Analysis on Islamic Home Financing in Malaysia

Azwina Wati Abdull Manaf 1*, Siti Marshita Mahyut2, Asfarina Kartika Shakri³

^{1,2,3}Faculty of Law, Multimedia University, Jalan Ayer Keroh Lama, 75450 Malacca, Malaysia

> *Corresponding Author azwina.manaf@mmu.edu.my

ABSTRACT

Islamic financial institutions (IFIs) realize that they need to innovate and create new products in order to remain competitive with the conventional products. In introducing Islamic home financing, Islamic banking has used several Islamic concepts such as Ijarah (leasing), Istisna' (purchase order) and Musharakah Mutanaqisah (partnership) to create more flexible products and provide more options for the people to choose the kind of products that suit them the most. Islamic home financing product is also considered as an alternative product to conventional housing loan with its own specialties to be discussed later. In introducing new product, Bank Negara Malaysia plays an important role in providing guidelines for the IFIs to adhere to in innovating or developing to serve the interest of the customers. This paper analyses in detail on how Islamic finance concepts are used and applied by the IFIs to introduce different types of home financing products.

Kewords: Islamis financial institutions; Islamic finance; Islamic home financing.

1. Introduction

Islamic banking is a Shariah - Compliant banking system. ("History of Islamic Banking", n.d) The foundation of Islamic Banking is based on the principle of Maqasid Shariah. The terms maqasid means goals or purposes (Nooraslinda, 2013). Hence, Maqasid Shariah generally means the purpose of Shariah Law. They concern on the rationales, aims and the basic good in the Shariah rulings and emphasize on their importance based on the Islamic scripts by observing the Islamic faith.

Many Islamic scholars have agreed on the point that the main purpose of Magasid Shariah is to serve the interest of humankind and to protect them from any harm. Such principle can also be seen as a guideline for Islamic Financial Institution to act in compliance with the standards of virtue and moral consciousness been laid down in Shariah law. Therefore, we can see that the Maqasid Shariah plays an important role in determining the legality of Islamic transaction whereby all transaction must be halal and must have positive impacts to the people's welfare. This is very important in the operation of Islamic Financial Institution. Anything that is innovated by the Islamic Financial Institution must be based on the Shariah principles as mentioned above and must put the customers' needs as the top priority to serve the best interest to them.

Under section 28(1) of the Islamic Financial Services Act 2013 (IFSA 2013), it states that an institution must ensure that its aims and operation, business, affairs and activities are in compliance with Shariah (IFSA, 2013). The basic governing principle of Islamic banking is that interest (riba), speculative trading (gharar) and gambling (maysir) are strictly prohibited in Islamic banking. The prohibition of riba can be seen under chapter al Baqarah 275 which states that 'Allah has permitted trade and prohibited riba'.

The development on Islamic banking product begins when the Islamic Financial Institution realize that they need to innovate and create new products in order to remain competitive with conventional products. Islamic banks, in introducing Islamic home financing products, used the Islamic finance concepts such as Bai' Bithaman Ajil (BBA), Musharakah Mutanaqisah (MM), Ijarah and Tawaruq (Teh, 2013) to create more flexible products and provide more choices for the people to choose the kind of products suit them the best ("Overview of Islamic Finance in Malaysia", n.d). Islamic home financing products are also considered as an alternative product to conventional housing loan

but with its own specialties.

In introducing new product in Islamic home financing, the central bank of Malaysia (Bank Negara Malaysia or BNM) plays an important role in guiding the introduction of such products. They ensure the compliance to the legislation in Malaysia. Bank Negara Malaysia also ensure that the new product protects the consumer to ensure that risk in home financing can be managed properly to ensure justice among the consumers. Generally, Bank Negara Malaysia serves as a guideline for Islamic Financial Institution to adhere to in innovating Islamic home financing product to serve the interest of the customers (Nooraslinda, 2013).

Since Islamic home financing is among the popular products being offered by banks in addition to car financing, it is therefore important to understand the products in detail.

2. Islamic Home Financing in Malaysia

There are several Islamic home financing products available in Islamic banks in Malaysia. Among others are products based on Bai' bi thaman Ajil (BBA), Musharakah Mutanagisah (MM), Ijarah and Tawarrug.

Bai' Bithaman Ajil (BBA)

Bai' Bithaman Ajil (BBA) is one of the most popular types of financing. In the Middle East, a similar practice is used under the term Murabahah. However in Malaysia, BBA and Murabahah are two different products. The main difference between the two is that Murabahah is often used for short term transaction while BBA is used for a much longer term transaction (Mahyuddin, 2016).

BBA is a deferred payment sale contract in which payment of a price is deferred at a certain time in the future while the delivery is made in advance. The selling price includes the cost of the price plus profit margin. BBA financing would allow customers who could not afford to pay cash in advance to be able to purchase the house of their own and pay instalment later. It is to facilitate and support the smooth flow of transaction and to provide a more flexible mode of payment through credit payment.

The permissibility of deferring the payment of price in a sale contract can be found in the hadith of the Prophet SAW. The Prophet's companion Jabir reported in the Hadith that the Prophet bought a camel from him outside the city of Madinah in which the payment was only later settled when he was in Madinah (Reported by al-Bukhari). In addition, the Qur'an provides a general principle which states that. "O you who believe!, Eat not up your property among yourself in vanities; by way of trade on mutual consent."(al-Nisa', 49).

There are several issues being raised against the practice of BBA in home financing. Among them is the involvement of three purchasers i.e. the customer, the developer and the bank, for the same subject matter. Besides, the customer alone is liable to pay the stamp duty for the purchase price and ownership of the property, while the bank is also going through the same process for the same property.

Another issue is that the stamp duty is payable not at the sale value of the percentage of the sale price under the property sale agreement where the bank immediately sells to the customer, having bought the same property under the property purchase agreement from the customer (Munawar Igbal, 2016).

In the case of Dato Hj Nik Mahmud bin Daud v Bank Islam Malaysia Berhad (1CLJ 576, 1996) it was held that BBA does not involve any sort of transfer of ownership but only a right to registrable interest. The execution of the property sale agreement and the property purchase agreement were merely constitute part of the process required by Islamic banking procedure before the bank would avail the customer of the financing facilities provided by the bank and the BBA principle. Therefore, the transaction still amounts to a lending transaction not a sale transaction.

In Affin Bank Bhd v Zulkifli bin Abdullah (1 CLJ 438, 2006) the court held that the profit margin that continued to be the charge of the unexpired part of the tenure cannot be actual profit. It was clearly

unearned profit. It contradicted to the principle of BBA as to the profit margin that the provider was entitled to. Obviously, if the profit had not been earned, it was not profit, and should not be claimed under the BBA facility.

In Malaysian Banking Berhad v Marilyn Ho Siok Lyn (3 CLJ 796, 2006) it was held that it would not be equitable to allow the bank to recover the sale price as defined in the instrument when the tenure of the facility was determined prematurely.

"It is common knowledge that people have preference to a BBA facility for the simple reason that they are better off than that of a conventional bank loan in terms of ringgit and cents as the amount of repayment in the nature of profits and slightly lower to the normal interest charge in a conventional loan and fix ... As such, people who take up a BBA loan should not be put in a worse position than had they taken a conventional bank loan. If the plaintiff in this succeeds, there is no doubt that the defendant would be put in a worse situation than had she taken a conventional one."

In short, it is important for all to appreciate the mechanics and nature of the Islamic financing scheme of BBA because BBA contracts although require some modifications in certain areas, it would undoubtedly continue to play a vital role in expanding business of Islamic banking in Malaysia.

Musharakah Mutanaqisah (MM)

Another option under the Islamic home financing product is Musharakah Mutanaqisah (MM) which managed to secure a total financing of RM 5.629 million (Syahidawati et al., 2013). AAOIFI (Accounting and Auditing of Islamic Financial Institutions) defines Musharakah Mutanagisah as a form of partnership in which one of the partners promises to buy the equity share of the other partner gradually until the title to the equity is completely transferred to him (AAIOFI, 2013). MM home financing is a hybrid product that adopts the concept of Musharakah (partnership), Bai' (sale), Ijarah (rent) as well as Wa'd (promise). MM is simply a contract of diminishing partnership.

In MM, customer would first identify the intended property to be purchased and approach the bank for financing under Musharakah Mutanaqisah arrangement. The bank and the customer would then jointly purchase the property. After the purchase, customer may use the property by way of leasing the asset from the bank and the monthly rental will be shared among them according to the percentage shareholding at the point the rental is paid.

Customer will get the share from the bank in the said property by way of purchasing the bank's equity of the jointly acquired property. The bank's share of the property is reduced from time to time over the financing tenure with the purchase made by the customer.

The partnership would end when the customer made the final payment to the bank which includes the profit and the amount equivalent to the remaining shares the bank has in the property. This kind of concept has been widely used in several Asian countries including Malaysia, Brunei and Indonesia.

In 1976, Samy Hamoud introduced this concept in his thesis. The Islamic bank in Jordan is using this concept for matters relating to financing as well as investment. It was around this time that the term Musharakah Mutanagisah was introduced and accepted in the first Islamic financial institutions' conference in Dubai and the concept was acknowledged as a new mode of property partnership. The permissibility of MM is agreed by majority of the scholars. Most of them argued that there is no specific evidence or ruling stated in the Quran as well as the Sunnah that could be said to prohibit the concept or practice of MM.

In Musharakah Mutanaqisah home financing, the documents needed are wa'ad (binding promise), Musharakah Mutanasigah agreement, sale and purchase (S & P) or the supplemental sale and purchase if the customer had signed the agreement with the vendor before going to the bank for financing purposes, ijarah lease agreement, trust deed (if necessary) and letter of undertaking.

There are however several issues being raised with regards to MM. The issues include the rental rate, the wa'ad, damage of the property and also tax and land ownership. The bank will be referring to the Islamic Bank Rate (IBR) with some adjustments to suit the profit rate. This profit rate is changeable according to the financing amount as well as the status of the property either it is still under construction or has been completed. For home financing that falls between RM 100,000 to RM 500,000, the IBR rate will be 1.70% for completed homes and 1.60% for homes under construction. If exceeds RM 500,000, the adjustment rate will be higher by 1% for both categories. Other than that, the rate for completed property more than RM 100,000 is 1.30% and 1.20% for property under construction. The issue here is, the bank that claims to be an Islamic bank still use conventional bank interest rate as a benchmark whereas the bank should be using only rental rate.

IBR is also based on the Overnight Policy Rate of Bank Negara Malaysia which may contain element of uncertainty because the interest rate is fluctuating on daily basis and may cause burden to the people although the bank stated that the profit rate is being caped at 10.25% which is similar to conventional bank. Other than that, customers always complain that they have to bear maintenance cost when there is no actual clause on such matter in the agreement. The bank may argue that the customer holds the legal title of the property; therefore the customer should be bearing such costs. It would be unfair to the bank to bear such costs when at the end of the day the house will be owned by the customer. Sooner or later the customer will have to pay the maintenance cost and not depending on the bank but no actual clause claims so (Ahmed et al., 2005).

Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) had agreed that financing based on MM contract is allowed due to the fact that it is actually a contract recognized in Figh Muamalat. In implementing the contract, the parties are allowed to combine the contract of Musharakah and Ijarah into an agreement document, as long as both contracts are being concluded separately and clearly and did not mix with each other (Sollehudin et al., 2011).

Bank Negara Malaysia had listed out the guidelines of the MM contract for the Islamic banks which include; improving corporate governance activity to manage MMP contract for Islamic institutions; mitigate the management of risks of MMP contract and diversify Islamic banking risk into equity base or floating-rate (Lee Ching Lung, 2013).

Ijarah and Tawarruq

Ijarah is a type of lease, which in its literal sense, means compensation or a return. Legally it is defined as a contract to use the usufruct of a thing or the service of a person in return for compensation. Ijarah is a contract in which service is delivered in exchange for a consideration. The main purpose or objective of a lease is to enable a customer (lessee) who does not wishes to own a certain asset, but in need to utilize the asset to make full use of the asset by paying an agreed rental fee to the lessor. Ijarah is a financing tool to allow customers to procure their assets through a lease, instead of buying the assets. The concept of Ijarah is widely used in Islamic banking (BNM, 2014).

Under Ijarah, things that can be consumed cannot be leased. For example, food, fruit or money cannot be rented as they are considered as perishable goods. Only usable properties could be leased as they can provide a continuous flow of usufruct. Usufruct refers to the intangible benefit that is derived from a certain property such as the shelter from a house, a lift from a car, or services extracted from an employee. This is in accordance to the majority of the fiqh schools. Thus, it is not permissible to rent a cow for its milk because the milk cannot be considered as usufruct as they are tangible (Abdul Sattar, 2013).

Furthermore, with regards to the legality of the Ijarah, it is evident that Ijarah is permissible as it can be seen in the Quran and the Hadith of the Prophet (p.b.u.h.). According to the Quran, "And if they suckle your (offspring), give them their recompense." (Quran, 65:6). As for the Hadith of the Prophet, "Pay the worker his wage before his sweat dries up." (Al-Bayhaqi, hadith no. 11431).

Moreover, Ijarah can be divided into two: first is lease for the

usufruct and lease for the service. Lease for the usufruct can either be movable assets such as a car, or it can also be for immovable assets such as a house. On the other hand, lease for the service can further be divided into two: first is an employee who works for an employer for a specific wage. During the period of employment, he is not allowed to work for another employer. He is subjected totally to the control of his employer. Second is an independent contractor or a general employee who works for himself and become his own master. Tailors, carpenters or consultancy firms are examples of general employees who may work for more than one employer. A general employee must perform his contract in the form of services even though he can determine his own method of performance (Abdul Sattar, 2013).

There are several conditions laid down for the usufruct or service. The first is the manfa'ah (usufruct) should be known; by clearly mentioning the leased asset. This is to avoid ambiguity and conflicts between parties. Secondly, the leased asset from which the usufruct is derived should be delivered to the lessee. Thirdly, the usufruct should be attainable. It is not permissible to rent perishable properties which the usufruct cannot be obtained. For example, a house which is not suitable for occupancy cannot be rented as it is not possible to derive any usufruct from these properties. Fourthly, the usufruct should only be used for lawful purposes. Anything that is haram is not permissible such as renting a house for gambling purpose or leasing a vat for producing alcohol beverages. Lastly, the usufruct should be used for the same purpose which the asset is rented (Yusuf Saleem, 2012).

Tawarruq is also known as reverse Murabahah, it is a contract where a person purchased certain commodities at a deferred higher price in order to sell it in cash to a third party for a lower price. In other words, Tawarrug comprises of two sale and purchase contracts where the first involves the sale of an asset to a purchaser via deferred payment and the latter sale or of subsequent in nature involves sale of the asset to a third party via cash. Besides, it also means, buying on credit and selling at cash to a third party (Nasrun & Ghazali, 2016).

An example of a Tawarrug contract is as follow. ABC & Co is in

need of cash to run their business operations and they approached the bank for providing them with liquidity of RM100, 000. The bank then offers the company to buy a building for RM100, 000 and sell it to the company on instalments with a 12% mark up price. The company then sells the building to a third party on cash basis at cost price (M.N Siddiqi, 2012).

Tawarruq is often used in Islamic banking to assist cash liquidity. This mode has become recently popular in Malaysia. However, the one practiced in Islamic bank is an organized Tawarruq where the bank purchases a commodity and sells it to customer at a deferred higher price. The customer then appoints the bank as an agent to sell the commodity at a lower price. The bank will then credit the price to the customer's account. Majma' al-Figh al-Islami al-Duwali ruled organised Tawarruq as prohibited (Nasrun & Ghazali, 2016) and the International Council of the Figh Academy of the Organisation of Islamic Conference (OIC) has decided that organised Tawarruq is not permissible as it involves simultaneous transactions between the bank and the customer. The Council held that the transaction involves deception in order to get additional quick cash and contain elements of riba (Yusuf Saleem, 2012). In the contemporary Islamic banking practice, both Ijarah and Tawarruq contracts are gaining popularity in offering home financing to customers.

3. Discussion

Based on the above discussion on the matters relating to Islamic home financing products that are available in Malaysia, each and every product has its own strengths and weaknesses.

Bai' Bithaman Ajil or BBA is a home financing which promotes deferred payment of sale. It is a contract where customer who wishes to buy a property but does not have enough money to own a property. The financier will purchase the property from customer at a price of the financing amount then sell back the property to the customer at a price including the profit margin. BBA is a facility which is provided by the financier to enable the customer to own a property over a period of financing in the future with the rate of payment as agreed beforehand (Nooraslinda, 2011).

Musharakah Mutanaqisah or MM is a home financing product which is based on the concept of diminishing partnership. This is a contract which is normally made between the customer and bank that has come to an agreement to own a property with joint ownership. In such joint ownership, the customer and bank will have their own shares in the related property. The customer will then purchase the shares owned by the bank gradually over a period of financing. After the final payment has been made to the bank, the customer could fully own the property by himself. This type of home financing product can be considered as the bank helping the customers to purchase the property by having joint ownership with the customer purchases the property from the bank gradually in the future. There will also be the Ijarah agreement because customers will have to rent the property which is owned by the bank in order for them to utilize such property.

Another type of home financing product is the Ijarah home financing. Such type of financing is commonly used when the customer does not wish to own a property but prefer to utilize the property for his or her own purposes. Hence, customer can choose ijarah home financing to rent certain property at a mutually agreed rental fee. This is quite similar to the renting agreement. In practice however, bank would normally asked the customer to purchase the property at the end of the leasing period.

The last type of Islamic home financing product is Tawarruq. It is known as a reverse Murabahah where customer could get cash by selling the purchased commodities from bank at a lower price. The cash would then be used by the customer to purchase the required property.

After all the discussion on the several types of home financing product, authors are of the opinion that the Musharakah Mutanaqisah or MM is the best choice among all for customers who wishes to purchase property. This is because MM is more flexible as compared to BBA. Customers are able to own the property earlier by paying the sum earlier to the bank without the need to compute the rebate. Furthermore, on the matter of selling price and bank profit, MMP tends to reflect the market price and also the rental value. This would enable the rental and the selling price of the property to be determined according to the market price. It is better than BBA as the selling price of BBA that includes the mark up profit is quite substantial (Nooraslinda, 2011). Hence, MM enables the customers to pay the rentals according to market price.

Besides, in MM, there is no advanced profit being charged by the bank. This is different from BBA. In BBA, there is fixed mark-up profit included in the selling price which customers may end up paying four times higher from the original cost of the property. Such payment will bring burden towards customers who has lower income (Nooraslinda, 2011).

Be there as it may, even though MM seems to be more friendly towards customers, banks are in favor of BBA rather than MM. This is because MM does not have any advanced profit. This will cause the bank to gain lesser profit as compared to BBA. Hence, as for bankers, they will tend to provide more BBA home facility to the public. However, as for customers, having MM is more favorable over BBA as it has more benefits as compared to BBA. Not only that, MM has lesser problems as compared to BBA which customers tend to bring forward the problems in BBA contract to the legal platform. MM tend to put the wellbeing of the people as priority as normally the outstanding balance of financing will not exceed the original price of the assets. As an example, the approach used by Citibank in offering a housing financing product in MM is in accordance with its own standard as well as necessary compliance with Shariah guidelines and according to the traditions of the buying and selling houses in Malaysia. In addition to that, the customers are allowed to pay more on installments at any time in addition to getting rebates (minus the profit rate taken by the bank). Citibank Home Partner-i customers can make installment payments at more than RM 5,000 although the original installment is only RM 500 per month without any prior notice. This means that customers do not need to inform the bank formally on the subject as Citibank is able to

track it automatically after the installment is paid (Sollehudin, 2011).

4. Conclusion

In conclusion, Islamic home financing products can be considered as a substitute to the conventional home financing products. Comparative to conventional home financing product, the products offered by Islamic banks are considerably fair, just and transparent which allow the customers to know better and know more on the financing products that they have chosen. Islamic home financing products are suitable for the public irrespective of Muslims or non-Muslims. It is a home financing product for all. Bank Negara Malaysia governs, supervises and also monitors the progress and performance of Islamic banks in introducing any new Islamic home financing products to ensure that they are Shariah compliant. Hence, when one are choosing which Islamic home financing products suits the best, one should choose the type of products that will bring joy and ease to your financial status.

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