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**THE ALTERNATIVE OF USING BAY' INAH IN MALAYSIA: AN
OVERVIEW**

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Abstract

Bay' Inah is a sale and re-purchase contract between two similar people by differed payment. The contract is characteristically a loan in a form of sale. Obviously, the contract is at aim to get cash rather than to do selling. Hence, majority of Islamic jurist do not permit the contract as loaning is forbidden in Islam. However, the system is very popular in Malaysian Islamic financing schemes during around 1990s. The Malaysian Central Bank allows bay 'inah with a strict condition that is to be conducted in an organized manner to satisfy selling and buying. However, after getting numerous criticisms, the Central Bank have issued a new resolution by authorizing tawarruq means. The contracts involve more than two parties who are truly outsiders. However, the contract is still criticized due to commit with elements of formation (hilah) and loan. As sum, both contract have elements of hilah. Therefore, the study was conducted to examine critically on the legality of both contract as well as its formation in avoiding usury. The study will look into alternatives in the Islamic financial financing system in order to comply the shariah principle completely. The study is a qualitative research by examining discourse of fiqh, as well as obtaining expert opinions from practitioners as well as academician.

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Keywords: Bay' inah, contract, muamalat, tawarruq, shariah compliant.



1. Introduction

This paper will discuss the using of bay' inah concept in the contract of financing among Malaysian financing institution, and bay' tawarruq as the alternative. Bay' inah stand as a medium of contract in sale and purchase contract enabling customer to get financial assistance. The word bay' is referring to sale, and 'inah is referring to facade which is a sale in appearance only. Basically, there are definitions for bay' al-'inah but those leads to the same meaning that is to get cash by undertaking two dealings between the same party. It is a situation whereby a person sells something to another individual for a particular price by varied payment, and the former then purchase back from the latter at lesser value by notes. As a result, the latter will get cash and hold an obligation to pay a debt to the former.

2. Problem Statement

The issue of bay' inah has been discussed among Shariah scholars as well as academicians due to its practice that involve an element of trickery (hilah) and usury (riba) (Mohamed Nor, 2009). Overall, it is a form of loaning in the framework of selling and buying presentation (Ibn Abidin, 1992; Abd Rahman, 2009). Therefore, most of Islamic jurists forbid bai' al-'inah due to loaning intention between the seller and buyer. As we can figure out that both parties is not at the first place have intention to do selling, but they are looking for getting cash and involve in loaning deeds. That's why it was actually a trickery in justifying to get cash. Even though not in the form of loaning, but still contains an elements of usury from different selling price. Therefore, some jurists acknowledge the deal as a back door to usury (al-Kashmiri, n.d.; Mohamed Nor, 2009; Jusoh @ Yusoff & Mat Zain, 2017).

However some jurist acknowledge the dealing of bay' inah, by looking from the external form of contract. They argue that the religion only evaluates from the outer side of transaction, meanwhile the inner side is depending to everyone intention, either to get cash or to accept usury through back door. As the needs of people increase, it seems as people are forcing to practice bay' inah in order to satisfy their wants especially when involved expensive asset (Amin, 2008).

3. Research Questions

The query in the study is about what is bay' inah? As well as what is the concept that lying upon it? How it works? As well as what is the related theory in applying the contract in Islamic finance in Malaysia?

4. Purpose of the Study

The drive of the article is at aims to explore the concept of bay' inah which was argued by the Islamic jurist in financing sector. The study also intend to know the reason of acceptance as well as to find solution in applying the contract without involve in non-shariah compliant transaction.

5. Research Methods

This study is a qualitative study in which data are collected through literatures from books, journals, official documents as well as normal practices. Through printed collections, researchers will collect the data about bay' inah and associated the theories with real practices. After that, the data that are gathered will be analysed using the content analysis method. Perspective are discussed based on inductive, deductive as well as comparative methods.

Meanwhile, the method of interview is done by going to the field especially banking and financing institutions to observe the real practise in processing an application of bay' al-inah. The observation is done by profound discussion in unstructured interviews with professionals and academicians to get the more in-depth information about the objective of the study.

6. Findings

Among of four school of laws in Islamic traditions, only Shafie jurists have allowed bai' al-'inah but with a stern restrictions. The contract is authorized due to it is a sale contract where the Shariah have permitted selling (Q2:275) and prohibited loan. Therefore, as long as the practice is a real contract of selling and buying that is not involve loaning or lending then the contract is legal (Ibn Abidin, 1992). In a detailed manner, both parties should not have an intention to do loan. Both contract should apply all elements of selling and buying contracts, as well as the first contract must be accomplished before the second contract taking place. In a meantime, each party of such contract have liberty in doing the business (ISRA, 2011; Shaharuddin, 2012).

In Malaysia, as the country have followed the Shafi'i school of law, the view of the Shafi'ite regarding bay' inah is fully adhered and applicable. Since the beginning of the Islamic banking and financing in Malaysia which was started since 1983, there was no issue regarding the bay' inah. According to the Central Bank of Malaysia (CBM), bay' al-'inah was known as a "sale contract followed by repurchase by the seller at a different price". The definition portray an involvement of two contracts between seller and purchaser in order manner, that are selling with high price by deferred payment and then buy again in lower price in cash mode (BNM, 2013a; Rosly & Sanusi, 2001).

As a control bank to safeguard every operations of all banking and financing manoeuvres in the country, CBM has imposed related guidelines and circulars, including on bai' al-'inah. This is to ensure the product is properly structured and well implemented that are, compliant to shariah rulings which is clean from usury, trickery and coercion. Among of the rulings of the CBM vis-a-vis bay' inah as follows (BNM, 2013b; Md. Sawari, Nik Abdullah, Mat Jubri @ Shamsuddin, & Abdul Aziz, 2018):

- i. Documentation must be made thoroughly which should involve two separate sets of documents, that are sale and purchase agreement. The application should be executed in a proper sequence, to ensure the ownership of the saler and vice versa.
- ii. No conditional obligation should be imposed on either party, other than the sale and purchase agreements. Every party should be free in taking part in both of the agreements.

These guidelines show the strictness of CBM in ensuring the contract deal is in a proper shariah compliance. The process of *ijab* (offer) and *qabul* (acceptance) must be done properly in every contract

and all process of solemnizing the contract under the purview of the shariah committee closely, including the sequence of contracts (Md. Sawari et al., 2018).

At early years of the Islamic Banking and Financing (IBF) operation, bay' al-'inah contract has been widely used by the Islamic banks as an underlying contract for financing, such as under bay' bithaman ajil (BBA). For example, the operation of bay' inah take place when a customer applies for personal financing. The deferred payment as intended in the bay' inah is in line with the phrase of bithaman ajil which means "delayed payment". Therefore, the contract is fit for financing purposes and has been developed for providing cash assistance either for personal support or home financing (ISRA, 2011). As Islam forbid loan, the way to financing is coming from the selling activities (bay'). The existence of Islamic banking as well as the products including bay' inah were considered as *maslahah* for Muslims in evading usury and promotes fairness and transparency in the contract involved (Ishak, 2019; Md. Sawari et al., 2018).

For examples, a customer needs RM100,000.00 financing from the Islamic bank. The way a bank do is by creating a sale and purchase contracts which at the end can produce some profit for the bank after giving the RM100,000. Basically, profit can be produce through different of selling and buying price. Therefore, the bank used bay' al-'inah method whereby the bank will sell an asset ('inah) to the customer with the price of RM250,000.00 on a deferred payment basis. Then in the second contract, customer then sells the asset back to the bank for RM100,000 in cash. As a result, the customer will get the real amount that he/she want in cash, while at the same time, he/she obliged to pay a deferred payment to the bank, in form of monthly instalment such as RM1000.00 for 10 years (120 months) as was agreed between the bank and customer (ISRA, 2011).

In procedure practice, the involve contracts are known as a Property Sales Agreement (PSA) or Asset Sales Agreements (ASA) and a Property Purchase Agreement (PPA) or Asset Purchase Agreements (APA). To fulfil the meaning of bay' inah, the PSA or ASA agreement will come first, then followed by the PPA or APA agreement. The act of purchasing should come after the selling contract was completed or otherwise the bay' inah is void due to purchasing something non exist. In this case, the date and time is crucial and significance to diverge between the first and the second contracts. The sequence will reflect on the Shariah compliance where the arrangement of *aqad* should be made in orderly manners (Md. Sawari et al., 2018). In other point, it was contravene to Shariah if selling something not exist at the time of contract as well as involving in in two dealings at the same time as prohibited by the hadith of Prophet Muhammad (pbuh): "The prophet (peace be upon him) prohibited two transaction within one" (Ibn Abidin, 1992).

Therefore, in nowadays practice, the first contract that is PSA or ASA must be completed first, followed by the PPA or APA. In this regards, the involvement of two contracts need different *ijab* and *qabul* upon each of the contracts. Both *ijab* and *qabul* should be solemnized as well as in orderly manners. For more detail, in the first selling contract, the bank will sell an asset in the form of offering (*ijab*) to the customers, and subsequently, the customers need to accept (*qabul*) the selling. As a result, the asset belongs to the customers. After the first deal is completed, the second dealing take place whereby the customer will offer (*ijab*) to sell back the asset to the bank in cash and the bank accepted (*qabul*). In the final stage, the bank possesses the asset again and the customer will get their cash from the personal financing contract (BNM, 2013a; Ishak, 2019).

However the above operation was said as a back door to usury and the practice is like a loaning activity whereby the practise involves a sales contract with immediate repurchase (Shaharuddin, 2012; Jusoh @ Yusoff & Mat Zain, 2017). As a result, the number of bay' inah contract that operates by the Islamic Banking and Financings (IBF) lately has declined due to the denunciation (Rosly & Sanusi, 2001). Hence, many of Islamic banking institutions have offered an alternative contract to evade the non-compliance issues such as through *bay' al-tawarruq*.

Al-tawarruq is almost like bay' inah except it involves more than two parties. The same description as in the bay' inah where al-tawarruq involves a sale and purchase of asset based on deferred payment which followed by the asset was sold again for cash. But in this case, the asset was sold to a party other than the original seller. In short, the sale and purchase contracts is in similar, but the different is on the party involve. Therefore, the trickery mode is seem to be lesser where the repurchase took place by the different seller at a different price.

In this perspective, it was similar to bay' inah and come to be controversial on the same intention that the commodity purchases is not for the buyer's use or ownership, but for getting cash. Hence certain scholars believe that the transactions are not Shariah compliant. However, to get a contract of selling and purchasing without having such intention completely a utopia.

Therefore, some scholars who accept this contract argue on the existence of real dealing between parties, who have freedom to commit in the sale and purchase contracts. The recognition also based on two valid legal contracts, murabaha (profit) and sales where every seller wants a profit through sales. And that tawarruq is fulfils closely the purpose which causes many Islamic banks such as the United Arab Bank, QNB Al-Islamic, Standard Chartered of United Arab Emirates, Bank Islam and Bank Muamalat of Malaysia used the products as an alternatives of bay' inah. In Malaysia, the concept of tawarruq had been accepted since the meeting between Malaysian Shariah board members at the 58th meeting on 27 April 2006.

7. Conclusion

Bay' Inah contract is still applied among some of financing institutions in Malaysia even though the application has been criticized by many Shariah scholars all around the world. The recognition was based on the view of Shafi'ite jurist that the contract is authorized in Islam as it comply the meaning of sale and purchase between seller and purchaser. In this case, the CBM has underlined a strict guidelines to be followed by financing institutions in order to fulfil the requirements. The most significant point that need to be put a concern is in the sequence between two contracts, whereby the date and time of the contract should be observe very well. In this case, bay' inah is standing as an independent contract as long as the element of conditions for repurchase are not included in the both contracts. Thus, the contract from it outfit is authorized and legal as the shariah adjudge from an external.

However there are alternatives for reluctant people to accept bay' inah by chosing al-tawarruq. Is was a way out and a solution for those who feel that there was an element of compulsion to repurchase in such a contract. Tawaruq not only involves the shariah-compliant sales process, it also includes the elements of business freedom and subsequently the return of profit. As a result, many overseas banks, especially from the Middle East, accept al-tawaruq and reject bay 'inah.

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