

An Overview of Ibra' Implementation in Malaysian Islamic Banks

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ABSTRACT

In the normal conventional banking system, customer only has to pay the outstanding principal amount and earned interest at the time when early settlement is made. The financier normally waives the unearned interest. Contractually, customer in Islamic banks has to settle all outstanding selling prices in the case of early settlement. Nevertheless, Islamic bank normally gives ibra' to its customer who made early settlement. This practice of rebate is important to maintain the competitiveness of Islamic banking as a mechanism of providing mutual help in terms of charitable matters within a Muslim society, which is highly recommended by shariah principles. This concept is actually more suitable for the financier who wants to surrender its right over the debt to customers. Hence, this paper aimed to explore the fundamental concept of ibra' as practised by the bankers currently within the ambit of Islamic teaching. In addition, it is hoped that; throughout this study, it would lead to the betterment of understanding of this concept holistically.

Keywords: Ibra', Interest, Rebate, Financier, Shariah

1. Introduction

Basically, *ibra'* refers to giving up of a right. *Ibra'* also means surrendering one's right to claim on debt either partially or fully (www.bankinginfo.com.my, 2008). In contemporary Islamic banking practice, '*muqasah*' refers to a rebate or discount given by the bank to a customer who chooses to settle his / her debts arising from BBA agreement prematurely, that is, before the expiry of a stipulated repayment period. Interestingly, it is the policy of BIMB to give its customers a *muqasah* even though it is stated to be discretionary (BIRT, 1997). More importantly, as far as Islamic definition is concerned, the word '*muqasah*' does not imply rebate. Accurately, it refers to a "setting off" of the debt between two debtors with an equivalent amount of debt. As such, *muqasah* in modern banking practice should be re-termed as '*ibra'*'.

2. Juristic Opinions

There are various opinions of the Muslim scholars with regards to the issues of *ibra'*, especially which are pertaining to terms like withdrawal and ownership (Nazir & Muhammad, 2001). According to Hanafis, they argued that *ibra'* refers to withdrawal, even though the term ownership still remains. Thus, such individual should not withdraw his rights upon the said property or to withdraw his rights to sell his own property. Conversely, if the withdrawal made is due to the rights over debt of other people, it can be regarded as valid.

On the other hand, Maliki's followers upheld that instead of aiming to withdraw a debt, *ibra'* also could withdraw the possession of an individual if he wants to do so. Once he has withdrawn his possession upon the said property, then the status is equated to *hibah* (gift). With regard to the Shafi'i school of law, *ibra'* connotes the ownership of debt of the debtors. Consequently, both parties must be mutually made known to each other pertaining to the transfer of such ownership to the debtor. Besides, some of them are inclined with the view proposed by Hanafi and considered to be the most proper (*sahih*).

Apart from that, Hanbalis opined that they have simply understood *ibra'* carries the meaning of withdrawal accordingly. By virtue of the Article 1536 as prescribed by Al-Ahkam Al-Adliyyah, the law says that there are two kinds of *ibra'*, namely *ibra' al-isqat* and *ibra' al-istifa'*. *Ibra' al-isqat* can be defined as when someone makes free of another

person by withdrawing the whole rights over that person or by reducing apart of the burden endured by him.

On the other hand, *ibra' al-istifa'* means a recognition of someone that he has accepted his rights endured by another person. It can be regarded as an *ibra'*. Apart from that, special *ibra'* signifies the act of releasing someone from being accused with certain matters. It can be illustrated with an accusation to claim a sum of money as a valued price of a house or other means. Besides, if someone has discharged another person from any kind of accusations, it actually refers to *ibra' bain*.

3. Some Selected Issues

3.1 Ibra' Clause in Financing Agreement (MIFC)

Ibra` was practised in Islamic banking institution based on a financier's discretion to award to their clients who resolve his debt earlier than the predetermined period. Although the practice of giving rebate is solely discretionary on the part of an Islamic banking institution, the client can be confused when they make an early settlement, and can question whether they are eligible to receive *ibra`* or not. In addition, many of the clients are unaware regarding the formula for the *ibra`* computation made by the bank. Instead, with the least knowledge of this matter, clients shift to conventional financing.

In order to prevail over the confusion in the granting and computation of *ibra`* by Islamic banking institution, it was proposed that a clause on promise to provide *ibra`* to customers who settle their debts earlier than the stipulated period be introduced. Consequently, it is important to determine the issue of whether the incorporation of such clause on promise to give *ibra`* to customers in the Islamic financing agreement is permissible by Shariah.

In order to beautify the concept of *ibra'* in Islamic financing, the Shariah Advisory Council (SAC) in its 24th meeting, has decided that Islamic banking institution may incorporate the clause on undertaking to provide *ibra`* to their clients who make early settlement in the Islamic financing agreement on the basis of public interest. The clause should be stated under the method of payment.

While including the *ibra`* clause in the financing agreement, the bank is obliged to honor their promise. This approach is a parallel concept of giving discount on price or reducing the debt of the clients who make early settlement based on the concept of *dha` wa ta'ajjal*. The

said concept is clearly acceptable in Shariah. The puzzlement on the issue of *gharar* (uncertainty in price) does not arise if the clause on promise to give *ibra`* is stated clearly in the financing agreement.

3.2 *Ibra`* in Variable Rate Bai' Bi Thaman Ajil Product

Other than the normal *bai` bithaman ajil* financing product, there is another innovative Islamic financing product based on variable rate. The main features of this product are as follows (SAC):

- (i) The contract used is deferred payment or *bai` bithaman ajil*. This contract would not change throughout the financing period except for the effective profit rate which may vary depending on the current market rate by modifying the rate of *ibra`* (rebate) on monthly basis;
- (ii) The bank and the customer would execute an asset sale contract based on a selling price. This selling price comprises cost plus and agreed ceiling profit rate. The ceiling profit rate would normally be higher than the current profit rate in the market since the bank needs to provide a buffer to cater for the increase in market rate;
- (iii) The bank will give monthly rebate to the customer to make it equivalent to the market rate if the current profit rate is lower than the agreed ceiling profit rate. In any circumstances, the effective profit rate will not exceed the stipulated ceiling profit rate.

Looking at the characteristics of variable rate *bai` bithaman ajil* product, there are several Shariah issues that need to be determined. These issues include:

- (i) Whether a clause of *ibra`* can be included in the financing agreement document;
- (ii) Whether two forms of *ibra`* can be incorporated in one single agreement: one clause on *ibra`* for early settlement and another clause on *ibra`* for monthly basis to correspond the current profit rate in the market;
- (iii) In the event the effective profit rate is increased with the monthly installment payment to remain unchanged, whether a clause on rescheduling to extend the financing period can be provided for in the agreement without the need to execute a fresh contract.

In its 32nd meeting in February 2003, the Council resolved that granting of ibra` in a variable rate bai` bithaman ajil product is permissible. In this situation, the bank is the party who offers the ibra` (unilaterally promise to give ibra`) to the clients and the bank may decide to give ibra` in any way it feels suitable. If the bank has promised to give ibra` to its customers, the bank is bound to fulfill its promise.

According to the mutual agreement in the contract, the financing period for the customer can be extended without the need to execute fresh contract if both parties fulfill all conditions in the agreement. Meanwhile, the final price charged on the customers must not exceed the original selling price contracted earlier.

In sequence to study the growth of ibra' in Islamic finance in Malaysia, there are a few cases that have been brought up to the court which is all are related to ibra'. Discussed below is among the precedent cases under the BBA contract related to ibra'.

3.3 Development of Ibra' In the Purview of Malaysian Cases

In the landmark case of *Bank Islam Malaysia Bank Islam Malaysia Berhad v. Adnan bin Omar*¹, the learned judge has laid down the principle that rebate is practised by the Plaintiff on a discretionary basis. In the event when there was a breach of the agreement, the Plaintiff has the right to invoke their/his right to demand for full repayment of the loan and immediate termination of the facility. This case since has become a landmark of an Islamic banking which involves rebate issue.

Later, in the case of *Affin Bank Berhad v. Zulkifli bin Abdullah*², the learned judge has made a reversed judgment from the previous case whereby he has granted the order for sale against the property and order the Plaintiff to reduce the amount of repayment. It would be inconsistent if the customer is required to pay the profit for full tenure, but he has not received the benefit for the full tenure. Although the rebate issue was under the discretion of the bank, the court has been reluctant to leave this issue to the Plaintiff to determine whether to give Defendant rebate or not. The court has taken the initiative to give the award regarding the rebate issue.

The judge mentioned that, even if the tenure is shortened, the profit margin could be recalculated with equal certainty since the profit margin

¹ [1994] 3 CLJ 735.

² [2006] 3 MLJ 67.

in BBA facility is calculated from a) the agreed profit rate b) tenure the facility is required and c) the amount of the facility. Therefore, the calculation of the profit can be made based on the current agreed profit rate, the shortened tenure of the facility and the amount of the facility used until the date of judgment.

In similar vein, the learned judge in the case of *Malayan Banking Bhd v. Marilyn Ho Siok Lin*³ may have approached the issue purely on construction of the contract basis. It was concluded that the real intention of the parties was that the sale price could be recovered only if the purchaser had the full use of the tenure of the facility. The judge further refers the *Affin Case*⁴ as an authority for the proposition that it would not be equitable to allow the bank to recover the sale price as defined when the tenure of the facility is terminated prematurely. Further, it is in the public interest that the Islamic banking industry continues to flourish in this country and abroad. The judge further stated that ‘unearned profit’, ‘inconsistent with the borrower’s right to the full tenure if he is required to pay the full bank’s profit and denied the enjoyment of the full tenure’ and ‘...the bank being able to earn a profit twice upon the same sum at the same time’.

On the other hand, in the case of *Bank Muamalat Bhd v. Suhaimi Md Hashim & Anor*⁵, the court held that the order for sale was granted with cost. According to the Judge Abdul Wahab Patail J, the amount claimed by the Plaintiff to be its profit for the whole 180 months was inaccurate. This is because the Plaintiff has terminated the contract with the Defendant before the full tenure, which is 180 months. The learned judge further affirmed that the Plaintiff did not intend to grant *ibra’*. The court is of the view that the question of *ibra’* need not be raised as the Plaintiff, fundamentally, was not entitled to claim profit which is essentially a future profit for the duration which has not lapsed. In this case, the judge asks the Plaintiff to calculate the mechanism of the profit, using the method used in the previous case. Indeed, in Shariah, there is *ibra’* principles which can be applied. Thus, the alternative calculation if the advance is taken into account as RM69,123.60, is for the account of the repayment which was made RM7165.34, and to give *ibra’* for the profit which had been taken into account in the sale price for the duration of 134 months have not lapsed. Thus, the profit of RM173.68 per month

³ [2006] 3 CLJ 796.

⁴ [2006] 3 MLJ 67.

⁵ [2007] 1MLJ 275.

for 134 months which had been taken into account, should be deducted as ibra' from the sum calculated as the amount due. The result with the amount due is the same, that is RM38, 685.74.

In the case of *Malayan Banking Bhd v. Ya'kup bin Oje & Anor*⁶, in delivering the judgment, the learned judge has referred to two High Court's decision in *Affin Bank*⁷ and *Malayan Banking Berhad*⁸, which has restricted the Plaintiff's suing under BBA facility from recovering the full profit that they were entitled to under the agreement. The judge has developed a concept that while judging the Islamic contract relating to commercial transaction, the case must be decided subject to the Quranic injunction and / or Islamic worldview. The learned judge has applied the concept of shariah and justice and taking into account that the courts must welcome and support Islamic banking as the principles involved. This will ultimately motivate a major attempt within the norms of Quranic injunction to eradicate total poverty and bring great success to the nation. In the same note, the court must be vigilant to arrest traders or venture capitalists from exploiting Islamic principles at the expense of the consumers. This is a constitutional duty and is not alien to Islamic concept.

It is clear to see that the honorable judge has taken a drastic change by following the Islamic principle and not only depending on what is stated in the secular law. Furthermore, the judge has not diminished the power of the bank in the rebate issue as the discretionary of the bank; he actually allows the bank exercise the discretionary power and propose how much the bank will give the rebate to its customer. With this extreme modification, we can be sure that the future of Islamic commercial matter will flourish in the future.

3. Suggested Reformation

Although the application of Islamic banking has tremendously boosted in the purview of Malaysian banking system due to the fact that has been said to be more widely developed and practised in Malaysia as compared to the other Muslim countries nowadays, sadly to say that yet this system is still regarded as "inferior". The reason is, the existing civil courts structure and procedures remain to be applied to transactions of Islamic

⁶ [2007] 6 MLJ 389.

⁷ [2006] 3 MLJ 67.

⁸ [2006] 3 CLJ 796.

law based, including the issues of rebate. Thus, for the purpose of avoiding from any further disputes in the future in terms of the overlapping of jurisdictions of both systems, it is recommended warmly for the existence of the law or the amendment of such existing laws (if so) to provide for Islamic law to take precedence or to prevail over civil law, wherever there is a conflict between Islamic law and civil law. This ground can be upheld in the cases involving Islamic transactions or in transactions which apply Islamic law entirely.

In similar vein, in the drafting process of any legislation, as well as subsidiary legislation, precautions should be taken into account pertaining to Islamic principles. This is because, for some subsidiary legislation, for example, the Rules of High Court, there are certain statutory provisions which are not in accordance with the Islamic law. Thus, such appropriate legislation should be formulated in order to remove such hardships to the full implementation of Islamic concept of transactions.

Besides, the court must make use of those who are experts in the field of Islamic banking system fully for the purpose of assisting the counsels and judges to have a better understanding regarding to the application of Islamic law in settling the cases brought. On the other hand, it would enhance the rapid progress of the Islamic law pertaining to the financial and commercial matters.

Next, efforts such as having a Special Committee like Islamic Bench or Division within the Court to deal with the cases involving Islamic law independently is highly recommended. In addition, the learned judges should be more flexible, creative and make more exceptions in the existing civil laws and procedures in order to facilitate the smooth running of Islamic banking in Malaysia. Furthermore, there should be more continuing research on legal issues on Islamic banking, particularly pertaining to the development of recent issues like *ibra'*, *sukuk* and others.

4. Conclusion

Alternatively, if the parties choose not to terminate the previous agreement, the parties could enter into another minor BBA agreement. This agreement will be independent for the first agreement, as it only covers the additional sum payable on the Plaintiff as a result of restructuring exercise. A new act of BBA agreement should be executed by both parties. This case brings into sharp focus the urgent need for bankers, lawyers as judges dealing with Islamic banking cases to be fully conversant with Islamic banking principles. The tendency to compare as equate BBA financing with conventional loan transaction is still prevalent. This is appropriate as it could avoid confusion. This tendency must be checked before it does more harm to Islamic banking. In short, there must be a paradigm shift in understanding and appreciating Islamic banking principles and practices on their own merits and not by comparing with interest-based lending practices. This can only be achieved by taking immediate measurement to train and educate bankers, lawyers and with respect, judges in Islamic banking principles and practices.

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