

IS ANY DEFECT IN ISLAMIC BANKING PRODUCTS? A CASE STUDY OF BBA

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ABSTRACT

The rapid growth of Islamic banking and finance plays significant role to provide the financing facility for both Muslims and non-Muslims. One of the most popular Islamic banking products for property financing is Bay' Bithaman Ajil (BBA). It has been widely used in Malaysian banking environment although this type of product is not allowed in Middle East. When BBA is used to finance for any incomplete property, the unethical problems arise. It is because the banks are forcing the customers to pay and at the end, the customer does not occupy the property and at the same time, they are in debt. Banks should be taking responsibility, rather than putting the entire burden on the customers, in the case of default by property developer. This paper suggests the regulators, industry players and shari'ah scholars to revisit the validity issue of BBA financing for the incomplete product.

1. Introduction

The development of Islamic banking in Malaysia has been on a gradual basis and evolutionary in its approach. The first Islamic Bank in Malaysia, Bank Islam Malaysia Berhad ('BIMB') was established in July 1983 with an initial paid up capital of RM 80 Million (Bank Negara Malaysia, 2008). As a pioneer in South-east Asia, Bank Islam Malaysia made notable efforts to market the Islamic banking products.

To provide an alternative solution to conventional banking Islamic banks endeavored to come out with products that are shariah complaint and at the same time meet the needs of the consumers in a just manner. Several Islamic mode of financing are currently in existence. One such dominant product is Bay' Bithaman Ajil or Bay' Al Muajjal (BBA) in Malaysia. BBA is a tool or mode of financing used by Islamic banks to facilitate customers to purchase a property. The BBA financing schemes were formulated by a team of legal and Shariah experts for implementation by Bank Islam Malaysia Bhd in 1983.

However, this paper raised the question "Does BBA fulfill the needs of its customer and is it justified from the Islamic perspective?" The objective of this paper is to highlight the ethical issues in Bai Bithman Ajil for the contract of incomplete property.

2. Definition

Bay' Bithaman Ajil (BBA) is the Arabic acronym for "Sale on deferred payment basis". It is basically a trade deal in which the seller allows the buyer to pay the price of a commodity at a future date in lump sum or installments (Ziauddin Ahmad, 1989). Bay' Bithaman Ajil refers to the sale of goods on a deferred payment basis at a sale price which includes a profit margin agreed upfront by both parties to be paid in one lump sum.

In classical Fiqh literature Bay' Al Muajjal or BBA refers to a sale against deferred payment. In other words the distinction between normal sale and BBA is the deferred payment.

2.1 The Bay' Bithaman Ajil (Bba) Contract

The BBA is basically 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 Murabaha (Cost

plus) contract, whereby the commodity exchanged is delivered immediately but the sale price with profit is paid in installments over a long period.

The BBA is widely used in Malaysia, Indonesia, Brunei and few other countries but most of the Middle East scholars have rejected it.

In the conventional system, financing a property is usually interest based and is forbidden in Islam. In BBA instead of charging interest, financiers charge profit derived through buy and sell contract which is permitted in Islam (Al-Baqarah, 2:275).

2.2 Legality of Bay' Bithaman Ajil (BBA)

In general, the sale (Bay') of any permissible thing is permissible, provided that there is consent by both parties. With regard to the question of whether the deferred price can be charged more than the spot price in Bay' Bithaman Ajil (BBA). The Hanafis, Shafiis, Zaid bin Ali, Al muayyad billah and jumhur of the fuqaha' permit such additional charge. This is also the opinion preferred by al Shaukani. Hence, majority of the Muslim jurists allow the selling price in deferred sale to be set higher than the cash sale. However, this permission does not go without any condition. It is provided that in order to be compatible with the Islamic principles, the object of the sale must come into the possession of the bank before being handed over to the other party. In addition, in case of default or delay of the payment by the customer, the price can no longer be raised. If the customer is in financial difficulty, respite should be given to him, and another date be fixed for the payment of the balance of the price.

The following are the few rules pertaining to Bay' Bithaman Ajil (BBA) as given by the Hanafis compendium of Fiqh, i.e. Majallah al Ahkam al 'Adliyyah in Articles 245-251. The Majallah refers to Bay' Bithaman Ajil (BBA).

Article 245 provides for the validity of Bay' Bithaman Ajil (BBA), whereby it says:

“A sale for a deferred payment or payment by installment is good.”

The Majallah also gives recognition to use and custom in determining whether a sale is to be paid by deferred payment or not. It provides in Article 251 that a sale without stipulation as to time is an agreement for ready money. But in place where there is a use and custom to pay by known installments or at a time known, the unconditional sale is turned into a sale for payment at that time. For example, if anyone sells a thing in market without saying anything about deferred payment, it is necessary to pay the money at once.

2.3 Example of Bay' Bithaman Ajil (Bba) Contract

A customer wishes to buy a property priced at RM200, 000. The customer puts a down-payment of 10 percent, i.e. RM20, 000 and using the BBA method finances the remaining 80 percent which is RM180, 000. The Islamic bank would first buy the property for RM180, 000 and then sell the property to the customer at a profit, with deferred payments over the 20-year period.

The monthly payment for the above financing is RM1, 737.0413, payable for 240 months which adds up to RM416, 889.35 in total. The difference between this figure and the original financing of RM180, 000 which equals RM236, 889.35 is the total profit for the Islamic bank from this transaction. The profit of RM236, 889.35 is capitalized upfront in the BBA mode.

3. Ethical Issues

Indeed, there have been lot of issues associated with the current practice of BBA financing in terms of Shari'ah and legal perspective and these issues have been discussed from time to time by many scholars and industry experts. Like shari'ah and legal issues, when it comes to the implementation of BBA financing for under-construction properties in the event of project being abandoned, a new set of issues

have emerged. These are mainly categorized as ethical issues. Ethics plays a vital role in Islamic shari'ah law. According to Qutb (n.d :379) "Islam has a fully integrated and comprehensive socio-economic system whose rules and ethics work harmoniously together, supporting and reinforcing each other." In the context of Islamic banks Wilson (n.d:11) has emphasized the role of Islamic financial institutions in maintaining economic justice in the society. He stated that "the shariah law in the finance sphere is essentially concerned with economic justice. How each bank's practices and products contribute to a more just financial system needs to be spelt out more clearly and fully." According to Zaroug (1999: 49), "Law, politics, and economics are soulless and insignificant if detached from ethics." He further added by quoting Amartya Sen's views that "there occurred a serious distancing between economics and ethics, which brought about one of the major deficiencies of contemporary economic theory." It seems that the practice of BBA financing for under construction properties do have some ethical issues that do not comply with the teaching of Quran and sunnah. As mentioned in the Holy Quran, "God commands you to deliver whatever you have been entrusted with to their rightful owners, and whenever you judge between people, to judge with justice. Most exhorts you to do. God hears all and sees all." According to Qutub (n.d : 164), "The verse makes it clear, that orders both to be true to one's trust and to maintain justice between people are part of Allah's admonition." Usmani (n.d: 472) has stated that:

"It can be said that the first sentence of this verse carries the command to fulfill trust obligations, while equity and justice have been enjoined in the second. Between the two, the fulfillment of trust obligations has been given precedence. Perhaps, the reason for this may be that the establishment of a system that guarantees equity and justice all over a country is just not possible without it. It means that those who hold power in a country must, first of all, fulfill their trust obligations, a bounden duty which has to be discharged correctly and properly. Consequently they must appoint only those to the offices of the government who prove to be the best of the lot in terms of their ability to perform the required job and in terms of their trustworthiness and honesty."

In the context of BBA financing for abandoned projects, here the customer entrusted the developer for completing the construction of the stipulated property within the time specified in the agreement. However, in most of BBA financing for under-construction properties the developers have failed to fulfill this trust obligation. Besides, the customer ends up paying entire financed amount to the bank without getting the possession of the property for which the bank financed the customer. This is utterly unjust to the customer; and customer has no idea about the responsible party from whom he can claim the compensation and indeed violation of the above mentioned verse. Azli, Othman, Sahri, Aris, Arshad and Yakoob (2011: 93) have stated that "BBA documentations demonstrate that the bank merely acts as a financier rather than seller and excludes itself of all liabilities." In relevance to maqasid al-Shari'ah BBA contract does not fulfill one of the objectives of Shari'ah, that is, protection of property. Due to the negligence of either of the parties (developer and bank) customer is deprived of acquiring property and put him in the situation wherein he would be facing hardship which is one the elements of legal maxim. Following are other ethical issues associated with the abandoned projects under BBA financing facility:

1. As mentioned above, the customer is forced to pay the entire financed amount irrespective of the project being completed or not. Besides, in the BBA agreement there is no such clause is mentioned which protects the interest of the customer.
2. Ideally, bank should take the responsibility and check the progress of the project to ensure that the said property would be delivered on time. However, in practice banks deny taking such responsibility. Contractually when the bank buys the property from the customer along with the ownership right the bank also acquires the liabilities or risk associated with the property. Hence, it is the bank's duty to make sure that the developer complete and deliver the property within the time specified in the agreement and this is what the ethical demand is.
3. According to Dahlan and Aljunid (2011:354) "purchasers would not get any compensation and damages from the defaulting abandoned developers as they may have no monetary provisions to meet the claims." As discussed earlier, the customers have not properly been compensated for the losses they incur due to abandoning of housing projects. This is because in many cases developers are not solvent enough to compensate the customer.

4. Conclusion

Islamic banking is known as an alternative of conventional banking system and one of its objectives is to promote social and economic justice. However, due to the practices of BBA financing for incomplete property, the question of fairness arises. This paper highlights unethical issues of BBA financing practices and suggests revisiting this issue.

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