayb In Al-Bay' Bithman Ajil Financing."

⁴ Ahmad Tarmidzi. Bay' Bithaman Ajil(BBA) in Housing Financing as Implemented By Malaysian financial Institution: A Criticle Analysis of Its Procrdures and Application From the Fiqh Point of View.IIUM 2007

the Property Sale Agreement (PSA) transfers all the liabilities on the part of the bank to the customer, which is show that the banks here act as financier not as the seller or vendor. They conclude that the absence of khiyr-al'Ayb in BBA financing has a risk of involving riba in the profit gain from this contract. The authors noted that using Property Purchase Agreement (PPA) and Property Sale Agreement (PSA) in BBA transaction is sort of legal device (hilah) to grant evidence that the act of buying and selling is actually taking place as required by Shariah.

Another study done by Dzuljastri et al (2008) shows that the practice of BBA in Malaysia is similar to the concept of debt financing which is often results in high cost that cause the BBA contract seen as not in compliance with the Shariah principle because the bank does not take the risk of ownership and liability on the property which is a similar finding for the previous study. Based on their study there is high level of dissatisfaction among the customers as evidenced by their low intention to use BBA. They recommended that Islamic banks or Islamic financing needs to come up with alternatives of Islamic home financing product.

Hilal and Zubaidah (2011) study the Shariah and legal issue in the Malaysian house buying. In their study they investigated whether the existence of the sale and purchase agreement in BBA practice and the loan agreement on it agreed with the requirement of the Shariah law. They argued that the customer is required to complete two agreements (PPA) and (PSA) to get financing for his property. Moreover, they explained that this type of transaction between the purchasers and the Bank is known as Bay al-Inah. There is different opinion among the fuqaha regarding Bay' al-nah for the sale involves riba (i.e. difference of prices) or a trick (helah).

Nevertheless, the minority (such as the Shafiie, Abu Hanifah, and Zahari Schools) have allowed it but with the condition that the application of Bay' al-inah must be used with

caution and if acceptable by the conditions. They also argue that some of BBA practices consists of a few elements of gharar which is prohibited in Islam (QS : Al Baqarah : 188) and Islamic law is clear on contracts involving non-existing subject matter (in this case house under construction) referring to many cases of abandoned housing projects in Peninsular Malaysia which one of the spread out problems of the housing industry. Finally they concluded that the current practice of the BBA in Malaysia is conversed to the teachings of Islam, and thus, it should be modified and revamped until it is fully able to protect the interests of the customer.

One of the most comprehensive paper studies the practice of BBA in house financing as it is implemented by Malaysian institutions (Tarmidzi, 2007). We quoted some points as follow, considering that BBA is the mainly preferred type of financing mode in the Malaysian and in view of that it is also the most debated type of facility in terms of its validity and Shariah-compliance. The study reviews and analyzes the structure as well as the implementation of the facility. Five areas have been identified as involving fiqh concerns and brought into discussion

Those concern five issues in BBA are : 1) the issue of bay'al madum , 2) the issue of Isqat khiyar al-ayb, 3) the issue of bay' washart, 4) the issue of ibra and 5) the issue of bay' al inah. Out of these five, only three are found to be justifiable. There are many opinions from different schools that support the practices. The five issue will be elaborated as follows :

1) The issue of Bay'al madum

Issue of Bay'al-madum or Bay' ma la tamlik it referred to Bay' the property under construction is the property does not exist yet the writer explained that according to IbniTayimah and Ibn al-Qayyim it is permissible as long as the seller is capable to make the delivery; however, the preferred way is bay'istinsa.

2) The issue of Isqat khiyar al-ayb

Based on the Hanafi school of thought, allows sale on the condition that the seller is not liable for any defects.

3) The issue of bay'washart

It was concluded that al conditional sales are prohibited. However, it is allowed to attach certain terms and conditions to the sales contract. The certain conditions that are allowed vary according to each school of law. The conditions that are imposed on BBA facilities are allowed since the condition are inserted in order to secure the interest and benefits of the contracting parties.

4) The issue of Ibra

For early settlement or during default is seen as more of a legal and technically concern despite there being some fiqh considerations. The question is how much a BBA customer should be required to pay in both situations. It was concluded that a certain amount of Ibra should be given to a customer either through a binding promise to the party (financial institution) or through the insertion of a close that stipulates the sum of rebate. It will be given when the settlement is made; the amount will be given based on how long the settlement lasts.

5) The issue of Bay' al inah

The writer considers bay-al inah as permissible instrument, however he has a solution for the discussion he provided in his paper.

In the case of Bay-alinah, Abu Ishaq al-Isfriyani and Abu Mohamed mention that if the practice has become a custom, both the contracts are considered invalid. Moreover, the elements of Bay'al inah in BBA should be removed to avoid any disputes on its authenticity.

The writer also believes that it is not impossible to avoid using this particular type of contract since the customer's real need in this context is to obtain real estate and not cash.

Therefore, it is very plausible to abstain from using bay' al inah by introducing other methods of financing.

V. Conclusion

As a way to achieve human justice and religious purpose, many Islamic instruments are offered to the customer as a way to avoid activities which prohibited is in the Shariah. As part of Islamic instrument, many issues rise in the practice of BBA. The issue rise due the customer not convince when it comes to early redemption or in the event of default, there is default payment, there is no transfer of ownership, and the price of the asset often exceeds the original price of the asset compare to other Islamic product like MMP (Musharakah Mutaqisah).

One of the improvement methods to BBA is by allowing the rate to be based on variable rate. Instead of imposing the interest to the customers, Islamic Banks charge a profit rate which is reliant on the rate of market interest.

The problematic arise in BBA cases that lead to the dispute are due to the bank making a claim for the full sale price as stipulated in the property sale agreement (PSA) because the bank have a legal right. And for most cases attracted much public attention is that the way how the bank practitioner calculated the outstanding amount to be repaid by borrower who had defaulted on their BBA contract. Most of the dispute cases that pass to the court were won by the Bank.

The prominent court case occurred in Malaysia were the case of Dato' Haji Nik Mahmud bin Daud versus Bank Islam Malaysia Berhad in 1998 and Affin Bank Bhd versus Zulkifli bin Abdullah in 2006.

According to Shariah, the principles that been allowed by Hanafi, Shafii, Maliki and Hanbali for Islamic transactions are the price must be fixed and the duration of payment or

period of payment any difference in the price or the period makes it invalid. In the contract of BBA, the bank sells the house to the customer at a mark-up price. All the jurists including Malikies, Hanafi's, and Hanbali are in the opinion that this kind of act (contract) is forbidden, except Al Shafi and Al Thahri.

The scholars mentioned that the absence of khiyr-al'Ayb in BBA financing has a risk of involving riba in the profit gain from this contract. Moreover using Property Purchase Agreement (PPA) and Property Sale Agreement (PSA) in BBA transaction is sort of legal device (hilah).

The practice of BBA in Malaysia is similar to the concept of debt financing which is often resulted in high cost. It causes the BBA contract seen as not in compliance with the Shariah principle because the bank does not take the risk of ownership and liability on the property which is a similar finding for the previous study. There is high level of dissatisfaction among the customers as shown in their low intention to use BBA. They recommended that Islamic banks or Islamic financing needs to come up with alternatives of Islamic home financing product.

Furthermore, the BBA practices consists of a few elements of gharar which is prohibited in Islam (QS : Al Baqarah : 188) and Islamic law is clear on contracts involving non-existing subject matter (in this case house under construction) referring to many cases of abandoned housing projects in Peninsular Malaysia. And also the practice of the BBA in Malaysia is conversed to the teachings of Islam. BBA transaction should be modified and revamped until it is fully able to protect the interests of the customer.

There are five concern issues in BBA , which are : 1) the issue of bay'alinah, 2) Isqat khiyar al-ayb, 3) bay'al madum, 4) bay'washart and 5) Ibra for early settlement. Out of these five, only three are found to be justifiable.

In the case of Bay-al inah, Abu Ishaq al-Isfriyani and Abu Mohamed mention that if the practice has become a custom, both the contracts are considered invalid. Moreover, the elements of Bay'al inah in BBA should be removed to avoid any disputes on its authenticity. In brief it is not impossible to avoid using this particular type of contract since the customer's real need in this context is to obtain real estate and not cash. Therefore, it is very plausible to abstain from using bay'al inah by introducing other methods of financing.

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