

QUESTIONS AND ANSWERS ON BAY BITHAMAN AJIL FINANCING FACILITIES

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1. You mentioned that the main issue of the BBA facilities is not about the selling price or right for rebate but concerns the fundamental issue of fiqh muamalat which extremely discourages any act of legal trick or fiqh hiyal as can be clearly found in the BBA instruments. Can you please explain in lay men's term what all these means and how BBA consist of legal trick?

To address this issue, it is essential to have better understanding on the conceptual framework of *Bay Bithaman Ajil* (BBA) facility. Having in mind that people are sometime confused with BBA and *bay' al-Inah*, it is worth mentioning the difference between the two. BBA is only a mode of payment and BBA facility is actually structured under *bay al-Inah* concept. *Bay' al-Inah* refers to the concept of buying and selling between two parties where the bank sells an asset (be it real or fictitious) to the customer on a deferred payment and then the financier immediately repurchases the asset for cash at a discount or vice versa. As a simple illustration, we may refer to the mechanism used in personal financing. Customer X needs cash for his personal consumption and applies for personal financing based on concept of *bay al-Inah*. To facilitate the financing arrangement, Bank X will sell a computer or a small lot of its fixed asset to the customer on deferred payment at selling price of RM5000 and then immediately repurchases the computer for cash at a discount price of RM4000. This kind of practice is questionable since the real intention of the contract is not for actual sale transaction but to provide cash to the customer. With the absence of several elements of valid contract, I am of the view that this kind of practice may constitute legal device which is quite equivalent to interest-based financing.

Although contract of *Inah* is confirmed from Shafi'i point of view which is even hardly to prove with satisfactorily evidence that he has expressly declared its validity, it is nevertheless condemned by numerous *fuqaha* as it has been seen as something similar to *riba-based* financing. The Malikis, Hanbalis, Ibnu Taymiyah, Ibnu Qayyim and contemporary *fuqaha* such as Yusuf Al-Qaradawi, Wahbah Al-Zuhailiy and others vividly hold that contract of *Inah* is not valid. If this is not sufficient to convince the proponents of *bay al-Inah*, perhaps judgment of the High Court in the case of *Arab Malaysian Finance Berhad vs Taman Ihsan Jaya and Ors* provides a strong message about the status of *bay al-Inah*. Despite of the High Court judgment was overruled by the Court of Appeal, the decision made by the learned judge at least effectively highlighted several significance issues on the validity and actual implementation of BBA facility.

2. Since no one has appealed against the Court of Appeal's decision that favoured the banks, what can consumers of BBA do in the event they default?

Besides going to the court of justice as a settlement of last resort, there are several avenues available for the consumers. They may consult the Bank Negara Malaysia *Laman Informasi Nasihat dan Khidmat*, the Association of Islamic Banking Institutions of Malaysia and any other consumer associations. These institutions may provide some

assistance, guidance and information for any potential settlement or action that needs to be taken for the consumers.

In addition, as an ex-in-house legal counsel for one of Islamic banks in Malaysia, I personally view that the best approach for the consumers is to discuss and consult the extent of their indebtedness with the financial institutions. I believe that the financial institutions are surely willing to offer various financial arrangements to the consumers for possible settlements either via refinancing, rescheduling or any other available financial instruments. As far as I concern, the financial institutions mainly concern about debt recovery and the consumers on the other hand if possible try to avoid any legal action against them. At this point, mutual understanding and agreement based on mutual consideration on any settlement of debt by both the financial institutions and the consumers are much more preferable.

3. Do you think Bank Negara should intervene in some way? How and what should be done?

I agree that the Bank Negara Malaysia (BNM) may interfere to certain extent. But I would like to insist here that any intervention or roles play by the BNM will only provides solution from regulator's perspective. For instance, the initiative taken by the BNM to amend the Central Bank of Malaysia Act 1958 which affirms the authority of the National Shari'ah Advisory Council (SAC) as the sole authoritative body on *Shari'ah* matters pertaining to Islamic banking, takaful and Islamic finance is commendable. This recent amendment enhances the status of the SAC's rulings to be binding upon the court as well as arbitration.

While affirming the essence of regulation to provide strong and robust framework for Islamic finance, I also have strong faith on the institutional and community approaches. The institutional approach requires the financial institutions to pro-actively consider the overall issue in Islamic finance which may affect the industry as a whole. In this regard, product innovation and financial engineering with *maqasid Shari'ah* as the paramount consideration for Islamic financial products are much needed. To complement this, community approach that nurtures the demand towards truly Islamic and *Shari'ah-based* financing products may create motivation to financial institutions to offer such kind of financing instruments.

4. What is your advice to consumers who are planning to take up BBA?

In the context of Malaysian consumer perspective, they do not have much choice about the availability of financing facilities particularly retail products. Furthermore, the consumers are motivated with price and package of financing that suit their needs and financial capabilities. Hence there must be a paradigm shift on the consumer's way of thinking and approach towards Islamic financial products including BBA. While believing that education and awareness about general understanding of Islamic financial products on the part of consumer are of the essence, I am of the view that the consumers must also be very diligent and concern about the mechanism of Islamic financial products that they plan to subscribe. With the basic knowledge of contemporary applied Islamic finance, then the consumer may be able to influence the market particularly financial institutions to satisfy their needs towards *Shari'ah-based* financing.

5. Can our banks sell things to customers? From what I understand, a bank is supposed to be a financial institution that gives out loans to clients, not sell goods. Is the role of the housing loan in BBA then contradicts the banking laws in any way? Must BBA housing loan adhere only to the Islamic Banking Act or must also adhere to BAFIA?

Let me first address the issue on the IBA and the BAFIA in order to clarify the framework of these both acts. The IBA is relevant to full fledged Islamic banks while the BAFIA particularly section 124 is concerned upon Islamic window i.e. conventional banks that offer Islamic financial services. In this regard, Section 124 (6) specifically exempts the application of the BAFIA to Islamic banks. In other words, Islamic banks shall adhere to the IBA and Islamic window to the BAFIA.

As regard to the second issue, section 33 and Section 66 of the BAFIA 1989 provides certain restriction on trading and investment in which the former require the banks to not to engage in any trading business other than its licensed business and the latter restricts the banks to have any shares in companies as well as immovable property. BNM nevertheless has the authority to give exemption on these restrictions. Furthermore, section 124 (1) allows Islamic window to carry on Islamic banking business or Islamic financial business in addition to its existing licensed business. At this point, Islamic banking business or Islamic financial business refers to any business that free from element which is not approved by religion of Islam and this includes sale or trading transaction such as in the case of BBA.

7. Do you think the BBA contradicted both the laws as ruled by the High Court Judge (before the decision was overturned)?

As highlighted by the learned judge in this case, I personally view that it is a matter of interpretation. There is no single definition of BBA or other Islamic financial instruments either in the IBA or the BAFIA. Moreover, the absence of precise definition of Islamic banking business leads to uncertainty and vagueness. Both the IBA and BAFIA are general, non-exhaustive and non-comprehensive. If this issue has not been resolved, I will not be surprised that there will be another controversial court's judgment which may give huge implications to Islamic finance industry in the future.