

Validity Of *Al-Bai Bithaman Ajil* Contract In Malaysia: An Analysis Of Judicial Decisions In Malaysia

By:

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ABSTRACT

It is known that Al-Bay' Bithaman Ajil (BBA) is the most common type of Islamic financing. The most probable reason might be that few people can afford to buy a house, land, consumer goods etc. on cash terms. It is clear that when disputes relating to BBA 'rears its ugly head', it is the civil court (and not the syariah court) which is empowered to examine and make a finding of fact in the case before it and what element if any, is involved which is not approved by the Religion of Islam. In the light of the above situation, this study intends to determine the nature and essential features of a BBA contract and to analyse the factual circumstances which are judicially taken into consideration by Malaysian civil courts in determining the validity of BBA contracts. This objectives are achieved by using reliable method well received by the legal fraternity i.e. by analyzing authoritative case laws which contain the findings of the trial judges and the appeal judge, as the case may be. The study is important in the sense that the findings can firstly; be a guide to ensure that BBA contracts meet not only syariah and legal requirements but more importantly are legally enforceable; and secondly to promote BBA as a safe product which has taken into account contractual justice from Islamic and secular views.

Keywords: BBA contract, nature, features, judicial reasonings

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1.0 Introduction

The fundamental requirement under Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989 is contained in the provision that in respect of Islamic banking and financing, the aims and operations of the bank do not involve any element not approved by the Religion of Islam. *Al-Bay' Bithaman Ajil* (BBA) facility is an Islamic facility which is defined as the sale of an object against an obligation to provide payment on a future date whereby the commodity exchanged is delivered immediately and the price is paid by instalments (Norhashimah Mohd Yasin, 1997). According to Nik Mustapha Nik Hassan (2000), BBA is universally known for at least one distinguishing feature namely that they are not based on *riba* (interest) Equally important feature is that Islamic financial instruments have to be *Maysir* (gambling free) as well as free from *Gharar* (excessive ambiguity).

Banking, hire-purchase, employment and trade, whether entered into by Muslims or non-Muslims, are within the purview of federal laws. Thus, in terms of testing the enforceability of an Islamic banking product in the event of default by the customer/borrower, it is the civil court (and not the syariah court) which is empowered to examine and make a finding of fact in the case before it. The civil court might be taking into consideration of any element which is not approved by the Religion of Islam. There is however, neither necessity nor reason for the civil court to refer religious concepts to the Syariah Advisory Council for any ruling, which in any case, while they are to be taken into consideration, are not binding upon the court. This was also evident with the enforcement of a practice circular known as *Arahan Amalan No.1/2003, Pendaftaran*

kes-kes Muamalat di Mahkamah (Kod Pengklasan) which later on led to the setting up of a *muamalat* division within the civil court system to specifically handle federal laws with an Islamic contents. It may be safely conclude that the function of the civil courts is to examine the application of these Islamic concepts, as to whether as implemented, and in the particular cases before it, the transactions do not involve any element not approved in the Religion of Islam. It is a question of looking at the particular facts. That remains the judicial function of the court which it cannot abdicate.

The above explanation forms the foundation of the civil court's approach in respect of the actions involving Islamic financing facilities before it.

2.0 Problem Statement

Muslim scholars worldwide agree that there is no dispute that the concepts of *Al-Bai' Bithaman Ajil*, *Al-Istisna'a*, *Bai Al-Inah*, *Murabahah*, *Al-Ijarah* and the like are, in principle, Islamic in nature by reason that no interest is involved. In Malaysia, Islamic financing schemes, approved by the Syariah Advisory Council under the Central Bank of Malaysia Act 1958 (Revised 1994) Act 519, in principle do not involve any element not approved by the Religion of Islam. However, the issue of concern is in terms of legal enforcement which takes place not in the syariah but the civil courts.

In Malaysia, List II, Paragraph 4(k) of the Federal Constitution provides the federal Parliament absolute power in relation to ascertaining Islamic law and other personal laws for purposes of federal law. It is judicially accepted that the federal Parliament have the last say on matters in the Federal List even with Islamic components.

Hence, the scenario in Malaysia is that disputes relating to Islamic financial schemes including BBA contract fall within the jurisdiction of the civil courts instead of the syariah courts. In *Bank Islam v Adnan Omar* [1984] 3 CLJ 735 and *Dato' Nik Mahmud Daud v Bank Islam* [1998] 3 MLJ393; *Bank Kerjasama Rakyat v. Emcee Corporation* [2003] 1 CLJ 625, the Courts 'did not buy' the argument that the syariah courts and not the civil courts as the proper forum to adjudicate matters over Islamic banking. The issue worth pondering here is what are the factors taken into consideration by civil court judges (who are not necessary Muslims and who are not necessary educated in Syariah or Islamic studies but is vested with powers to hear disputes relating to Islamic banking) which led to undisputable judgment worthy of praises from both Muslims and non-Muslims scholars.

Hence, there are several questions needed to be answered for the purpose of this study. The questions are:

1. What is the nature of a BBA contract from the civil courts' perspective?
2. What are the essential features of a BBA contract from the civil courts' perspective?
3. What are the factual circumstances which are judicially taken into consideration by Malaysian civil courts in disputes involving BBA contract?

3.0 Objectives of the Paper

This paper aims to:

1. determine the nature of a BBA contract from the civil courts' perspective
2. determine the essential features of a BBA contract from the civil courts' perspective

3. analyze the factual circumstances which are judicially taken into consideration by Malaysian civil courts in disputes involving BBA contract

4.0 Literature Review

Islamic banking business is one whose aims and operations do not involve any element which is not approved by Islam (Mohamed Ismail Sharif, 1998) and there arise no charging of interest (Hamid Sultan, 2002). The relationship between the banker and its client is that of a banker and a borrower instead of a lender and a borrower (Yow, 2003). However, the validity of a BBA contract can only be tested in the civil courts and not the Syariah Court. The Federal Constitution (Malaysia) reveals that legal areas such as civil law, criminal law, contracts, employment, equity and trust, banking, trade, commerce are mentioned in the Federal list. List 1 Federal List indicates 27 paragraphs cover 110 more items where important legislative matters such as finance, defence and internal security is vested to the federal Parliament.

Apart from the Federal Constitution, there are judicially decided cases which show that disputes relating to Islamic banking products fell within the jurisdiction of the civil courts instead of the syariah courts. Decisions in *Bank Islam v Adnan Omar* [1994] 3 CLJ 735 and *Dato Nik Mahmud Daud v Bank Islam* [1998] 3 MLJ 393; *Bank Kerjasama Rakyat v. Emcee Corporation* [2003] 1 CLJ 625 are evidence that the civil courts and not the syariah courts are vested with powers or jurisdiction to hear Islamic banking matters. In fact, superior court decisions strengthened the view that the civil court is the proper forum to hear Islamic banking litigation. Prior to *Adnan Omar's* case, in *Tinta Press Sdn Bhd v. Bank Islam Malaysia Berhad* (1987) 2 MLJ 192, the Supreme Court held that the High Court had discretion to grant an interlocutory mandatory injunction in the dispute which involved an Islamic banking product.

There is inclination of civil court judges who are not necessary educated in Syariah or Islamic studies to refer to Islamic principles as seen in the case of *Tahan Steel Corp Sdn Bhd v bank Islam Malaysia Berhad* [2004] 6 MLJ 1 whereby the learned judge referred to the prohibition of usury as prohibited in Surah Al-Baqarah verse 275. Sudin Haron (1997) speaks of the functions of the Syariah Advisory Council which amongst others include the duty to ensure that services and banking products are in line with the Syariah. However, according to Noor Inayah Yaakub *et. el.* (2008), the present scenario in Malaysia is that *fatwa* (religious rulings/edicts made by the National Syariah Advisory Council (NSAC) including matters on Islamic banking are not binding on the civil courts. The writer's argument is found to hold support from the case of *Tengku Mariam Binti Tengku Sri Wa Raja v. Commissioner for Religious Affairs Terengganu & Ors* [1969] 1 MLJ 110 where the civil court held that it was not bound by the fatwa of the Mufti. In spite of the call by Bank Negara via amendment to Bank Negara (amendment) Act 2003 ;section 16B(8) that civil courts should refer to *fatwas* of the NSAC but however the situation has not changed as seen in the case of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Berhad* [2004] 6 MLJ 1, whereby the civil court still do not find it binding upon it.

An analysis of other decisions of civil court judges tend to show that even though there is inclination to refer to Islamic principles, but however, they are not ready to be bound by Islamic principles but by secular laws. This trend can be seen in the manner adopted by civil court in interpreting and determining the nature and form of agreements executed by parties Islamic banking product. For example, the Honourable Dato' Abdul

Hamid Mohamad JCA stated in his judgment in *Bank Kerjasama Rakyat Malaysia Bhd. v. Emcee Corp Sdn Bhd* (Court of Appeal, appeal no.N-02-421-1999)(unreported) as follows :

“As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is under the National land Code. The Procedure is provided by the Rules of the High Court 1980...”.

Similarly, in *Bank Islam Malaysia Bhd v. _Pasaraya Peladang Sdn Bhd* [2004] 7 MLJ 355, the court followed the decision in *Bank Rakyat Malaysia Bhd v. EMCEE Corporation Sdn Bhd* [2003] 1 CLJ 625 and held that the laws applicable were the National Land Code and the Rules of the High Court 1980 even though the facility (which was a BBA contract) was granted under Islamic principles.

Islamic banking brings in the idea of ethical values to the centre of banking practices (Monzer Kahf, 2000.) Lack of unequivocal and unambiguous specification of the details of one of the three constituents of a valid transaction either the *Mabie'* (sale item) and/or *Thaman* (item price) and /or *Ajal* (time of sale), the non-fulfillment of these requirements will see to the disruption of stability and confidence in the contractual relationship and fairness regarding the outcome (Ahmad Abisourour & Muhammad Anas Zarqa, 2000, *An Islamic Approach To Infrastructure Financing: The Emerging Role of Islamic Finance*, Institute of Islamic Understanding, Kuala Lumpur Malaysia.

Central to the concept of Islam is Justice. Justice is connected to honesty and sincerity. In this sense, Islam prohibits false or misleading presentations of one's products for such dishonesty removes the "mutual consent". Prophet Muhammad (pbuh) advised: *Swearing produces a ready sale but blots out the blessing.* ((Nik Mohamed Affandi, 2002).

All transactions whether it is judicial, political, commercial or private etc. are subject to this concept. In the Qur'an, (al-Hijr: 85) states that:

We created not the heavens, The earth, and all between them, But for just ends. And the Hour is surely Coming (when this will be manifest). So overlook (any human faults) With gracious forgiveness.

This concept has been emphasised in various places in the Holy Qur'an. (See the Qur'an (al-Maidah: 8); Qur'an (an-Nisaa: 135); Qur'an (ad-Dukhan: 38-39); Qur'an (an-Nisaa: 58) and Qur'an (an-Nisaa: 105); Qur'an (al-Baqarah: 213); Qur'an (ash-Shura: 15); Qur'an (an-Nisaa: 107); Qur'an (Sad: 26); Qur'an (al-Hadid :25)). In Islam, man is seen to be the servant (abd) and vicegerent of Almighty. He has specific duties and obligations to perform in relation to Allah, to himself, to nature, to the religion, to his relatives and to the community. Islamic ethos demands that a Muslim abides by the messages of the Holy Qur'an, follows the Sunnah of the Prophet (Pbuh) and accepts the rulings of recognised religious scholars of the past. Justice in Islam is part of Allah's attribute and to stand firm for it is to be a witness to Allah. (See the Qur'an (an-Nisaa: 135). In the Qur'an, (al-Maidah: 8) it is asserted that:

O ye who believe! Stand out firmly, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear God. For God is well-acquainted with all that ye do.

In addition, the Qur'an, (an-Nisaa: 135) says:

O ye who believe! Stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it be (against) rich and poor: For God can best protect both, follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily God is well-acquainted with all that ye do.

Furthermore, in the Qur'an (ad-Dukhan: 38-39) it is asserted that:

We created not the heavens, the earth, and all between them, merely in (idle) sport. We created them not except just ends: but most of them do not understand.

Further, the Qur'an (an-Nisaa: 58) says:

God doth command you to render your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: verily how excellent is the teaching which he giveth you! For God is He who heareth and seeth all things.

In addition, in the Qur'an (al-Baqarah: 213) it is asserted that:

Mankind was one single nation, and God sent Messengers with glad tidings and warnings; and with them He sent the Book in truth, to judge between people in matters wherein they differed; but the People of the Book, after the clear Signs came to them, did

not differ among themselves through selfish contumacy. God by His Grace guided the Believers to the Truth, concerning that wherein they differed. For God guides whom He will to a path that is straight.

The Qur'an (ash-Shura: 15), over and above says:

Now then, for that (reason), call (them to the Faith), and stand steadfast as thou art commanded, nor follow thou their vain desires; but say: "I believe in the Book which God has sent down; and I am commanded to judge justly between you. God is our Lord and your Lord: For us (is the responsibility for) our deeds, and for you your deeds. There is no contention between us and you. God will bring us together, and to Him is (our) final goal."

Riba transaction is prohibited in Islam. Islam encourages brotherhood and good relationship with even non-Muslims and proper contracts particularly in written form to ensure economic prosperity and social harmony (Nik Mohamed Affandi, 2002). Saiful Azhar Rosly (2000) in *The Premises and promises of Islamic Banking in the Revitalisation of the Malaysian Economy*, opines that al-bay and riba loans are two major forms of transactions widely used in pre-Islamic Mecca but only riba was responsible for economic unrest. The writer adds that the economic crisis in Asia today has robbed the Muslim Ummah the opportunity to best identify the problems of the crisis and to suggest appropriate remedies. Riba is also associated with unjust distribution of wealth.

Allah (SWT) has placed an injunction on all Muslims (or mankind) not to deal in any transactions that have an element of interest ('riba' or usury). The Holy Qur'an (al-Baqarah) asserts 2:275:

Those who devour usury will not stand except as stands one whom the satan by his touch Hath driven to madness. That is because they say: 'Trade is like usury, but Allah hath permitted trade and forbidden usury.

All trade related documents under the Syariah must have the element of employment of capital, labour and risk, failing which it may be tainted as a '*riba*' transaction and treated as forbidden (haram). The fixing of profit or definite returns in terms of percentage as opposed to sharing of profits in Syariah banking activities are more akin to '*riba*' than trade. It must be emphasized that the basic and most important characteristic of Islamic financing is that it does not deal with fixed interest rate or predetermined profits. It is based on a profit and loss sharing contract.

The primary element governing Islamic financing facilities is the Qur'anic prohibition and condemnation of *riba*. On this, there is no dispute among the different *mazhabs*.

Translations of the same verses of the Qur'an into English from other recognised sources are as follows:

Verse 275

YUSUF ALI: *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).*

Verse 276

YUSUF ALI: *Allah will deprive usury of all blessing, but will give increase for deeds of charity: For He loveth not creatures ungrateful and wicked.*

Verse 277

YUSUF ALI: *Those who believe, and do deeds of righteousness, and establish regular prayers and regular charity, will have their reward with their Lord: on them shall be no fear, nor shall they grieve.*

Verse 278

YUSUF ALI: *O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers.*

Verse 279

YUSUF ALI: *If ye do it not, Take notice of war from Allah and His Messenger: But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be with unjustly.*

Verse 280

YUSUF ALI: *If the debtor is in a difficulty, grant him time Till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.*

5.0 Findings from Analysis of Case Reports

There are two sets of appeal that went before the Court of Appeal relating to BBA contracts in Islamic banking. The first set of appeal involves 11 Writs of Summons and one originating summons. They were heard together and decided by the Court of Appeal on 26 August 2009 which was delivered on 26 August 2009 by a panel of judges consisted of Raus Sharif JCA, Abdull Hamid Embong JCA and Ahmad Maarop JCA [CIVIL APPEALS NOS: W-02-918-2008, W-02-954-2008, W-02-955-2008, W-02-957-2008, W-02-958-2008, W-02-959-2008, W-02-960-2008, W-02-961-2008 and W-02-962-2008] and reported in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22. The Court of Appeal held that a BBA contract is valid and enforceable and reversed an earlier decision of the High Court in *Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases* [2009] 1 CLJ 419 HC. Another set of appeal came

before another panel of the Court of Appeal on 20 October 2009. That panel followed its earlier decision. Particulars of nine out of the 12 appeals are as shown in **Figure 1:**

No.	Case References	Particulars of Parties
i.	Civil Appeal No:W-02-918-2008	Bank Islam Malaysia Berhad v. Lim Kok Hoe & Koh Hsia Ping (F)
ii.	Civil Appeal No: W-02-954-2008	Bank Islam Malaysia Berhad v. Mohd Razmi bin A.Rahman & Wan Hazlina binti Wan Mohd Ali
iii.	Civil Appeal No: W-02-955-2008	Bank Islam Malaysia Berhad v. Baharom bin Harun & Rohynoon bt Mohd Yusoff
iv.	Civil Appeal No:W-02-957-2008	Bank Islam Malaysia Berhad v. Ghazali bin Shamsuddin, Mokhtar bin Shamsudin & Kamarudin bin Shamsudin
v.	Civil Appeal No:W-02-958-2008	Bank Islam Malaysia Berhad v. Peringkat Raya (M) Sdn Bhd & Mohamed Kamal bin Hussain
vi.	Civil Appeal No:W-02-959-	Bank Islam Malaysia Berhad v. Nordin bin Suboh

	2008	
vii	Civil Appeal No:W-02-959-2008	Bank Islam Malaysia Berhad v. Zawawi bin Osman & Maznon binti Mohd Sidin
viii	Civil Appeal No:W-02-961-2008	Bank Islam Malaysia Berhad v. Widyawati binti Mohd Nor
ix	Civil Appeal No:W-02-962-2008	Bank Islam Malaysia Berhad v. Noor Azlina bt Baharom

Figure 1

After hearing the parties, the court of appeal unanimously allowed the respective appeals of Bank Islam Malaysia Berhad. Thus, based upon the reasoning of the learned judges in *Lim Kok Hoe*, the test of validity of a BBA contract is based on the nature and essential features which are laid down as follows:

6.0 Nature of a BBA contract from Viewpoint of Civil Courts

In *Lim Kok Hoe & Anor*, the nature of a valid BBA contract is explained as follows:

In a typical BBA contract, the first transaction begins with a Property Purchase Agreement ("PPA"). There are, depending on the circumstances, variations as to the manner in which a bank pays the purchase price under the PPA to the customer. In a case where the construction of the property is completed, the bank will pay by lump sum payment of the full purchase price. In other instances, payment may be made progressively, which usually depends on the stage of completion. Ordinarily the repayment by the customer under the PSA is on deferred payment basis by way of periodical installments for an agreed tenure which may run to 20 years or more. Again depending on the terms agreed, payment of the installments may commence immediately upon the initial payment or after payment by the bank of the full purchase price under the PPA. As security for the payment of the installments by the customer under the PSA, a charge over the property is created in favour of the bank.

Upon default by the customer, the bank may enforce the charge by applying for an order for sale. Simultaneously, the bank may also file a writ of summons for judgment sum. An application for an order for sale is made by way of an originating summons. Section 256(2) of the National Land Code, 1965 ("NLC") states that, an application for an Order for Sale, must be made in accordance with the law relating to civil procedure, namely, the procedures as laid down under the Rules of the High Court 1980, ("RHC"). O. 83 of the RHC provides for *inter alia*, the procedure for a sale of a charged property. Section 257(1)(c) NLC, requires an order for sale made by the court "shall specify the total amount due to the chargee at the date on which the order is made ..." whilst under O. 83 r. 3 of the RHC, requires that there must be "particularisation" of the account between the chargor and chargee which includes "the amount remaining under the charge" (see O.

83 r. 3(3)(d)). Thus, an additional or supplementary affidavit would be required in an application for an order for sale for the purpose of specifying the amount due to the chargee at the date on which the order is made.

7.0 Essential features of a valid BBA Contract

The panel of judges In *Lim Kok Hoe & Anor* also decided on the essential features of a valid BBA contract as follows:

A BBA contract contains the element of *bona fide*

A *bona fide* sale is one where the profit should not be an element not approved by the Religion of Islam. Even so, an interpretation of the selling price must not be such as to impose a heavier burden than on a loan with interest for that would obviously be contrary to the intent and purpose of Surah al-Baqarah. The correct interpretation would be that which is not worse if not better than in conventional loan with *riba*. If effort to maintain a *bona fide* sale is abandoned, deferred payment of sale price is effectively a credit or loan extended and any profit would be prohibited as *riba*.

The substance of the BBA contract must be in line with Islamic teachings

The correct approach to determine the validity of a BBA contract would be to look at the substance, not just the label which had been attached to it. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (see *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240; *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513).

The argument that the court must look no further into a BBA contract if the parties have agreed upon a selling price, there is "aqad" does not appear to be right. The fact there is an "aqad", and before that an "ijab" and "qabul" does not prevent an examination of the terms as to the transaction in fact is. (see *Malayan Banking Bhd v. P K Rajamani* [1994] 2 CLJ 25 SC)

The court has authority to check whether there are elements that are not approved by the religion of Islam by looking beyond the words of agreement to the actual facts of the case in order to determine the substance of the transaction between the plaintiffs and the defendants before it draws any conclusions on the nature of the BBA contract.

It is necessary to look beyond the labels used and look at the substance particularly in light of the fact that the interpretation advanced by the plaintiffs result in the defendants being burdened with a debt far in excess of that if they had taken an interest based conventional loan, a result which on the face of it contradicts the intent and purpose of the Qur'an to banish the burden of *riba* in *riba*-burdened loans.

8.0 Factual circumstances which are judicially taken into consideration by Malaysian civil courts in disputes involving BBA contracts

8.1 Foundation of the BBA contract

BBA contracts have Islam as their foundation whilst the foreclosure proceedings come under the civil law jurisdiction specifically the National Land Code 1965 and the Rules of the High Court 1980. It follows that if the civil court is not to be a rubber stamp to issue

orders for sale, it must maintain crucial supervision that the orders for sale are being sought upon balance sums that are not disproved by Islam.

The essential features laid down in the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22 and *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party)* (2009) 1 CLJ 419 are as follows:

- a) That order for sale by public auction is granted in respect of charged properties for the recovery of the balance of purchase price upon the sum due as purchase price on the date of settlement, if any;
- b) That auction date shall be held on a date four months from the date of this judgment;
- c) That the reserved price, being a price equivalent to the market price, shall be fixed by the deputy registrar;
- d) Other orders in respect of auction as provided by s. 257(1) of the National Land Code;
- e) Costs to be taxed and paid by the defendants; and
- f) Liberty to apply.

In *Arab-Malaysian Merchant Bank Berhad v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9 as follows:

This case involves the marriage of two distinctly diverse worlds, namely the Islamic world and the common-law sourced civil law, both protected and enabled by the

Federal Constitution. The agreements here have Islam as their foundation whilst the foreclosure proceedings come under the civil law jurisdiction, specifically the National Land Code 1965 and the Rules of the High Court 1980.

8.2 The manner of concluding the BBA contract

Reported cases in *Bank Kerjasama rakyat Malaysia Bhd v. PSC Naval Dockyard Sdn Bhd* [2008] 1 CLJ 784 (High Court Malaya, Kuala Lumpur), *BIMB v. Adnan bin Omar* [1994] 3 CLJ 735 and *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735; [1994] 4 CLJ 372 show that the courts would look into aspects of the existence of undue pressure or persuasion to determine the validity of a BBA contract. A valid BBA contract is one where parties have agreed before executing the agreements, and without any undue pressure or persuasion, to the preconditions of the Islamic based contracts. Parties also must agree to be bound by the terms to conclude the agreement.

A defendant who had chosen a banking facility which is more exorbitant than the other available products or the conduct of the defendant in having agreed to be bound and in fact complied with the terms of the agreement by installment payment but subsequently claimed the agreements to be uncertain, are situations that invite the application of the doctrine of estoppel. The decision of the Court of Appeal in *Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283 is a clear authority that the defendant by its own conduct has waived all the issues raised.

8.3 Profit earned in BBA contracts

The issue of the presence of *riba* in BBA contracts is laid to rest in the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22 wherein it is not right to equate BBA contracts to conventional contracts.

Raus JCA in delivering the appellate court's decision, said:

“but it is equally evident in this case that the result of what is presented as the application of the Quran principle is that the defendant became liable, upon default at any time, to an amount that is 2.2 times the facility he obtained. It could hardly have been intended by these words in the Surah Al-Baqarah that an Islamic financing facility should result in consequences for more onerous than the conventional loan with "riba" that is prohibited and unequivocally condemned. One might pause and observe that the harshness of usury is hardest upon those who default, and much less so, if at all, upon those fortunate enough to be able to service the loan successfully. The Qur'an could hardly have intended that its followers, faithfully and trustingly seeking an Islamic compliant facility, should be delivered to those who offer what appear to be perfectly Islamic compliant facilities, but upon a default, had an interpretation applied that imposes a far more onerous liability than the conventional loan with interest. It is difficult to conceive that the Religion of Islam intended to discourage its followers from the conventional loan with interest, condemn lenders for such loans, and deliver its followers into the bands of banks and financiers who under sale agreements with deferred payments, exact upon default, payments far exceeding the liability upon default of a conventional loan with interest. One cannot say that the Religion of Islam is so much

more concerned with form than substance as would sustain the bank's interpretation of "selling price". “

However, the learned judge held that BBA contract should not be equated to conventional loan agreement. This is because the two instruments of financing are not alike and have different characteristics. BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction. BBA contract is in fact a trade transaction. It is a transaction between the customer and the bank. In such transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank.

Further, the comparison between BBA contract and conventional loan agreement is of no relevance. It serves no purpose as the law applicable in BBA contract is no different from the law that is applicable in a conventional loan agreement.

8.4 Computation of “unearned profit” under a valid BBA contract

“Unearned profit”, as the name suggests, is the amount which has yet to be earned by the bank. The computation, as I understand it, is based on the full sale price under the Property Sale Agreement (PSA) less the paid installments. Since the tenure of the contract has not completed, the bank will further deduct as *ibrar* (a term used in Islamic banking for rebate) what it refers to as "unearned profit".

In *Bank Islam Malaysia Bhd. v. Azhar Osman & Other* [2010] 5 CLJ 54, Rohana Yusuf J illustrated the method of computation used by the bank based on this table in

determining the balance sale price and the rebate granted to customers. This table below represents an ideal BBA transaction. In reality of a banking transaction, there may be late payment of installment by a customer. Then the bank will have to readjust the respective figures in the table accordingly.

Eg, for illustration purposes only

Payment No.	Installment	Financing Amount	Unearned Profit/Ibrar	Balance Selling Price
0		100,000.00	48,912.97	148,912.97
1	1,128.13	99,517.70	48,267.14	147,784.85
111	1,128.13	22,087.88	1,602.82	23,690.70
112	1,128.13	21,102.40	1,406.17	22,562.57
113	1,128.13	20,110.56	1,323.88	21,434.44
114	1,128.13	19,112.31	1,194.00	20,306.31
115	1,128.13	18,107.62	1,070.57	19,178.19
116	1,128.13	17,096.43	953.62	18,050.06
117	1,128.13	16,078.72	843.21	16,921.93
118	1,128.13	15,054.43	739.37	15,793.80
119	1,128.13	14,023.53	642.14	14,665.67
120	1,128.13	12,985.97	551.57	13,537.54
121	1,128.13	11,941.71	467.71	12,409.41
122	1,128.13	10,890.70	390.58	11,281.29
123	1,128.13	9,832.91	320.25	10,153.16

124	1,128.13	8,768.29	256.74	9,025.03
125	1,128.13	7,696.79	200.11	7,896.90
126	1,128.13	6,618.37	150.41	6,768.77
127	1,128.13	5,532.98	107.66	5,640.64
128	1,128.13	4,440.59	71.93	4,512.51
129	1,128.13	3,341.14	43.25	3,384.39
130	1,128.13	2,234.59	21.67	2,256.26
131	1,128.13	1,120.89	7.24	1,128.13
132	1,128.13	0.00	0.00	0.00

This table illustrates a BBA transaction where the customer sells to the bank *vide* a PPA an assets of the customer for a sum of RM100, 000. The bank sells back to the customer under the PSA for RM148,912.97, payable in 132 installments of each RM1,128.13. The first column denotes the installment numbers which is on monthly basis. As an example, if a customer defaulted on payment of installment No. 112 in the first column, the balance selling price due to the bank will be RM23,690.70. This figure appears in the last column. If the sum is paid immediately, the bank will grant an *ibrar* by deducting the unearned profit of RM1,406.17 as shown in the "unearned profit" column. However, if the amount is not paid immediately, for example, it is only paid on the date when installment No. 124 is due; the unearned profit that the bank will deduct as *ibrar* will be recomputed taking into account the non payment of the outstanding instalment from date of default to the payment date. It must be born in mind that the figure in the "unearned profit" column in the installment number 124 does not automatically apply but need adjustment based on punctuality of installment payment.

In the event that no payment is made till the end of the tenure that is, when installment No. 132 becomes due or thereafter, the bank would be entitled to receive the sum of RM23,690.70 with no rebate, as there would be no further unearned profit left to be deducted as *ibrar*. The balance sale price of RM23,690.70 would be the maximum amount that the bank could claim as there is no interest chargeable thereon after judgment is obtained. If I am permitted to state here, compared to conventional banks, Islamic banks' claim will be capped to the sale price and no more. Needless to say, depending on the terms of the contract the bank may also be entitled to other ancillary charges due, including late payment charges.

9.0 Conclusion

The financing aspects of BBA is complex as it must represent the buying and selling activities (al-bay'). The introduction of Islamic financing in Malaysia is complicated by this country's constitutional arrangements. Article 74 of the Federal Constitution of Malaysia which provides that finance, including banking, money-lending, pawn-brokers, control of credit, as well as trade, commerce and industry are subject matters within the Federal List draws issues where Islamic financing disputes are decided in the civil courts instead of the Syariah courts. This jurisdictional limitation in respect of the States and the Syariah courts means that cases involving Islamic financing in Malaysia will remain within the Federal legislative jurisdiction, and cases relating thereto are brought in the Civil courts. Thus, the way civil judges perceive BBA contracts must be looked into by practitioners of Islamic financing (bankers and lawyers alike) in order to find a way to minimize the occurrence of BBA contracts being challenged for being invalid.

To sum up, civil court judges must give consideration of the basic principles concerning Islamic financing. In this regard, consideration of the Religion of Islam under the Federal Constitution must be given emphasis apart from the relevant laws as to banking and finance. Apart from that, the practitioners of Islamic financing (bankers and lawyers) must also be conversant with both legal systems as well as rules and procedure so as to avoid possibility of a BBA contract being challenged in the court of law for non-conformity or contradiction with Shariah, existing civil law or even on rules of procedure.

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