

Shariah and Legal Issues in House Buying in Malaysia: The Legality of *Bay' Bithaman-Al-Ajil* ('BBA') with Special Reference to Abandoned Housing Projects

Nuarrual Hilal Md. Dahlan^{1*} and Sharifah Zubaidah Syed Abdul Kader Aljunid²

¹College of Law, Government and International Studies,
Universiti Utara Malaysia,

UUM Sintok, 06010 Kedah, Malaysia

²Ahmad Ibrahim Kulliyah of Laws,
International Islamic University Malaysia,
P.O.Box 10, 50728 Kuala Lumpur, Malaysia

*E-mail: nuarrualhilal@gmail.com

ABSTRACT

The primary duties of Islamic banks and financial institutions in Malaysia are to carry out Islamic banking and financial activities and to offer products that are in accordance with the Islamic teachings. These products are subject to the scrutiny and approval of Bank Negara's Shariah Advisory Council (SAC) and the internal Shariah Advisory Bodies (SAB) or the Shariah Committees of the respective financial institutions. Despite having been in existence for more than 25 years, in the authors' view, it is still questionable whether or not the Islamic banks and financial institutions in Malaysia have been satisfactorily carrying out these duties. One area worth examining is the transaction involving house buying, particularly the one that falls under the purview of the Housing Development (Control and Licensing) Act 1966 (Act 118) and transactions involving houses pending completion. This paper examines this area of transaction and the loan agreement, affected via *Bay' Bithaman al-Ajil* (BBA), provided by Islamic banking and financial institutions in Malaysia. The purpose is to see to what extent the sale and purchase agreement and the loan agreement have complied with the requirements of the Islamic Law in protecting stakeholders and to provide practical suggestions to improve the existing practice. The paper concludes that the current practice of the BBA contradicts with the teachings of Islam and should therefore be modified and revamped until it is fully able to protect the interests of the purchasers/borrowers.

Keywords: Bay' Bithaman al-Ajil, Gharar al-Fahish, Islamic Banking Law, abandoned housing projects, Malaysia

INTRODUCTION

Islamic banking aroused quite an interest in the 1960s and 1970s, following the resurgence of Islam in the early twentieth century, with the momentum being spearheaded particularly by Egyptian Muslim scholars and thinkers, such as Muhammad Abduh, Rashid Rida, Hassan al-Banna, and Jamaluddin al-Afghani. Islamic

banking eventually gained foothold in Malaysia, with the establishment of Bank Islam Malaysia Berhad in 1983 (Haron & Shanmugam, 1997). Thus, the Islamic banking facilities have since expanded to meet and serve the customers' insatiable demands for user-friendly banking facilities and products. These Islamic banking products include *Mudarabah* - a general and

Received: 24 February 2010

Accepted: 30 August 2010

*Corresponding Author

special investment deposit in the nature of profit sharing between the depositors/customers and the bank, acting as the entrepreneur; *Wadiah* - where the bank simply acts as the safe-keeper of the deposits of the depositors/customers but it may provide returns to the depositors as a gift (*al-Hibah*); *Murabahah* (partnership and equity financing); *Ijarah* (leasing); *Musharakah* (partnership) and *Bay' Bithaman al-Ajil* (BBA) (i.e. sale by deferred payment). Due to the increasing demand for these Islamic banking products, Islamic windows (Islamic banking products) are likewise introduced by the conventional banks (Yacop, 1996).

OBJECTIVES

This paper examines the provisions of the standard *Bay' Bithaman al-Ajil* (BBA) agreement as practised by the Islamic Banks and Islamic Window Banks (IWB) in Malaysia, as to whether the BBA conforms to the requirements of the *Shariah* (Islamic Law), specifically insofar, as it relates to the purchase of houses-still-pending-completion and abandoned housing projects.

THE BAY' BITHAMAN AL-AJIL (BBA) - THE PROPERTY PURCHASE AGREEMENT (PPA) AND THE PROPERTY SALE AGREEMENT (PSA)

It is a trite practice in Malaysia that for some who wish to purchase a house, specifically a transaction falling under the Housing Development (Control and Licensing) Act 1966 (Act 118), they will seek to obtain a loan from an Islamic bank or the IWB. Before the purchasers apply for a housing loan from an Islamic Bank or IWB, they should have entered into agreements of sale and purchase with the licensed developers. Once the said agreements are executed and enforceable, the purchasers may apply for loans from an Islamic Bank or IWB to finance the balance purchase price of the property. The purchasers are required to execute two agreements to facilitate this; firstly, the Property Purchase Agreement (PPA) and

secondly, the Property Sale Agreement (PSA). The first agreement (PPA) provides that the purchasers agree to sell the property, which he purchased from the developer, at the price similar to the price he agrees with the developer, to that particular Islamic Bank or IWB and on the undertaking that they (the purchasers) are to re-purchase the property from the Bank. The second agreement is the Property Sale Agreement (PSA). Under this agreement (PSA), the property (which has been vested in the Bank) is sold by the Bank back to the purchasers, at an increased price. The purchasers are required to repay the Bank this price, by way of instalments for a specified duration until the sale price is fully settled. The Bank will get a profit, being the difference between the price stipulated in the PPA or the said agreement and the price stated in the PSA (the sale price).

The type of transaction between the purchasers and the Bank described above is called *Bay al-Inah*. It should be noted that the theory and application of *Bay al-Inah* are still subject to debate by the schools of Islamic Law as the sale involves *riba'* (i.e. difference of prices) or a trick (*helah*), in the sale and purchase activities, by applying *riba'* method of borrowing transaction (al-Zuhayli, 1988). The majority of Muslim jurists reject *Bay al-Inah* (al-Zuhayli, 1988). However, the minority (such as the Shafie, Abu Hanifah, and Zahari Schools) have permitted it but with the condition that the application of *Bay al-Inah* must be used with circumspection and if warranted by circumstances (al-Zuhayli, 1988). Otherwise, its application should be limited (Resolution of Shariah Advisory Council of Bank Negara, 2009).

GHARAR

There are many verses from the Quran which call for the doing of justice and abstaining from committing any cruelty, fraud, and injustice, especially in business and transactions. The following are some examples of the relevant verses:

1. "Do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property" (al-Baqarah (2): verse 188).
2. "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!" (al-Nisa'(4): verse 29).
3. "Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition" (al-Nahl (16): verse 90).

Some examples of the practices involving fraud and injustice are the practice of *riba'* (interest/usury) in lending transactions and the '*gharar*' sale and purchase. The practice may be necessary and appropriate for investors and businessmen as being creative and devious capitalist business devices to maximise profits with no or less risk, but they are unlawful and injustice according to the Islamic law. Thus, Islam prohibits the practice of *riba'* (interest/usury) and '*gharar*' transactions. These are explained in the following Quranic verses:

1. "Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (for ever)." (Al-Baqarah (2): verses 275).
2. "This because they love the life of this world better than the Hereafter: and Allah will not guide those who reject Faith. Those are

they whose hearts, ears, and eyes Allah has sealed up, and they take no heed. Without doubt, in the Hereafter they will perish" (al-Nahl (16): verses 107-109).

Similarly, the *hadith* of the Prophet Muhammad (Peace Be Upon Him - PBUH) also, calls for a similar practice in carrying out any transaction:

1. "Muslims are brothers. It is not permissible for a Muslim to sell a thing which contains faulty elements/flaws/defects (*aib*) to his fellow brother (Muslim) except if he discloses it" (reported by Ibnu Majah from Utbah bin A'mir, in al-Shawkani, 2002: p. 1115).
2. It was reported that the Prophet Muhammad (PBUH), while he was passing a vendor selling foods, and became attracted to the bunch of foods before him. He put his hand into the bunch and found the part below the foods were wet. He asked the seller: What is this? The seller replied: the foods were wet because they were poured with rain water and to prevent public from knowing this fact, he put the wet foods at the bottom part of the bunch. On hearing of this, the Prophet (PBUH) said: 'He who cheats us, is not from us' (reported by majority except al-Bukhari and al-Nasai, in al-Shawkani, 2002: p. 1115).
3. "It is not permissible for someone to sell a thing except after he has explained about it, nor is it permissible for a person who knows such a state of condition of a thing, except he explains about it" (reported by Ahmad, in al-Shawkani, 2002: p. 1115).

CONTRACT OF SALE INVOLVING A NON-EXISTENT SUBJECT MATTER

The position of the Islamic law is clear on contracts involving a non-existent subject-matter. The Islamic law lays down a condition that the subject-matter must actually exist at the conclusion of the contract. Hence, if the

subject matter does not exist, generally, the contract is void even though it could probably exist thereafter, or even if it is established, then that it would exist in the future but the existence is still to the detriment of any party to the contract. A contract which involves a non-existent subject-matter is prohibited pursuant to a *hadith*, whereby the Prophet Muhammad (PBUH) prohibited a person from selling an animal foetus yet to be born while it is still in the mother's womb, when the mother is not part of the sale (Nawawi, 1999, p. 7). This is also applied to the selling of milk whilst it is still within the udder of the animal. This sale is void as there is a possibility of the udder being perhaps void of milk, and instead, only containing air (al-Zuhayli, 1988, pp. 427-429). In one *hadith*, the Prophet (PBUH) prohibited the act of stopping the milk of udder of the female goat for certain duration for the purpose of enticing the public to purchase the female goat on the pretext of it containing a lot of milk (al-Shawkani, 1357H). The Prophet (PBUH) too prohibited the sale of things which one does not own (al-Zuhayli, 1988).

However, Muslim jurists allow the contract of a non-existent subject matter, as one of the exceptions to the above, relating to the sale of agricultural products before they become ripe. However, this is subject to the knowledge that the products have already appeared even before the signs of ripeness are shown. Furthermore, this type of contract is allowed if the purchaser immediately harvests them. The position is the same in respect of the sale of fruit and agricultural products, which yield successively one after another during one harvest as in the case of watermelons and egg-plants. In this particular case, Muslim jurists in general have agreed to allow the sale of the fruits which have already appeared but disallow the sale of fruit which have yet to appear (al-Kasani, 1328H). This contract falls under the category – “the subject matter exists in essence, then comes into existence thereafter” (Nawawi, 1999, p. 74).

As for the subject-matter which does not exist at the time of contract and it is established and it will not exist in the future, Muslim jurists

also do not accept this kind of contract as it contains the element of *gharar* (Nawawi, 1999, p.74). Transactions containing a *gharar* element are prohibited based on the verses of the Quran above and the *Hadith* of the Prophet (PBUH) (al-Baihaqi & 'Ata, n.d., p. 338). Majority of the jurists are also unanimously of the opinion that the contract which its subject-matter can not generally be surrendered to the parties at the conclusion of the contract, or at the promised date, is a *gharar* contract and thus, it is void, not binding and having no legal effect (al-Zuhayli, 1988, pp. 429—432).

Hence, *gharar* is forbidden in Islam as its existence will harm the well-being, rights, and interests of contractual parties and cannot ensure satisfactory outcomes, justice, and fairness in their contractual dealings (Zaharuddin, 2008). It is also forbidden by the *Shariah* because this element typically causes enmity, dispute, hardship, injustice, and losses to the parties.

ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

Abandoned housing projects in Peninsular Malaysia are one of the spill-over problems of the housing industry. This problem is a nightmare for the affected purchasers and becomes a burdensome social obligation for the government to tackle. From 1990 until June 2005, a total of 141 projects were considered as abandoned. This figure did not include abandoned housing projects which had been categorised as abandoned *in toto* since the 1970s, i.e. abandoned housing projects which had no possibility for rehabilitation at all, housing projects (which are abandoned) carried out by parties not being within the purview of the Ministry of Housing and Local Government (MHLG) and abandoned housing projects in Sabah and Sarawak (East Malaysia). This figure is a cause of concern to the general public purchasers who may lose confidence in housing developers and the housing industry as a whole and especially the government (the Ministry of Housing and Local Government – ‘MHLG’) being the regulatory body in the housing industry

(Dahlan, 2009). There is also a formidable problem of what to do with abandoned housing projects? Can these abandoned projects be expediently and expeditiously rehabilitated? If so, how much will they additionally cost?

CAUSES OF ABANDONMENT OF HOUSING DEVELOPMENT PROJECTS IN PENINSULAR MALAYSIA

Among the reasons leading to the abandonment of housing projects in Peninsular Malaysia are:

1. Financial problems faced by the developers. The cause of this problem is owing to the problems with the developers' financial and construction management (severe liquidity problems and high gearing) to meet the construction costs and to repay creditors;
2. Loose approval of the applications for housing developer licences by MHLG. MHLG fails to obtain the requisite advice and opinions from economists, legal experts, property experts and other experts in approving the applications;
3. Challenges and problems in dealing with and clearing the project site of squatters;
4. Ongoing conflicts, feuds and squabbles ensuing between and among the developers, land proprietors, purchasers, contractors, consultants, and financiers causing further difficulty to coordinate and streamline the development and construction activities; and,
5. Insufficient coordination between the land administration authority, planning authority, building authority, housing authority, and other technical agencies in respect of the approval for the alienation of land, land uses, subdivision of lands, planning permission, building/infrastructure plans' approval, housing developers' licences and issuance of the Certificate of Fitness for Occupation (CF) and Certificate of Completion and Compliance (CCC), as the case may be (Dahlan, 2009).

GRIEVANCES OF PURCHASERS IN ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

The grievances and problems faced by the purchasers, if a housing development project is abandoned, are:

1. They are unable to get vacant possession of the units on time as promised by the vendor developers.
2. The construction of the houses is terminated or partly completed resulting in the houses being unsuitable for occupation for a long duration of time, unless the units can expeditiously be revived.
3. In the course of the abandonment of the project, purchasers still have to bear all and keep up the monthly instalments of the housing loans repayable to their respective end-financiers, failing which, the purchased lots being the security for the housing loan would be sold off and with the possibility of the borrower purchasers be made bankrupts by their lender bank.
4. Further, as the purported purchased unit has been abandoned and cannot be occupied, purchasers have to rent other premises, thus, adding up to their monthly expenses.
5. Purchasers' inability to revoke the sale and purchase agreements and claim for the return of all the purchase money paid to the developers as the developer may have absconded or may have no monetary provisions at all to meet the claims.
6. Many problems and difficulties happen in attempts to rehabilitate abandoned housing units. The problems are because the projects may have too long been overdue without any prospect of revival and to rehabilitate them, additional costs and expenditure are needed on the part of the purchasers.
7. Possible difficulties in reaching consensus and towards getting cooperation from purchasers, defaulting abandoned developers, end-financiers, bridging loan financiers, contractors, consultants,

technical agencies, local authority, land administration authority, state authority and planning authority to rehabilitate the projects. This may be due to technical and legal problems faced in the attempt to rehabilitate the projects.

8. Insufficient funds to generate the rehabilitation as the outstanding loan funds of the purchasers are not enough, purchasers refuse to part with their own money, no financial assistance from any agencies, and the fact that the rehabilitating parties would incur losses if they were to proceed with the purported rehabilitation.
9. Purchasers themselves need to top-up using their own money, as the available funds are insufficient for meeting the rehabilitation costs and they themselves personally have to rehabilitate the projects left abandoned. Thus, they have to face all kinds of music in consequence of the abandonment and initiating efforts for rehabilitation.
10. Purchasers would not get any compensation and damages from the defaulting abandoned developers as they (the defaulting abandoned developers) may have no monetary provisions to meet the claims.
11. There may be no party agreeable to rehabilitate the abandoned housing projects, causing the project to be stalled for an indefinite period of time or for a long period of time or at the worst, the abandoned project may not altogether be rehabilitated.
12. Other pecuniary and non-pecuniary losses subtle or otherwise, suffered by purchasers due to the abandonment and in the course of rehabilitation of the projects pending full completion, such as divorces, family breakdowns, dismissals from employment, nervous shocks, mental breakdowns, and losses of future earnings.
13. Due to the abandonment and the ensuing complications occurring thereafter, the ordinary machinery and enforcement of the housing, planning, building, and

development laws becomes dysfunctional at the expense of the purchasers. This also includes the inability of the purchasers to take legal actions against the defaulting developer because the actions might not be beneficial nor feasible (Dahlan, 2006; Dahlan, 2007a, b).

THE LATEST LEGAL DEVELOPMENT OF BAY' BITHAMAN AL-AJIL (BBA) IN HOUSE FINANCING

In a recent historic decision by the Court of Appeal on 26 August, 2009, the Court of Appeal in 9 cases [among them are *Bank Islam Malaysia Berhad vs. Lim Kok Hoe & Koh Hsia Ping* (Civil Appeal No: W-02-918-2008), *Bank Islam Malaysia Berhad vs. Mohd Razmi bin A. Rahman & Wan Hazlina binti Wan Mohd Ali* (Civil Appeal No. W-02-954-2008), *Bank Islam Malaysia Berhad vs. Baharom bin Harun & Rohynoon bt Mohd Yussof* (Civil No. W-02-955-2008)] decided that BBA was valid according to the Islamic Law. Prior to this in the High Court, in these 9 cases, the judge had decided that BBA was contrary to the religion of Islam as it involved *riba'* transaction. However, the judge in the Court of Appeal (Raus Shariff, JCA, on behalf of the court and the other judges, Abdul Hamid Embong and Ahmad Maarop, JCA concurring) held that the learned judge in the High Court erred in holding that BBA was contrary to the religion of Islam as it involved *riba'*. According to Raus Shariff JCA, BBA is not a *riba'* transaction, but instead, it is a sale transaction under the Islamic Law. According to Raus Shariff JCA, the High Court judge was not competent to decide the matter, i.e. whether or not the BBA is in compliance with the Islamic law. The competent persons are those Islamic jurists who are conversant in the Islamic law and in reference to the Islamic banking and finance in Malaysia are the Bank Negara Shariah Advisory Council ('Bank Negara SAC') and Shariah Advisory Body ('SAB') of the Islamic banks. Furthermore, the High Court judge in the 9 cases had not observed the doctrine of the *stare decisis* (judicial precedent), whereby

prior to the adjudication of these 9 cases, they were Supreme Court and Court of Appeal cases [*Adnan bin Omar vs. Bank Islam Malaysia Berhad* (unreported) (Supreme Court), *Dato' Haji Nik Mahmud vs. Bank Islam Malaysia Bhd* (1998) 4 MLJ 393 (Court of Appeal) and *Bank Kerjasama Rakyat Malaysia Berhad vs. Emcee Corporation* (2003) 1 CLJ 625 (Court of Appeal)] which held that BBA is valid under the Islamic law.

OUR OPINION ON THE BBA OF HOUSE FINANCING IN MALAYSIA

Although judicial decisions have held that BBA does not involve elements of *riba'*, in the authors' opinion, BBA that is being practised in Malaysia may not be valid on the ground of the elements of *gharar al-fahish* contained in it. Hence, following the elaboration on the *gharar al-fahish* (exorbitant *gharar*) and some judicial decisions that the BBA contains the *riba'* element, the following are the findings of the authors in respect of the BBA, as practised in Malaysia by the Islamic financial institutions.

1. The BBA is void for it inherently may involve the possible (*ihthimal*) (al-Zuhayli, 1988, vol. 4, pp. 172, 173, 174, 175, 176, 180, 226, 229, 430, 431, 437 & 438), occurrence of *gharar al-fahish* elements, particularly in the case of a transaction financing a house pending completion. The elements of *gharar al-fahish* are the grievances of the purchasers in abandoned housing projects which have been elaborated above (Dahlan, 2009);
2. In houses pending completion, where the transaction involves the application of Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989 or otherwise, normally the purchaser/borrower may pay some portion of the price as a deposit. However, on the payment of the deposit and on the execution of the sale and purchase agreement with the developer, the purchaser applies for a housing loan (BBA) from an Islamic bank to

finance the balance purchase price. This is affected by the PPA and PSA, as well as other documents, such as the charge document or deed of assignment, as the case may be. Normally, in the purchase of a house, the purchaser pays a deposit representing 10% of the purchase price. The balance purchase price (90%) will be paid by the Bank to the vendor/developer progressively. The bank granting the loan (90% of the purchase price) to the purchasers to complete the sale will charge the said house as collateral to the loan. The title to the housing unit will not be registered into the purchaser's name until and unless the purchaser has fully settled that loan (90% of the purchase price), together with the profit margin (the sale price), to the bank. Once the purchaser has fully settled the sale price (usually in instalments), the bank will then discharge the collateral (the house as the security to the loan) and allow the transfer of the house into the purchaser's name. The issue is, whether the purchaser/borrower, in this circumstance, has acquired full ownership (*milk al-tam*) warranting him to become the full and absolute legal owner (not just being an equitable and beneficial owner) to the purported house on the payment of the deposit and on the execution of the sale and purchase agreement, when his name has yet to be registered as the registered proprietor of the property at the land office? It is still doubtful that he has obtained any legal ownership (*milk al-tam*) to the purported house to warrant him to 'sell' the purported house to the Islamic bank for the latter to re-sell the purported house to him (the purchaser/borrower) in accordance with *Bay' al-Inah* and *Murabahah* principles (Engku Ali, 2009, pp. 21-27). Thus, in transactions involving houses pending completion, the issue of ownership of the purported uncompleted house is still unresolved. In other words, the ownership is not a full (*milk ghair al-tam*) and not an unconditional ownership but an incomplete ownership (equitable/beneficial ownership).

Incomplete ownership does not give any absolute power/authority on the part of the purchaser to sell the purported house to Islamic Bank. However, it may be argued that, the purchaser/borrower can sell the purported house to the Islamic Bank, even though his ownership of the house is still incomplete, in order to get the housing loan from the Islamic Bank, on the condition that the actual owner (the developer or the like) has agreed to such an undertaking. Be that as it may, in the opinion of the authors, still this is not acceptable under the Islamic law, as the ownership of the purchaser over the house is still incomplete (*milk ghair al-tam*), which can justify the selling of the house by the purchaser to the bank and for the bank to re-sell the house to purchaser, under *bay' al-Inah* and *murabahah* modes. This is to avoid possibility of *gharar* in the transaction. It follows that the charge created over the house (which still under *milk ghair al-tam*) as the security to the BBA may also not valid under Islamic law, as the house is still not absolutely/fully owned (*milk ghair al-tam*) by the purchaser/borrower to warrant the selling of the said house to the bank for the bank to re-sell back the house under the BBA transaction.

3. It is opined that, the current practice of the BBA seems absurd, in the sense that the house, which is subject to the charge being a security to BBA, is also considered under the ownership of the bank. The bank's ownership over the house is explicitly stated in the PPA and PSA. How could the bank as the 'owner' of the house, become a 'chargee' to their own asset? Thus, the positions and status of the house, the charge, the ownership, the purchaser, the bank and the developer in the BBA transaction are ambiguous and not certain. This can lead to *gharar al-fahish*. It should be noted, notwithstanding a charge is created against the land and in abandoned housing unit, in the event of default on the BBA repayment by the purchaser, the bank may also not

be able to enforce the charge as the house is still not complete and the fact that there is a term in the statutory standard sale and purchase agreement (pursuant to clause 2(2) of the Schedules G, H, I and J of Housing Development (Control and Licensing) Regulations 1989), which excludes the charged land from being subject to a foreclosure. Furthermore, it is doubtful if there is any interested buyer to bid for the purchase of the incomplete house/project (abandoned housing unit).

4. The BBA is void, based on the judicial decisions, on the ground that the practice is inequitable and unfair to the general public. The inequitable elements are that the profit margin is higher than the debt owed. This would amount to a *riba* transaction. Secondly, if the borrower defaults, he has to pay the whole amount of the debt and the profit margin for the whole repayment of the instalment period without being entitled to any equitable and appropriate rebate. This practice in the BBA will lead to an inequitable and unconscionable mode of transaction. On the contrary, this rebate is applicable in the conventional system in the house financing loan (*Malayan Banking Bhd vs. Ya'kup bin Oje & Anor* [2007] 6 MLJ, pp. 390, 399 & 417). Inequitable and unconscionable mode of transaction is prohibited under the Islamic Law (*al-Nisa'*(4): verse 29), *al-Nahl* (16): verse 90, *Al-A'raf*(7): 85 & *Al-Syu'araa'*(26): 183).
5. There will be no adversity (hardship) in rejecting the Malaysian style of BBA. In other words, the degree of necessity (*darurah*) does not exist currently in Malaysia, for allowing the practice of the BBA (hybrid of *Bay' al-Inah* and *murabahah*), which are rejected by majority of jurists as it may involve the *riba'* elements. Instead other modes which are more equitable should be implemented such as *musharakah* (partnership) or *Ijarah* (lease) or that the current terms in BBA are radically revamped to the effect of

eliminating the elements of *gharar*, *riba*, and other inequitable terms. Some quarters may argue that the current practice of the Malaysian style of BBA is for the *maslahah/maslahah amah/maslahah al-mursalah* (public interest) of the *ummah* (Muslim society), in line with the *maqasid al-Shariah* (Ibnu Qayyim al-Jawziah, 1977, vol. 3, pp. 14-15). However, to reply this, the *maslahah* must not be in derogation of the express provisions of the primary texts (al-Quran and al-Sunnah), which clearly prohibit *gharar*, *riba*, and other inequitable/unjust practices. It (BBA) may be applicable if there is a necessity (*darurah*) for it. However, the degree of necessity (*darurah*) for the practice of the BBA in Malaysia warranting the application of BBA, it is opined, has not yet actualized. The persons in authority (the Government of Malaysia, Bank Negara, and Shariah Advisory Committee/Body), it is submitted, have the means and ability to replace the Malaysian style of BBA in house financing with better products, but they do not resort to them. This is sinful. This is akin to the requirement that to perform the obligatory prayer (*solah fardu*), one shall have to stand up (*qiyam*). If he has the ability to stand up (*qiyam*) without any difficulty or hardship, but instead he chooses to pray by sitting down, his prayer is rejected as the *rukun* (pillar) of the obligatory prayer (*solah fardu*) has not been fulfilled (al-Zuhayli, 1988, vol. 1, pp. 635-645). Similarly in house financing, the persons in authority have the ability and means to use better Islamic products, such as *musharakah* and *ijarah* in house financing to avoid the occasion of *riba* by way of *helah* (as in the BBA which utilizes *Bay'al-Inah* and *Murabahah* modes) and other inequitable modes of transaction (such as no rebate given if any early settlement is made); however, they choose the BBA (the Malaysian style of BBA). The reason for this may be economic and/or maximization of profit factors. Thus

on this footing, it is opined, the rationale and reason for adopting the Malaysian style of BBA are not satisfactorily sound.

6. If a housing project fails and is subsequently abandoned, the purchasers are still required to pay the monthly instalments to the Bank. There is no term in the BBA that protects the interest of the purchasers if in the course of construction, the houses are abandoned.
7. The banks absolve any liability for ensuring the completion of the houses. The banks do not consider the grievances faced by the abandoned housing projects' purchasers. What the bank want is, it is submitted, the instalment moneys of the BBA must be fully settled by aggrieved purchasers;
8. Purchasers are persons aggrieved if abandonment occurs as they must pay monthly instalments and they cannot occupy the purported houses. Consequently, they have to rent other premises and face other grievances, pecuniary and non-pecuniary. There is no term in the BBA which can provide measures to face these problems.
9. In BBA, through the PSA, the banks are the owners of the property. Logically, the owners are obligated to ensure that the purported houses will be duly completed and duly handed over to purchasers and the titles can be registered in the purchasers' names. There is no guarantee that at the end of the day, if the project is abandoned or the property has not been duly constructed, the bank as the owner must either do whatever is necessary to protect the interests of the purchasers or to compensate the purchasers or to return back all the moneys paid to them (restitution and indemnity). Apparently, there is no term prescribing this duty on the banks in the PPA and PSA.
10. There are no preventive and curative measures provided in the BBA, especially in the PSA, to avoid losses on the part of the purchasers due to the abandonment of houses they purchased.

11. There is no term in the BBA which provides the purchasers with the right to sue the bank for the calamities that have occurred or the right to claim compensation and damages. Meanwhile, the provisions such as defect liability period, protection against sub-standard housing constructions, the guarantee that the titles to the property are to be registered into the purchasers' name upon full settlement of the loan and compensation for late delivery of vacant possession and the obligation of the bank to obtain the certificate of completion and compliance (CCC), must also be made clear and provided in the BBA. This suggestion is made bearing in mind that the owner of the house (i.e. the bank, is effected through the PPA) must be responsible to hand over the duly completed house to purchaser in receipt and as a consideration of the specified amount of sale price by way of monthly instalments paid by the purchasers (effected through the PSA).

SUGGESTIONS

In facing the above problems, the following are suggested:

1. The current practice of the Malaysian style of BBA should be abolished. Instead, the Islamic financial institutions should use other modes of transactions, such as *musharakah*, *ijarah* or a modified BBA in house financing. In order to illustrate this, in *musharakah*, the Islamic Bank enters into an agreement with the customer/purchaser that both (the Bank and the customer/purchaser as partners) agree to jointly purchase a duly completed housing accommodation. The customer/purchaser will pay certain portion of the purchase price to the vendor developer and the balance of the purchase price shall be paid by the Bank to the vendor developer. The ownership of the house will be shared by both on the execution of the sale and purchase agreement with the vendor developer. The whole ownership will be transferred by
2. The new modes in house financing, such as *musharakah* and *ijarah*, if involved the purchases of houses pending completion, must also provide sufficient terms to protect the interests of purchasers if abandonment or otherwise inevitably occurs; or,
3. If the current practice of the Malaysian style of BBA is to resume, it must substantially be revamped to the effect of protecting the rights of the stakeholders. This is also in accordance with the principles of *sadd al-dhari'*. Thus, the following proposals should be adopted by the Islamic banking and financial institutions, *viz*:
 - a. the profit margin should be reduced to a more acceptable and equitable amount so as to avoid *riba'* commensurate with the period of occupation and enjoyment of the house by the purchasers/customers (to

the Bank to the customer/purchaser, on the customer/purchaser paying the full balance purchase price, together with the profit margin (in instalments for certain duration or in lump sum), which the bank stipulated to the customer/purchaser, insofar as it is equitable and fair. The Bank undertakes to give certain rebate if the customer can settle earlier the balance purchase price together with the profit margin. Similarly, this illustration is likewise applicable in *ijarah* transaction. The Islamic Bank will pay the full amount of the purchase price of the duly completed house to the developer. Later, the bank leases it to the customer/purchaser for certain duration. The whole progressive rental payment paid in instalments for certain duration by the customer/purchaser are considered as a settlement of the full price, together will the profit margin set by the Bank, of the house. Under the *ijarah* mode, the customer/purchaser also enjoys equitable rebate if he can settle the full purchase price and the profit margin earlier. This would prevent the possibility of the occurrences of *riba'* and *gharar al-fahish* transactions and other problems associated with the BBA, as illustrated above;

- avoid any unconscionable and inequitable modes of transaction prohibited under Islamic law as enshrined in the Quranic verses above), if the customer/purchaser defaults on the instalment payment before settling the full sale price;
- b. the rebate should be substantial if the customers/purchasers/borrowers were to make early settlement or where the borrowers default during the repayment period as far as the rebate is commensurate with the period of enjoyment of the house and the total instalments which have been paid to the bank and as far as this is equitable to the bank and the purchasers/borrowers;
 - c. The Islamic Bank should only apply BBA for financing houses which have been duly completed only (with CCC and title ready for transmission to purchaser on full settlement), not for financing houses pending completion to avoid any possible occurrence of abandoned housing projects, as well as grievances and problems consequent to it altogether;
 - d. If the BBA is applied for houses pending completion, the terms in the BBA should provide for the responsibilities and duties of the Islamic bank as the owner of the houses in the course of construction of the houses and for the position where the construction of the houses is terminated and the project is abandoned. The duty is to ensure that rehabilitation can be carried out. If rehabilitation of the houses is impossible, the duties are to return back all the moneys paid by the purchaser and to pay all incidental compensations consequential to the abandonment and above all, to ensure that the bank shall be fully responsible for the purchasers if abandonment is inevitable in the protection of the purchasers' interests and rights. Similarly, as the owner of the property (effected through the PPA and PSA), the Islamic bank in the BBA transaction must observe the duty to deliver the house on time, failing which late delivery damages may be chargeable on them, the duty to observe defect liability period and the duty to ensure that all the requirements under the laws (Street, Drainage and Building Act 1974 (SDBA), the Uniform Building By-Laws 1984 (UBBL), the requirements for obtaining the CCC or Certificate of Fitness for Occupation ('CF'), as the case may be and the guarantee that the title to the property can be registered in the purchasers' name upon full settlement of the loan) relating to the construction of the houses have been duly and fully complied with. If the Islamic bank (as the owner to the purported houses under BBA) fails to adhere to these requirements, the purchasers/borrowers shall have every right to take actions against the bank for specific performance and claim damages in lieu of specific performance, as well other equitable relief insofar as they are just and expedient.
 - e. Under the current BBA practice, there should be no charge created over the land and the property under construction, i.e. involving incomplete purchaser's ownership (equitable/beneficial ownership) of the house and the property of which is being the subject matter of the sale. This suggestion is to avoid *gharar*. In replace of this kind of charge, the purchasers/customers shall have to create a third party legal charge or the first party legal charge on other property belonging to him, or there must be some guarantors to the BBA, or a special Islamic insurance (*Takaful*) should be introduced to guarantee repayment of the purchase price by the purchaser, if the purchaser later defaults on the BBA repayment. If the purchaser defaults, these means can be used to settle the outstanding BBA repayment.

- f. Above all, the terms and conditions in the BBA should strike a balance between the interests of the bank (i.e. profit-oriented interests), as well as the interests and rights of the customers.

CONCLUSION

It is the opinion of the authors that the current practice of the BBA in Malaysia is contrary to the teachings of Islam, and thus, it should be modified and revamped until it is fully able to protect the interests of the purchasers/borrowers in all circumstances [including when the housing projects/housing units are abandoned, to avoid any possibility (*ihtimal*) of *gharar al-fahish*] or in the alternative, other modes of house financing should be chosen in replace of the current BBA. The alternative modes or if the BBA is still to remain, these instruments should also contain terms and conditions which can balance the interests of the bank and the purchasers/borrowers, and provide measures so as to protect the interests of the latter, particularly when the housing units are abandoned and above all, the instruments must contain no terms which can lead to the possibility of the occurrence of *gharar al-fahish*.

REFERENCES

- Abu Bakar Ahmad bin Husain bin Ali bin Abdullah al-Baihaqi, & Muhammad Abd al-Qadir 'Ata (Eds). (n.d). *al-Sunan al-Kubra*. Vol. 5. Bayrut Lubnan: Dar al-Kitab al-Ilmiyah.
- Ali, Abdullah Yusuf. (1989). *The Holy Quran: Text, translation and commentary*. Brentwood, Maryland: Amana Corporation.
- Al-Kasani, Ala'uddin Abi Bakr bin Mas'ud. (1328H). *Bada'i al-Sana'i* (Vol. 5). Qahirah: Matba'ah al-Jamaliyyah.
- Al-Shawkani, Muhammad bin Ali bin Muhammad. (1357H). *Nayl al-Awtar* (Vol. 2). Qahirah: Matba'at al-Misriyyah.
- Al-Zuhayli, Wahbah. Dr. (1988). *al-Fiqh al-Islami wa Adillatuhu* (Vol. 4). Dimashq, Syria: Dar al-Fikri.
- Al-Zuhayli, Wahbah. Dr. (1988). *al-Fiqh al-Islami wa Adillatuhu* (Vol. 1). Dimashq, Syria: Dar al-Fikri.
- Bank Negara. (2009). *Resolution of Shariah Advisory Council of Bank Negara BNM/RH/GL/02-2*. Retrieved from Bank Negara Website: http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/07_shariah_resolution.pdf
- Dahlan, N. H. Md. (2006). Abandoned housing projects in Peninsular Malaysia: A legal perspective. *Malayan Law Journal*, 6, xxviii—xxxiii.
- Dahlan, N. H. Md. (2007a). Rehabilitation of abandoned housing project: Experience of an abandoned housing developer through the help of a government agency. *Malayan Law Journal*, 1, lxxxiv—cxxxvi.
- Dahlan, N. H. Md. (2007b). Rehabilitation of abandoned housing project in Peninsular Malaysia by a purchaser's voluntary scheme: A case study. *Malayan Law Journal*, 4, clvii—cxvii.
- Dahlan, N. H. Md. (2009). Abandoned housing projects in Peninsular Malaysia: Legal & regulatory framework (Unpublished Phd in Law Thesis). International Islamic University Malaysia, Malaysia.
- El-Muhammady, A. H. (2001). *Undang-undang muamalat & aplikasinya kepada produk-produk perbankan Islam*. Kajang, Selangor: Aras Mega (M) Sdn. Bhd.
- Engku Ali, E. R. A. (2009). Islamic house financing: Issues & solutions. In *Prosiding Muzakarah Penasihat Syariah Kewangan Islam* (pp. 21-27). Kuala Lumpur: CERT Publications Sdn. Bhd.
- Haron, S., & Shanmugam. B. (1997). *Islamic banking system, concept & application*. Selangor: Pelanduk Publications.
- Ibnu Qayyim al-Jawziah, Shams al-Din Abi Abdullah Muhammad bin Abi Bakar, & Abd al-Hamid, Muhammad Muhy al-Din. (Eds). (1977). *Ilam al-Muwaqqai'in 'An Rab al-Alamin* (Vol. 3). Bayrut Lubnan: Dar al-Fikri.
- Nawawi, R. (1999). *Islamic law on commercial transaction*. Malaysia: CT Publications.

- Yakcop, N. M. (1996). *Teori, amalan dan prospek sistem kewangan Islam di Malaysia*. Kuala Lumpur: Utusan Publications & Distribution.
- Zaharuddin. (2008, December). Gharar & Gambling in Daily Transactions [Web log message]. Retrieved from <http://zaharuddin.net>
- Bank Islam Malaysia Bhd lwn Pasaraya Peladang Sdn Bhd* [2004] 7 MLJ 355.
- Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation* [2003] 1 CLJ 625 (Court of Appeal).
- Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1996] 4 MLJ 295.

CASE LAW

- Adnan bin Omar v Bank Islam Malaysia Berhad* (unreported) (Supreme Court).
- Bank Islam Malaysia Berhad v Baharom bin Harun & Rohynoon bt Mohd Yussof* (Civil No. W-02-955-2008) (unreported).
- Bank Islam Malaysia Berhad v Lim Kok Hoe & Koh Hsia Ping* (Civil Appeal No: W-02-918-2008) (unreported)
- Bank Islam Malaysia Berhad v. Mohd Razmi bin A. Rahman & Wan Hazlina binti Wan Mohd Ali* (Civil Appeal No. W-02-954-2008) (unreported).
- Dato' Haji Nik Mahmud v Bank Islam Malaysia Bhd* [1998] 4 MLJ 393 (Court of Appeal).
- Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389 (High Court at Kuching).

STATUTES

- Housing Development (Control and Licensing) Act 1966 (Act 118).
- Housing Development (Control and Licensing) Regulations 1989.
- Street, Drainage and Building Act 1974 (Act 113).
- Uniform Building By-Laws 1984.

