

## A Reappraisal of the Legality and Viability of Sales and Partnership Concepts in Islamic Home Financing

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### ABSTRACT

The Islamic financial system globally has witnessed a tremendous growth in terms of demand, acceptance and development. The variety of products offered is to meet the ever sophisticated consumers' demand and economic changes. For home financing, the application of sales concept under *al-Bay' Bithaman Ajil* (sale with deferred payment) contract is widely used in countries like Malaysia, Indonesia and Brunei even though most of the Middle East scholars have rejected it. Nevertheless, *al-Bay' Bithaman Ajil* contract is heavily criticised for its conceptual and practical problems particularly related to the inconsistencies of the sales concept used for financing purposes. On the other hand, *Musharakah Mutanaqisah* (diminishing partnership) contract is another innovation that offers a viable alternative which is based on partnership and leasing. The objective of this article is to analyse the strength and practical problems of *Musharakah Mutanaqisah* contract in Islamic home financing. The study revealed that the partnership foundation of *Musharakah Mutanaqisah* contract may add to the diversification of the Islamic financial products and attend more to the consumers' needs and interests globally. The strength of the concept lies on revenue sharing between the parties, namely the financier and the customer who proportionally share their profits and risks as agreed in the contract. However, practical problems may arise in determining rental rate and risks distributions which the financiers would adapt according to their interests. Ultimately, any Islamic financing packages may need to be made compatible with the prevailing practices of the conventional financing and conceptually, that may attract more controversies.

**Keywords:** *Musharakah Mutanaqisah*, *al-Bay' Bithaman Ajil*, Islamic Finance

### INTRODUCTION

Islamic financing instruments need a pragmatic direction for expansion in tandem with the development of Islamic finance generally. Home ownership constitutes most of the financing needs for the obvious reason that home is a basic necessity for human life. Muslim customers especially would prefer that Islamic banking and finance observe the general rule in ensuring that there is no contravention of any *Shari'ah* principles in the transactions; for example, all

transactions must be free from the elements of usury, dubiousness and gambling.

At the beginning of its development, the notion or application of the sales concept dominated the basic features of Islamic financing generally. Recently, an innovative Islamic financial concept employing partnership contracts and leasing are explored and developed in order to provide more options to the customers. Many literatures suggest that *Musharakah Mutanaqisah* (a diminishing partnership) is a better option available for home financing

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compared to those applying the sales concept such as *al-Bay' Bithaman Ajil* (sale with deferred payment). Therefore, *Musharakah Mutanaqisah* instrument should be promoted as a viable alternative for Islamic home financing.

This paper concurs theoretically that *Musharakah Mutanaqisah* is to be recognised as a formidable mode of home financing, which is more consistent with the *Maqasid Shari'ah* (the general purposes of *Shari'ah*) (Meera & Abdul Razak, 2005). *Musharakah* (partnership) concept emphasises on the revenue sharing of profits and risks among the parties in the contract. However, this paper will highlight some of the practical problems revolving around the application of *Musharakah Mutanaqisah* especially related to the general tendency of the financiers in determining the rental rate and the risks distribution. A brief account of comparison with some other modes of financing especially related to sale in *al-Bay' Bithaman Ajil* and the concept of leasing in *Ijarah* will be made. This paper will specifically draw attention to the challenges how well the concepts may cope with the realities of business and commerce.

### **MURABAHAH CONCEPTS IN FINANCING TRANSACTIONS**

There are many innovations in the field of Islamic financing which provide funding facilities for home buyers. The concept of *Murabahah*, a sale concept (also known as, cost-plus financing) is used widely in the Islamic modes of home financing. Under the *Murabahah* concept, payment is done based on the resale value made by the financier (the seller) including the profit margin agreed by both buyer (the customer) and seller. The purchase and selling price, the mode of payments and its tenure, other costs and the profit margin for the financier are stated at the time the agreement of sale is concluded. The sales concept of *Murabahah* in financing transactions is not against *Shari'ah* so far as it does not violate any basic principle laid down by the Holy Qur'an, the Sunnah or the consensus of the Muslim jurists particularly related to the injunction against the imposition of interests.

However, in practice *Murabahah* may be subject to many conceptual and practical problems. In the context of home financing, *Murabahah* is applied especially in the form of *Istisna'* (i.e., sale with deferred product/subject matter of the contract) and *al-Bay' Bithaman Ajil*.

*Istisna'* is a purchase order contract of an asset where a buyer will place an order to purchase an asset that will be delivered in the future. In other words a buyer will require a seller or a contractor to deliver or construct the asset that will be completed in the future according to the specifications given in the sale and purchase contract. Both parties of the contract will decide on the sale and purchase prices as they wish and the settlement can be delayed or arranged based on the schedule of the work completed (ICM Task Force, 2004). *Istisna'* is similar to *al-Bay' Bithaman Ajil* transaction as both are sale based transactions but differ in the deferment aspects where *Istisna'* refers to the deferment of the subject matter of the contract while *al-Bay' Bithaman Ajil* concerns on the deferment of the payment. However, *Istisna'* offers greater future structuring possibilities for trading and financing. This instrument is suitable for Islamic banks to finance construction and manufacturing projects (Lewis and Hassan, 2007). However, for home financing, *Istisna'* requires the bank to assume the role of a house builder, with its associated risks apart from being a financier. Hence, many banks may be unprepared to assume both roles.

The contract of *al-Bay' Bithaman Ajil* is a popular form of *Murabahah* particularly used in home financing in Malaysia, Indonesia and Brunei. *Al-Bay' Bithaman Ajil* consists of several principles employed in the Islamic financing like sale based, interest free, deferred payment and long term financing (SAC, 2006). Nevertheless, the current practice of *al-Bay' Bithaman Ajil* as the main facility for home financing is surrounded with some conceptual and practical problems. The prevailing condition is that, many housing projects are incomplete therefore the houses offered for sale are normally not yet in existence. The basic condition of the subject matter of a valid contract namely the commodity

should exist at the time of contract may be subject to challenges. When such a property is still under construction it means the subject matter which is a condition for the validity of the contract of sale is not met. The Islamic jurists, Ibn Taymiyyah and Ibn al-Qayyim view the selling of the non-existent subject matter is allowed. However, their opinion is based on the near certainty of delivery. The arising question is whether the application of *al-Bay' Bithaman Ajil* financing in Malaysia passed the test of certainty of delivery (see ibn\_abdullah, 2010). Apart from the issue of non-completion, an under construction property may also pose other risks, such as late delivery which commonly occurred in the property industry, where the risks and costs are mostly borne by the buyer; In cases where the buyer is in default because he or she refuses to continue paying for an undelivered house. According to *al-Bay' Bithaman Ajil* contract, the bank may request the full payment of the purchase price together with the agreed profit which is not fair to the customer (Kamaruddin, 2007; Mohamed, 2008).

The modus operandi of *al-Bay' Bithaman Ajil* is the bank will purchase the property and thereafter sell the property back to the borrower at a profit. The profit appears as a difference between the purchase price paid by the bank and the sale price. The current practice of *al-Bay' Bithaman Ajil* therefore resembles a financing facility since bankers and financiers have adopted *al-Bay' Bithaman Ajil* to finance the customers (Tan, 2010). Since *al-Bay' Bithaman Ajil* is a type of *Murabahah*, it is in contrast with the original condition referring to the early practice during the Prophet time, where *Murabahah* was a trade facility (Arifin, 2008). As one commentator puts it, the validity of financial *Murabahah* is disputed by many scholars as it releases them from the associated problems such as stock keeping, marketing and other incidental risks related to trade. The seller is supposed to keep the goods together with the associated risks before a resale can be made at a profit to the buyer. This is not feasible for a purely financial *Murabahah* transaction. Moreover, *al-Bay' Bithaman Ajil* is a home

financing facility which is applied on both the property under construction and the completed ones. In addition, the prevailing risks in the home financing concerning the abandoned or incomplete projects is that any associated risks are mostly borne by the customers. This development has caused many scholars to question the validity of financial *Murabahah* under *Shari'ah* (Arifin, 2008).

The *Murabahah* price is fixed for the delivery of the complete house at the price inclusive of the agreed profit reflecting the rate with the period for deferred payment. In the event of default by the borrower (the buyer), the question is whether the banker is allowed to claim for the full amount of unearned profit. If *Murabahah* or *al-Bay' Bithaman Ajil* transactions are treated as trading facilities, the banks therefore are entitled to the full purchase price which is stated in the agreement. However, allowing this would cause hardship to the customer. In contrast, the practice of conventional financing would impose interests only up to the date on which the customer (the buyer) had committed a default. The question raised is that; should the profit be calculated in accordance to the date on which the customer had committed an event of default?

Authorities from decided cases suggest that claiming for unearned profit should not be allowed. In *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67, Abdul Wahab Patail J held that Islamic banks are merely entitled to claim the sum due to them on the date of the default and further profit on a daily rate basis instead of claiming the full sums outstanding of the purchase price. This question was again answered in a similar tone by the same learned judge in *Bank Muamalat Malaysia v Suhaimi bin Md Hashim* [2007] 1 MLJ 275. The learned judge again reiterated that banks when foreclosing on property due to the default by the borrower could only claim the amount profit due on the date of default. Earlier, in *Dato Hj Nik Mahmud Bin Daud v Bank Islam Malaysia Berhad* [1996] 4 MLJ 295, it was held that *al-Bay' Bithaman Ajil* is not a trade facility because it does not involve any transfer of ownership

but only a right to a registrable interest. The court did not actually assert to the extent that the execution of the property sale agreement and the property purchase agreement is a mere disguise of sale transaction. Nevertheless the court said that they merely constituted part of the process required by Islamic banking procedure before the bank customer could avail him of the financial facilities provided by the bank under the *al-Bay' Bithaman Ajil* principle. The learned Hamid Sultan bin Abu Backer J.C. asserted that "abhorrent to the notion of justice and fair play when compared and contrasted with the secular banking facilities" if the payment of unearned profit is allowed, it constitutes a 'glaring injustice.' The judgments in *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67; and *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 were followed. In *Malayan Banking Bhd v Ya'kup Oje & Anor* [2007] 6 MLJ 389, Hamid Sultan Abu Backer J.C. stated that:

*If a contract between the contracting parties becomes an instrument of injustice, a judge cannot ignore the unfairness and insist on strict adherence to the letter of the contract. Hence, a judge is empowered to set aside a contract when the fact discloses gross unfairness on one of the parties as the Islamic system is a just and equitable system that promotes close relationship between the banks and the customers based on co-operation and the equitable sharing of risks and rewards.*

An interesting observation may be made from the above development. Theoretically, the conventional banking and financing is prohibited because the imposition of interest is considered a kind of commercial exploitation. Unfortunately, it is evident in the above *al-Bay' Bithaman Ajil* contracts that the profit rate payable by the customer to the bank may be higher than the payable rate if reverted to the conventional banking (Arifin, 2008). In the

conventional system, customer has to pay only the outstanding principal amount and earns interest at the time when the early settlement is made. The unearned interest is normally waived by the financier. Contractually, however, the customer in Islamic financial system has to settle the total outstanding selling price in a case of early settlement (Abdul Razak, *et al.*, 2008).

Islamic bank normally gives rebate to its customer who makes early settlement. However, giving rebate is made at the discretion of the Islamic banking institution. The doubt as to whether the customers are eligible to receive rebate when they make an early settlement still persists. Any perception of uncertainty and unfairness from this system may cause the consumers to turn to a more orderly conventional financing. In order to stay competitive, the problems should be rectified. Therefore, in order to promote certainty and overcome confusion in the granting and computation of rebate by Islamic banking institutions, a clause on promise to provide *ibra'* to customers who settle their debts earlier than the stipulated period was introduced (SAC, 2006). *Ibra'* is a discount amount given either when the customer pays the loaned sum earlier, or when the customer defaults in his repayments. Without any clear clause in the agreement, *ibra'* or discount which is given at the discretion of the banks may become uncertain.

However, SAC acknowledged that there is a view that there should be no fixed rule as to discount to be stated in the agreements concerning *al-Bay' Bithaman Ajil* contracts. This issue is however considered by the SAC's in that incorporation of such clause promising to give *ibra'* to customers in the Islamic financing agreement is permissible by *Shari'ah* (Mohd Nor, 2008). Doing this however may cause such an *al-Bay' Bithaman Ajil* instrument equivalent to the conventional financing, namely profit amount payable is an interest equivalent under the conventional financing system where the profit rate tracks the market interest rate (Meera & Abdul Razak, 2005).

### **MUSHARAKAH MUTANAQISAH: THE ALTERNATIVE MODE OF FINANCING**

Following the controversies surrounding the inconsistencies of *al-Bay' Bithaman Ajil* as a mode of Islamic home financing, an innovative Islamic financial concept employing partnership contract and leasing was developed (Mohd Nor, 2008). *Shari'ah* scholars had introduced the diminishing or declining partnership (*Musharakah Mutanaqisah*) which is underpinned by the more equitable concept of *Musharakah* as a method of financing. The partnership concept (*Musharakah*) is used, and this literally means a partnership between the entrepreneur and investor who contribute to the capital (such as assets, technical and managerial expertise, working capital, etc.) of the operation in varying degrees and agree to share the returns, as well as the risks, in proportions as agreed by them in advance (ICM Task Force, 2004).

*Musharakah* is a traditional yet pragmatic instrument which can keep pace with the ever-advancing need for modern speedy transactions. *Musharakah* has set some broad principles which can accommodate numerous forms and procedures. A financing package incorporates *Musharakah* can be acceptable to the *Shari'ah* as far as it does not violate any basic principle laid down by the Holy Qur'an, the Sunnah or the consensus of the Muslim jurists (Usmani, 2005).

The traditional *Musharakah* concept if used for financing would involve the bank as a permanent partner in a particular venture. This departs from the main business of a bank as financier and it may find this unattractive. A hybrid concept which integrates the concept of *Ijarah* (leasing) is therefore introduced. *Ijarah* (leasing) is an instrument originally designed for financing an asset or equipment. Basically, the contract is over a *manfaah* (benefit) or the right to use the asset or equipment. The lessor leases out an asset or equipment to the client at an agreed rental fee for a pre-determined period pursuant to the contract (ICM Task Force, 2004). The ownership of the leased asset remains in the hands of a lessor. This feature is not appealing to many house buyers who look forward to

the full ownership of the property eventually. For the purpose of *Musharakah Mutanaqisah*, the contract of *Ijarah mawsufah fi zimmah* (forward lease) is adopted in cases of house under completion.

*Musharakah Mutanaqisah* is a combination of two contracts namely partnership and leasing. Under *Musharakah Mutanaqisah* contract, the financier and the customer share the ownership of the property. The customer will make payment in two phases; a rental payment for the part of the property owned by the financier and a buy-out of the part of the ownership by the customer. The bank's share in the equity (in this regard the property) is diminished each year through partial return of capital while at the same time, the portion of the property owned by the customer increases, until he owns completely the property before the contract is terminated (ICM Task Force, 2004). The bank receives periodic profits based on its reduced equity share that remains invested during the period. The SAC defines *Musharakah Mutanaqisah* as a contract of partnership between a financier and a recipient of financing (the customer) to own a property in which one of the partners (the financier) gives the right to the other partner (the customer) to buy his equity share of the asset either by one payment or several payments based on agreed conditions (SAC, 2006).

One of the issues arises is whether a combination of more than one contract in an agreement is allowed for financing purposes. Partnership and leasing require two different contracts and they are combined under a *Musharakah Mutanaqisah* instrument. The *Shari'ah* principle has made it clear that a combined agreement and made conditional to each other is not permissible. According to the SAC resolution, under paragraph 36, the Council in its 56th meeting held on 5th February 2006/7th Muharram 1427 resolved that;

*The financing product structured based on Musharakah Mutanaqisah contract is permissible. Musharakah Mutanaqisah being a contract*

*recognised in Islamic muamalat is the underlying reason. However, certain conditions are imposed in implementing such a Musharakah Mutanaqisah contract. The contracting parties may combine the two contracts of musharakah and ijarah in one document of agreement, provided that both contracts are concluded separately and clearly not mixed between each other (SAC, 2006).*

### **PRACTICAL PROBLEMS OF MUSHARAKAH MUTANAQISAH**

The *Musharakah Mutanaqisah* concept also has its own operational problems. The works of Meera have highlighted these problems using a hypothetical calculation of the implementation of *Musharakah Mutanaqisah* contract. The main problem is related to the determination of the rental rate that the customer is required to pay. Rental rate is normally based on the market rental value. Factors such as location and time may be vital even though most likely the rate is always increases. This may cause burdensome on the part of the customer to pay the ever increasing yet uncertain amount of rent year after year while the bank would find it cumbersome as well to keep track with the changing rate (Meera & Abdul Razak, 2009). In this context, the interest rate which relates to the base lending rate (BLR) is more practical in offering more certainty and transparency. In this regard, the rental rate should be replaced with the interest rate which is floating based on the market interest rate. However, Shaikh Nizam Ya'quby and Muhammad Taqi Usmani have warned that the benchmark normally used in the interest-based transactions should not be used in the Islamic transaction to avoid resemblance with an interest-based transaction (*Asharq Al-Awsat*, personal communication, January 22, 2010). Majority of the financial institutions in Malaysia which offer *Musharakah Mutanaqisah* Islamic financing packages showed that they offered their financing packages based on a rental rate which fluctuates according to the

movement of the interest rate. Some banks may use the expression such as Islamic Base Rate (IBR) or Profit Rate for this purpose which is essentially floating based on the movement of the Base Financing Rate (BFR). At the same time, a fixed rate package for home financing normally for a longer term (about 10 – 20 years of tenure) may be offered as another option. Similarly, a combination of fixed and variable rate may also be offered ( see Malaysiacentral.com) However, if BFR is not used, the offered packages may resemble the former contract of *al-Bay' Bithaman Ajil* instrument and give rise to the problems related to it. Meera and Abdul Razak proposed that instead of depending on the interest rate, a house price index may be used for the purpose determined by the Malaysian House Price Index (Meera & Abdul Razak, 2009).

Another interesting issue is the risk distribution and the costs sharing. For example, legal fees for the legal documentations involved are to be borne by the buyer including the processing fees, legal fees, stamping and transfer fees and possible penalty charges. Under *Musharakah Mutanaqisah*, the sharing principle means the contracting parties should share these costs. A typical Islamic financing agreement may state exactly that the customer will bear all these costs. In promoting the Islamic financing schemes, however, financial institutions may offer to pay the legal fees on the legal documentation as part of their marketing package. This is normally dubbed as *Zero Entry Cost* (ZEC) in the banks' adverts.

Following the controversies surrounding the application of *al-Bay' Bithaman Ajil* contracts, a few Malaysian Banks which offer Islamic banking services have shifted to *Musharakah Mutanaqisah* (Mohd Nor, 2008) whilst many retain the *al-Bay' Bithaman Ajil* packages. *Musharakah Mutanaqisah* may address certain concerns which give rise to disappointments among the banks and customers. *Musharakah Mutanaqisah* should be the best option available for the dilemma faced by the customers when the project is incomplete since the sharing of risks and profits principle may protect the customers from continuing paying the instalments for

an undelivered house. Unfortunately, this is normally not the case. In practice, the financier may insert a clause which excludes them from the liabilities arising from a house financing under the *Musharakah Mutanaqisah* instrument including that caused by an abandoned project. The clause may make the buyer/customer liable if he or she refuses to continue payment because that non-payment constitutes an event of default which triggers a breach of contract.

On the other hand, *Musharakah Mutanaqisah* may eliminate certain operational issues such as related to the claiming of unearned profits in the event of default by the customer. The issue related to uncertainty of how much rebate is payable also does not arise. Many conceptual issues arising under *al-Bay' Bithaman Ajil* may be able to be overcome. This is due to the fact that *Musharakah Mutanaqisah* contract is a diminishing partnership and not sale based. In fact, the leasing element in its payment structure secured fair risk to both parties in the event of default.

During the early introduction of the concept of *Musharakah Mutanaqisah*, a straight application of the instrument was only possible through cooperative societies. The lending and financing using *Musharakah Mutanaqisah* was adopted by a number of Islamic financial services providers, which predominantly cooperative-type models including the Islamic Housing Cooperative (Canada), Ansar Cooperative Housing (Canada) and the Ansar Housing Limited (U.K) whose purpose was to cater the need of Muslim customers in home financing (Meera & Abdul Razak, 2005).

Even though the concept is now widely adopted and practiced by the commercial banks, they still hesitate to offer *Musharakah Mutanaqisah* according to its original virtues. In practice, the home financing instruments like *Musharakah Mutanaqisah* and *al-Bay' Bithaman Ajil* are structured to be similar operationally to the conventional system as part of the attempts by the bankers to make it viable yet friendly and attractive to the widest range of customers. The common strategies adopted by the banks in offering their products of home financing

packages are to suit various kinds of customers' needs. Various financing packages are available for different individuals' needs depending on their nature of income, either regular or flexible. For example, certain customers may seek financing to meet their temporary financial problems. A first-time homebuyer prefers a low initial repayment. On the other hand, if someone is upgrading his or her current home or buying property as an investment, there is a possibility of early settlement or a lump sum to be made at the end of the tenure. These are the considerations that many banks have when offering their financing packages (BNM and the Association of Banks in Malaysia, 2011). Each of this may find its way translated into Islamic financing packages offered along with the conventional packages.

The resemblance of *al-Bay' Bithaman Ajil* and *Musharakah Mutanaqisah*, or in fact, any *Shari'ah*-compliant home financing instruments, with the conventional financing packages therefore cannot simply be overruled. They were invented akin to financing facilities. Financiers would stress on the profitability of the financial packages they offer for their own sustainability. In the end, a customer may find that whether the instrument is *Musharakah Mutanaqisah*, *al-Bay' Bithaman Ajil* or a conventional loan, the amount payable is more or less the same and they bear similar risks, especially when the prevailing interest rate is used as a benchmark (Meera & Abdul Razak, 2009; Osmani & Abdullah, 2010). As one commentator puts it, Islamic banks may mask themselves by merely using Arabic terminologies but retain the methods of operation and tools of the conventional banks (Arifin, 2008).

## CONCLUSION

Islamic compliant financing packages should address consumers' needs and interests so that they should not be perceived as more exploitative and unfair to the customers. A strict application of *al-Bay' Bithaman Ajil* has shown that such contract may allow the earning of full payment prematurely in the event of default by

the customer or if the customer sought an early settlement. Unfortunately, the solutions put in place are not necessarily consistent with the *Shari'ah* either.

Any Islamic compliant concepts to be used in financing at the same time must be as far as possible compatible and at par with the existing practices of conventional financing. This is the greatest challenge for the Islamic financing instruments in order to stay competitive. Any arbitrage opportunities arising from the perceived generosity in the application of Islamic concepts may be adjusted by the banks to meet their own interests. The banks are profit oriented whose businesses are to earn profit from the financing activities. Therefore, *Musharakah Mutanaqisah* which is purely based on the sharing of revenues and risks may not be appealing to the majority of these financiers.

As discussed above, in either situation, this may expose inconsistencies with the principles in the *Shari'ah*. There is a practical limit each time the Islamic finance can offer side by side with the conventional system especially in addressing the challenges posed by the need to strike a balance between market pragmatism on the one hand and complying with *Shari'ah* requirements on the other (Osmani & Abdullah, 2010). Some jurists opine that the resemblance of the two systems is not healthy within the context of Islamic finance development (Meera & Abdul Razak, 2009; Osmani & Abdullah, 2010).

The high expectation is therefore on the shoulder of 'Shari'ah Advisory Council' (SAC) established under sec 56 of the Central Bank of Malaysia Act 2009. The council sole purpose is to be a specialized committee in the field of Islamic banking to speedily ascertain the Islamic law on financial matters so as to command the confidence of all in terms of the sanctity, quality and consistency of the interpretation and application of *Shari'ah* principles pertaining to Islamic finance transactions. A recent anomaly arises with respect to the scope of authority of this council. Each bank offering Islamic products needs a *Shari'ah* Advisory Body (SAB) as required by the Islamic Bank Act, essentially in ensuring *Shari'ah* compliance.

The new Central Bank of Malaysia Act 2009 provides that the Islamic banks are to seek the advice of the *Shari'ah* Advisory Council (SAC) of the BNM; and it is mandatory for the Islamic banks to comply with the advice given by the SAC. This will ensure that *Shari'ah* compliance is always strictly observed and adhered by the Islamic banks with the advice of the SAC. The close relationship with SAC can also facilitate shorter timeframe in endorsing any new products in IBF (Engku Ali, 2008). However, the recent judgment by Mohd Zawawi Salleh J in *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* [2011] CLJ JT(2) may cast some doubts for a secure future direction of the Islamic finance system generally. While acknowledging the advisory power of the council, the SAC is merely required to make an ascertainment and not determination of Islamic laws related to any questions on Islamic financing issues (para 85 and 87-88). Any disputes related to the validity of the instruments or contract used in a particular transaction is a judicial decision and traditionally is exercised by the courts (para 102, 105 and 106). This means there is no finality in terms of the validity of any of the instruments introduced in the Islamic finance system until the court confirms. Therefore, the question of whether a resilient legal environment for Islamic finance has been appropriately put in place continues.

*Al-Bay' Bithaman Ajil* has been criticised for its incompatibility with the existing system of neither Islamic finance nor the conventional one. The implementation of the partnership concept in *Musharakah Mutanaqisah* is another test of how pragmatic is the *Shari'ah* principle alongside the conventional system, taking into consideration the limited viability and the power of authority concerned in paving the way for its future direction. Therefore, the issue of SAC of course requires a different analysis of its own.

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