

The Dispute between Bank and Customer in the Case of Bai Bithaman Ajil (BBA): Malaysian Experience

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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 arised 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 arised due to customer's less understanding of 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

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1. Introduction

1.1. Background

A huge interest in Islamic financing during three decades worldwide particularly in the Muslim countries, has led to 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' Bithaman Ajil (BBA), due to the easiness compared to other products. However, it is also considered as the most debated type of facility in terms of its validity and Shariah-compliance.

BBA is a sale contract in which 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 discharging 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. Taking into account the above mention argument, this paper aimed at elaborating the issues and dispute that arise in the practice of BBA and the practical case of BBA in the context of Malaysia and Shariah perspective with regard to BBA practices. Critical review of the existing literature namely journals and research papers have been employed in this paper as methodology. Observation on current situation has been used to complement as a way to response objective of the paper.

The remaining section of this paper is structured into 4 sections. Section two elaborates the issue of 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. Lastly, section five sums up the result in the paper.

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

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

2.1. Issue on BBA

BBA is a popular instrument in South East Asian countries namely Malaysia, Indonesia and Brunei. The practice of BBA that occurred in those countries had shown to be quite unsatisfied for the customers and bankers that then lead to legal disputes. 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 are not convinced when it comes to early redemption or in the event of default. In these matters, with the same reason, BBA contract always brings the customer to end up with a higher financing balance at any certain time if compared to the conventional loan with the same monthly payment and *Affin Bank vs. Zulkifli Abdullah* was the example of BBA dispute case which ended up in court.

Secondly, when there is default payment, the ownership of the asset is remained in hold in the bank as the financier; there is no transfer of ownership proportionate according to the amount 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 compared to other Islamic product like MMP (Musharakah Muta qisah) which is the combination between the Partnership and Ijarah. Critically, the global Fuqaha specifically Shariah scholars in the Middle East are diverged in the opinion of the BBA with regard to the prohibition of interest 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 use 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 arises when the BBA fixed financing mode triggers the problem of liquidity management due to the charge of funds especially the deposit rate is determined based on floating rate while its income is decided 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 improvisations in methods to BBA is done 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 buy the property first and then look for financing. The transactions seem to be looked 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 should be distinguished that the profit derived from the deferred payment in loan basis is prohibited as this is considered as Riba. However, this trading based transaction is allowed by majority Muslim Jurist. Some support the idea of taking profit upon deferred payment in the sale and purchase contract due to the following reasons.

1. Price will possibly rise due to its deferred payment.
2. The deferment for some period of time has a value in the price.
3. Five which is paid in cash is equal to six which is paid on deferred.
4. The period is part of the price.
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.

2.2. Dispute on BBA in case of default payment

The problem arises in BBA cases leading to the disputes 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 respected and implemented in clear written terms of the contract and should not be interfered by the intention of parties 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.

3. The Practical Case of BBA

The purpose of Islamic economics and finance is to ensure justice and prevent things which is prohibited in Shariah namely *riba* (usury), *gharar* (uncertainty) and *maisir* (gambling). Moreover, there are many Islamic instruments which provide benefit to 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 of 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

as:less comprehension of the consumer and the Bank regarding Islamic finance. This section analyzes two court cases arised on BBA in Malaysia namely: (a) Dato' Haji Nik Mahmud bin Daud versus Bank Islam Malaysia Berhad, and (b) 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 alleged the bank because the instrument executed by it for the transaction was null and void, and there was no transfer of ownership in the lands concerned. The previous argument elucidate that the court is not in favor of the customer to win the case. Moreover, the court intended to save the bank because if the court wins the customer, the bank will not be able to recover benefits or gain profit under the BBA instrument. It will also harm the Islamic financial institutions in Malaysia because BBA is consider as the most preferred type of Islamic instrument 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 case was won by the bank and the customer had to pay the remaining installment. This case occurred due to default in payment of installment before the end of tenure in the form of home financing facility. In the transaction this incident is consider 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

In the previous section both cases for (a) Dato' Haji Nik Mahmud bin Daud versus Bank Islam Malaysia Berhad, and (b) Affin Bank Bhd versus Zulkifli bin Abdullah were won by the bank. The judge intentionally won the bank side in order for the bank to recover its profit. If the court won the banks, they will gain positive image from the economic side and in the public eye.

The purpose of the customer in dealing with Islamic bank through BBA instrument is to avoid conventional banking based on interest, 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 lost the case and received the burden by paying the remaining installment. Further, the customer had less legal coverage 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 short, public should be educated with Islamic economics and finance knowledge, hence they can prevent themselves from legal tricks of banking institutions. Moreover, there are NGOs that have stood on the customer side in terms of legality for Islamic instruments agreement.

4. BBA from Shariah perspective

BBA is a sale contract which is widely used not only in Malaysia but also in other countries such as Pakistan and Indonesia. Almost all financial institutions in Malaysia have practiced it since Bank Islam Malaysia Berhad (BIMB) implemented it in 1983 (Razak et al,2008). This section will discuss the Shariah perspective in terms of the concept of BBA and the main issue arised in the practice of Malaysian BBA.

4.1. The Concept of BBA according to Shariah

It's very important to explain the difference between the BBA, what is practiced now by the Malaysian financial institutions, and the original concept of BBA or what is its similarity to other instruments namely Al Bay al muajal, Bay' al nasiah and Al Bay' bi al taqsit'. 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 is used to be called Al baialmu'jl, which has been allowed and proven by all scholar or mazahhib.

The principles that have been allowed by Hanafi, Shafiai, Maliki and Hanbali are the conditions that the price must be fixed and any difference in price with the change in duration of payment 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 1200.¹ From the definition of BBA, there are two constituents 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.

¹ <http://www.hablullah.com>

Second, *Tajil al thaman* (deferment payment) depend on agreed period. Moreover, there are two more components added in the 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 have separate contract with the developer to claim ownership of the house first, then resale it to the customer.³

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 the customer is 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 complete 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 Maliki's, Hanafi's, and Hanbali's are in the opinion that this kind of act (contract) is forbidden, except Al Shafi and Al Thahri. There are a temporary scholar Ahmed Al Salus who 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 valid.⁴

The element of *khiyr-al' Ayb* in BBA financing (the option of defect) has become an issue in this transaction, whereas it is a significant element in a sale contract. They found that the Property Sale Agreement (PSA) transfers all the liabilities on the part of the bank to the customer, which means 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.

² 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

³ Rosly, SaifulAzhar, and MahmoodSanusi. "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

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 was low customers to use BBA which due to high level of dissatisfaction. They recommend 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-Inah for the sale involving riba (i.e. difference of prices) or a trick (helah).

Nevertheless, the minority (such as the Shafie, 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 is 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 papers studied 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 concerned five issues in BBA are: 1) the issue of Bay' almadum, 2) the issue of Isqatkhiyar al-ayb, 3) the issue of Bay' washart, 4) the issue of ibraand 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 issues are elaborate as follows:

1) The issue of Bay' almadum

Issue of Bay' al-madum or Bay' ma la tamlik is referred to Bay' the property under construction is the property that does not exist yet the writer explained that according to IbnTayimah 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 Isqatkhiyar al-ayb

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

3) The issue of Bay' washart

It was concluded that all 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 clause 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 Bayal-Inah as permissible instrument. However, he has a solution for the discussion he provided in his paper. 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 considered invalid. Moreover, the elements of Bay'al-Inah in BBA should be eliminated 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.

5. Conclusion

As a way to establish justice and realize religious purpose, many Islamic instruments are offered to the customer as a way to avoid activities which is prohibited in the Shariah. As part of Islamic instrument, many issues arise in the practice of BBA. The issue arises due the customer is not convinced 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 compared to other Islamic products such as MMP (Musharakah Mutaqisah).

One of the improved 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 arised in BBA cases that led to 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. Most cases that attracted much public attention were the way the bank practitioner calculated the outstanding amount to be repay by borrower who had defaulted on their BBA contract. Dispute cases that arised between the customer and the Bank that passed to the court won by the Bank.

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

According to the Shariah, principles allowed by Hanafi, Shafii, Maliki and Hanbalifor Islamic transactions to be valid require the price must be fixed and the duration of payment or period of payment bringing 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 Maliki's, Hanafi'sand Hanbali's 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 a 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 consist 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'al-Inah, 2) Isqatkhiyar al-ayb, 3) Bay'almadum, 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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