

Legal Stains in the Malaysian Islamic Banking Practices of Alljarah Thumma Al Bai' (AITAB)

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Alljarah Thumma al Bai' (AITAB) is a modern product of Islamic banking which was incepted more than ten years ago. It shows the novel constituent of Islamic banking. AITAB is the alternative for conventional hire-purchase. The popularity of this product have boosted among the customers, but there are certain legal stains in this product which needs to be highlighted and rectified in order to engrave Islamicity in the product. The main objective of this paper is to analyze the legal issues involved in AITAB and to give appropriate recommendations to curb these predicaments.

JEL Codes: K19, K29 and K39

1. Introduction

Islamic banking is a worldwide phenomenon today irrespective of the faith conviction of the community. Malaysia is indeed a leader of the Islamic banking, which has been practicing Islamic banking form 1983 with the adoption of Islamic Banking Act. In Malaysia, Islamic banking is surviving its existence by competing with its counterpart, the conventional banking system. Indeed this is a challenge, because conventional banking has been deeply rooted in the world and Malaysian society for centuries.

The most intricate defy faced at the initial stage of Islamic banking in Malaysia was to craft wide range of products which are in compliance with Islamic fundamental principles. Therefore, the Islamic banking players at that time did was to Islamise and adopt the conventional banking products. And AITAB is one of these products. In Malaysia, AITAB was first adopted by Bank Islam and later was extended to the conventional banks operating under Islamic Banking Scheme.

AITAB is a unique contract involving a combination of two different contracts, i.e. contract of lease (ijarah) followed by a contract of sale (bai') and it involves numerous legal and Islamic law (shari'ah) issues. As a result, unique rules on leasing and sale at different stages of the transaction are needed. And these rules were not developed instantaneously and today also the law applied to AITAB is the conventional Hire Purchase Act 1967 (HPA).

AITAB was developed in stages. In the first ten years of Islamic banking in Malaysia (1983-1994), though Ijarah (lease) was utilized as a facility, AITAB was not born. However, it was this Ijarah facility which was later developed into AITAB through deliberation of scholars by using Ijthihad and today it is used profoundly for buying of

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Hassan, Yusoff & Muneeza

motor vehicles. The objective of this paper is to highlight the legal problems in AITAB facility and to suggest adequate recommendations for these problems, so that the future of this product would not be in jeopardy. It is sincerely hoped that AITAB would have an evergreen future as a demanding facility among the customers.

2. Literature Review

There have been numerous literatures written on AITAB and its operation (like Al-Omar and Abdel-Haq,1996; Kamil, 1993; and Hassan,2011) . But only few of these literatures deal with the legal issues of it. Literatures solely dedicated on the discussion of the legal issues of AITAB are hard to find. Ma'sumBillah (N/A) has written on the operational mechanisms of Islamic hire-purchase. He identifies the differences between conventional and Islamic hire-purchase clearly. According to him, in conventional hire-purchase, the product is considered as a loan to which interest rate and hiring charges would be applicable and in case of late payment of installment price, interest would accumulate. But in Islamic hire-purchase, the product is considered as a mode of financing, not a loan and the product would have a profit rate and a markup and for late payment of installment price, only late payment charge pre-agreed would be applicable.

Issues of implementing Islamic hire-purchase in Malaysia have also been discussed by El-Din and Abdullah (2007) and they have discussed a much more detailed and a clear version of the differences between conventional hire purchase and Islamic hire purchase from a shari'ah point of view. The following table 1 illustrates them.

Table 1: Differences between conventional and Islamic hire purchase from a shari'ah point of view

Item	Conventional Hire Purchase	Islamic Hire Purchase
Terms	Loan Interest rate Hiring Charges Late payment interest	Financing Profit rate Mark-up Late payment charges
Eligible Customer	Good credit rating	Not involved in immoral activities against shari'ah
Goods	Limited to consumer goods, motor vehicles & non-Act goods (corporate)	Applicable to all types of goods
Contract	One standard contract	2 aqad in sequential contract
Purchase Price/ Installments	cost price x interest rate/month	Cost price + profit/number of payments
Profit Margin/ Interest Rate	Floating based on the annual rate, decided up front	Determined based on market value
Responsibility	Hirer/customer bears all costs of maintenance	Owner bears basic and structural maintenance

Source: El-Din and Abdullah (2007)

Abdullah and Dusuki (N/A) have carried out a comprehensive research on general issues and prospects of AITAB. In this empirical research, the findings were based on interviews conducted on 46 respondents representing six different groups, namely

Hassan, Yusoff & Muneeza

bank officers, Shari'ah advisors of banks offering Islamic products, Shari'ah Scholars, Economists, Legal Experts and Government Officials. Hence, the problems highlighted in this research are reliable and can be considered as practical problems and prospects of AITAB. Customer's attitude, lack of experience among Bank Officers, lack of awareness and corporation among the dealers, documentation, competition in the market, and lack of shari'ah framework are the problems identified in this work. As for the prospect of AITAB, they have said that the future of AITAB would be bright due to strong public acceptance, competitiveness of it in the market, and because of the strong prospect and possibility of legalizing the Muamalat hire-purchase Bill (2002), which has been rejected now. Abdullah and Dusuki (N/A) identify the legal loopholes of Hire-purchase Act 1967 (HPA) in relation to AITAB as follows:

Despite possessing some advantageous features, HPA, like any other law, is not completely perfect and does contain certain loopholes, either in Shari'ah or legal requirements of Islamic transaction, for instance, unclear documentation in respect of ijarah and sale contract, limited application to certain goods only and involvement in elements of interest in calculation of term charges. This fact certainly proves that HPA is not an adequate law to regulate AITAB transaction, thus a specific Shari'ah regulation providing a complete rule for AITAB transaction is highly needed.

This observation made by Abdullah and Dusuki (N/A) is indeed true and precise. In just one paragraph, they have identified almost all the crucial and serious problems in HPA. And similar problems have also been discussed by Abdullah and Dusuki (2006) in another research. It is anticipated that this research would further deliberate on the legal stains of AITAB in the Malaysian Islamic banking arena.

3. Methodology

This is an exploratory study aims to find out the legal problems facing AITAB in Malaysia. In recent years, there has been an increasing concern over the sustainability of Islamic banking in Malaysia. Hence, this paper aids in filling the important gap to the present literature on Islamic banking law.

4. Discussions & Findings

AITAB is the result of hybrid combination of lease and sale contract in one business document. Under the contract of lease, which is the first contract to be entered; the hirer lease goods from owner at an agreed rental over a specified period. When the agreed period expires, and lease ends, the hirer enters into a second contract to purchase the goods from the owner at an agreed price.

In an AITAB transaction, normally three parties are involved; i.e. the customer, bank and the seller. On the request of the customer, the bank would buy the requested goods or commodity from the seller/shop and then would rent that commodity to the customer for an agreed period of time over a fixed price paid by installment. Once, the agreed period is over and the pre-agreed price is paid by installment, the Bank would enter into a sale agreement with the customer and would, then sell the commodity to the customer for a nominal price. This would definitely relieve the bank

Hassan, Yusoff & Muneeza

from the operational cost of looking after the commodity rented and save the bank from the price risk, if the bank were to sell the commodity to another party.

In practical sense, if the AITAB is used for buying a vehicle, the customer would first identify the vehicle (asset) he wants to buy and then order the bank. The bank would then buy that vehicle from the seller and rents the vehicle to the customer at a rate agreed upon for a specified period of time. The customer (hirer) would then agree to pay for road tax and coverage and would agree to be responsible for the maintenance of the vehicle. Then at the end of the period the bank and the customer would sign the sale and purchase agreement. In AITAB, the bank has the authority to the leased asset. If the customer defaults, the bank would repossess the asset and is free to take an action against him. The gist of AITAB is that if the customer continuously pays and satisfies all the legal requirements, at the end of the lease period the bank would transfer the ownership of the asset to the customer.

There are legal stains in the practice of AITAB in Malaysia (El-Din and Abdullah, 2007; Abdullah and Dusuki, N/A; Abdullah and Dusuki. 2006). The most dominant problems are related to documentation and the lack of shari'ah framework. The documents utilized in AITAB are replicated from the conventional banking which is based on Hire-Purchase Act 1967 and the Contracts Act 1950. This is the root of the documentation problem. Despite being the most demanding facility of Islamic banking, AITAB does not have a shari'ah legal framework to govern it. Hence any dispute arising from it would be determined by using the conventional legislations. This may be viewed as the main reason why the customers have difficulty in understanding the differences between the conventional hire-purchase and AITAB.

The documents used in AITAB are much more complicated than that used in the conventional hire-purchase facility which is being replicated with minor shari'ah compliant modifications. This is because AITAB involves an additional document, the aqd or the acceptance letter and the documents shall be presented before the customer in sequence; first, leasing (ijarah) document, second, sale and the purchase agreement. The customer needs to be explained this sequence of signing of documents and the rational for doing so. When signing the agreements the contents of it shall be understood by the parties and the effect of shall be explained frankly. The rights and obligations of the customer must be explained to the customer precisely. The dilemma is that some banks require the customer to sign a bulk of documents relating to the facility. This kind of requirement often creates burden to the customer in the sense that, for instance if the customer commits an error in one of the documents, it will indeed cause delay in the processing of the application. The end result of this is that dealers recommending conventional hire-purchase to guarantee speedy process of their applications.

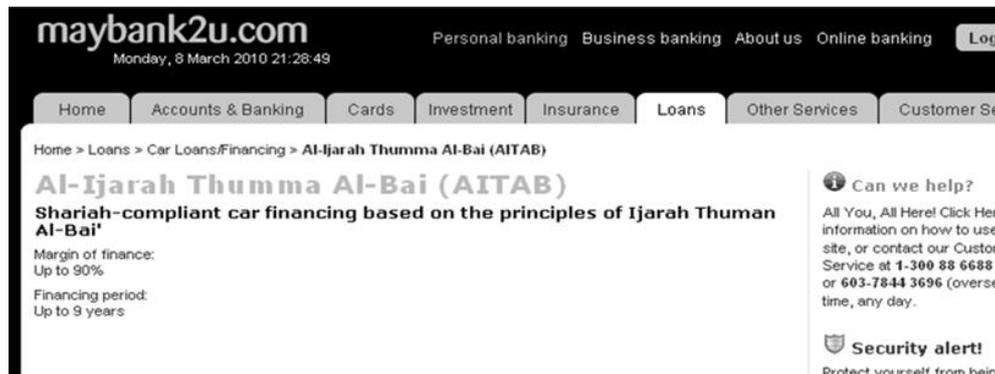
The lacuna in shari'ah governance to regulate AITAB has mingled the uniqueness of AITAB with its conventional counterpart, confusing the minds of the customers. This has happened due to several reasons. The absence of standardized Islamic hire-purchase regulation has forced the uses of AITAB to obtain legal recourse from conventional Hire-purchase Act 1967. This makes the operation of AITAB similar to conventional counterpart in determination of fixed rate, standard documentation and formation of agreement. However, the difference in AITAB from the conventional counterpart lies in the issuance of the interest and the acceptance or aqd letter. This is further exacerbated by the fact that mostly AITAB facility is used to purchase motor

Hassan, Yusoff & Muneeza

vehicles and the consumer goods and these are types of goods are bound by the conventional Hire-Purchase Act 1967. Hence, the institutions offering these goods are obliged to follow the conventional statute.

Some of the banks in Malaysia have put AITAB under loan facility; where as the true AITAB is based on ijarah concept. This may be because the banks are unaware of the true nature of this facility. The following diagram 1 shows this dilemma;

Diagram 1: Website image showing AITAB classified as a loan



Source: <http://www.maybank2u.com.my>

Another dilemma is that civil courts are the courts which handle the mercantile matters including the Islamic banking matters. Hence, the judges in cases involved AITAB facility would utilize the conventional statutes and determine the matters before them. The outcome of this would be that the shari'ah elements which shall be abided would be eroded from the minds of the parties. So far, none of the Islamic banking case which has been decided involves an AITAB facility. But in the case of *Affin Bank Bhd v Zulkifli Abdullah* (2006), an issue was raised about the granting of ibra (rebate) in a BBA facility of Islamic bank. In *obiter*, court in this case held the following with respect to Islamic hire purchase facilities:

...rebates are commonly to be found in the event of pre-payment in hire purchase agreements. In the case of goods where the Hire Purchase Act 1967 applies, the hirer is entitled to a statutory rebates on terms charges and insurance in the event of pre-payment... (*Affin Bank Bhd v Zulkifli Abdullah*, 2006)

From the above words of the court, it is evident that in case of hire purchase; whether conventional or Islamic; the law applicable to the transaction in Malaysia would be Hire Purchase Act 1967. The potential effect of this that could be perceived to any legal practitioner is that shari'ah would not be applicable to Islamic hire-purchase in Malaysia even if the Hire Purchase Act 1967 is contrary to the principles of Islamic law. Even if the Act is silent about a matter, the law applied would be English law by virtue of Civil Law Act 1956. Hence, there is a huge legal problem here. Furthermore, most of the lawyers are also unaware of the differences between the conventional hire-purchase and AITAB and this makes it impossible for the parties to argue on shari'ah grounds.

5. Conclusions

The Hire-Purchase Act 1967 needs to be amended by inserting the Islamic commercial principles relating to AITAB inside it. This way the Act would have the Islamic commercial law principles in it and would cease the problems arising from it. This is a feasible way to remove the legal stains, rather than adopting a full-fledged Muamalat Hire-purchase Act, which is fully based on Islamic law. There have been several failed attempt made in the past to adopt the Muamalat Hire-Purchase Bill of 2002. Enacting a full-fledged legislation on Islamic hire-purchase is a good way to curb the legal problems in this area. It is hoped that this research would be a contribution to highlight the basic legal problems in one of the Islamic banking instruments; that is AITAB. There is swift need to solve the legal problems facing AITAB to ensure that this vital and important product of Islamic banking could be sustained without inhibitions.

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