

## THE ROLE OF *KHIYAR AL-'AYB* IN *AL-BAY' BITHAMAN AJIL* FINANCING

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*The widespread application of al-bay' bithaman ajil (BBA) contract in the Islamic banking business today requires a serious reexamination. This is to see that the welfare of consumers is protected, which all Islamic contracts must provided for. It is made by way of making the existence of 'iwad in profit arising from BBA or murabahah transactions evidently clear. One of the component of 'iwad is the right of the buyer to annul the contract when a defect is evident in the product sold, namely Khiyar Al-'Ayb. It follows that the contract of BBA must include the provision of Khiyar Al-'Ayb as the natural right of the buying party. This paper has argued that this right was not granted by the Islamic bank who is acting as the selling party to the BBA contract. It has thus undermined the legal maxim Al-Kharaj bil- Daman, which all selling parties taking part in the contract of al-bay', including al-bay' bithaman ajil, must readily observed*

### 1.0 Introduction

The requirement of *'iwad* (equal countervalue or compensation) in the contract of sale (*al-bay'*) is one of the cornerstone of Islamic theory of profit depicted well by the legal maxim "*al-ghorm bil ghonm*", (no reward without risk) and "*al-kharaj bil daman*" (in any benefit lies a liability). The *'iwad* factor was mentioned by Ibn al-'Arabi(d. 543/1148), in which he says, 'every increase, which is without *'iwad* or an equal countervalue is riba"<sup>1</sup>. It follows that all prevailing Islamic modes of finances applied in Islamic banking today must contain the element of *'iwad*. Because a sale is necessarily an exchange of a value against an equivalent value, any form of profit derived from the application of Islamic modes of finance using the contract of sale such as *bay' muajjal* or credit-based *murabahah, mudarabah, ijarah, salam, istisna'* and others must be able to exhibit the existent of *'iwad*.

In this paper, we will argue that the application of *al-bai-bithman ajil* contract in Malaysian Islamic banks has apparently overlook the requirement of *'iwad*. This is done by way of passing the obligation of warranty to the vendor. When this is true a BBA sale has put a waiver in protecting the rights of consumers and thereby placing welfare on the backseat. Theoretically, in a BBA sale the bank as a seller, must be liable for any product defect and the ensuing compensatory damages. The option of defect (*Al-Khiyar al-'Ayb*) is operative once the goods are sold, which the bank must honour in order to claim legitimacy on the profit made. To illustrate our case, we will use the *al-bai-bithaman* home financing involving the sale of a new house. The first section discusses the requirement and component of *'iwad* in the contract of sale. In section two the legal documentation of *al-bai-bithman ajil* is discussed. It serves to investigate the extent to which an Islamic bank will observe its role as the legitimate selling party if the buyer, namely the customer discovered that the asset or property sold is not in the specifications provided for in the contract. Section three explains the concept of *Al-Khiyar 'Ayb* and how is the option can be applied in the Islamic law of contracts. The paper ends with a conclusion and recommendations.

### 2.0 The Meaning of *'iwad*

Now that *al-bay'* is enjoined by the Quran as opposed to riba, there is a urgent need to understand in what way is profit from loans, namely riba is different from profit from sale (*al-bay'*). As mentioned by Ibn al-'Arabi earlier, "every increase, which is without *'iwad* or an equal counter value is riba". This can imply that a contractual

increase arising from a loan is *riba* because it does not contain '*iwad*'. It follows that an increase (i.e. profit created) from a sale is not *riba* because it i.e. the profit is supposed to contain '*iwad*'.

The following illustration is useful to further explore the meaning of '*iwad*' and how it must exist in all legitimate sale. For example, Mr. Mustafa has paid RM1000 for a television set in which an exchange of goods for money has taken place. Pricing of the television shall consist of cost of inputs and a profit margin where it i.e. the profit margin is created from the effort (*ikhtiyar*) rendered and risk-taken (*ghurmi*) by the manufacturer and the liability to rectify any defects found in the goods sold. First, the risk element (*ghurmi*), namely the risk of ownership which implicate itself with risks arising from volatile market price movement. That is, inability to sell goods at a price higher than the average cost will mean losses. Failure to sell goods due to changes in consumer tastes can also lead to high inventory buildup, which can also end up in losses. Secondly, the contract of sale must provide a warranty agreement that favours the customer when the goods sold are proven defective. The seller must be made responsible to assume this type of liability. The legal maxim "*al-kharaj bil daman*" is therefore instrumental in determining the nature of '*iwad*' in sales since it says that any benefits (i.e. profit) derived from a transaction must be accompanied with the liability arising from a potential loss. Lastly, the conversion of inputs into output involves work or effort as it adds value to the process of production. It follows that skills and expertise imputed into production must therefore be rewarded.

In other words, in any sale an equivalent counter value or '*iwad*' shall consist of three main elements, namely 1) cost of inputs 2) market risk and liability and 3) effort or value added<sup>2</sup>. In the case of an interest-bearing loan, say RM10,000 at 10% interest rate per annum, we are looking at an exchange of money worth RM10,000 in year 1 for RM11,000 in year 2. The principle component, namely RM10,000 constitutes the cost of inputs while the extra RM1,000 represents the profit created from the loan made to the debtor. However, this surplus or profit does not implicate risk-taking, liability and value added services discharged by the creditor. It does not contain '*iwad*' and as such any increment arising from it is tantamount to *riba* since by definition "Every increase, which is without '*iwad*' or an equal counter value is *riba*".

It is therefore crucial to highlight the role of '*iwad*' in explaining the superiority of sale (*al-bay'*) over *riba*, when one wishes to appreciate the role of Islamic banking and finance in achieving socio-economic justice. It would not be wise to embrace the *riba* issues without placing the *al-bay'* and "*iwad*" factor as an integrated whole. Otherwise it can cause great confusion to society if undue focus is given to the *riba* factor alone when one wishes to introduce and propagate the concept and the practice of Islamic banking and finance to the discerning public.

### 3.0 *Al-Bai-Bithaman Ajil* Home Financing and Legal Documentation

Problems and issues of the sale involving defective houses are not new. For example, in Malaysia, the developer of a housing estate Bandar Puncak Alam at Bukit Cerakah received complaints of structural defects involving 300 double story houses it had earlier sold. Cracks and sunken floors were evident and proved difficult for owners to move in. To ensure that the safety is guaranteed, repairs must be made but who shall bear the cost of repairs? To some extent, some of home purchasers at Bandar Puncak Alam may have applied the *al-bai-bithaman ajil* home financing package. This is because the city of Shah Alam in Malaysia is a predominantly Muslim area.

By definition *al-bay' bithaman ajil* is a mark-up sale in which payments are delayed and made in equal instalments. Theoretically, in the contract of BBA the bank sells the house to the customer at a mark-up price, whose content consists of the cost price plus a profit margin the bank wants to make over a specified financing period, say 20 years. Ideally, the BBA contract should not include the sale transaction between the bank and the developer. This contract should be separated from the BBA contract since the bank is supposed to purchase the house from the developer in order to claim legal ownership before the house is put on sale. Thus, the BBA contract should only deal with the instalment sale between the bank and the customer.

### 3.1 *Al-Bai-Bithaman Ajil* Legal Documentation

To further discuss the legal documentation of BBA and how the option of defect came into effect, it is important to understand the nature of the BBA legal documentations. A BBA legal documentation must reflect the true nature of sale (*al-bay'*) contract. The terms and conditions of *al-bay'* such as the purchase and selling prices, the rights and duties of a seller and buyer, consideration, etc. must be included. Any uncertainties and ambiguities about the principles of a sale contract can tantamount to a contract to be rendered null and void. Likewise, the terminologies used in the sale contract must reflect the rules and principles governing it; such expression such as loan, fixed returns must be strictly avoided. Equally important is the issue of ownership. The main purpose of a sale contract is to transfer ownership from the seller to the buyer. As such, this is the basic consideration that the buyer is getting in return to the money he has paid to the seller. The ownership should be unqualified/unconditional; any attempts to qualify it could make the sale contract invalid at the option of the buyer. In addition, the issue of liability is also paramount important in a sale contract. Both parties, seller and buyer should be liable to each other and they must comply with their respective rights and obligations. Under no circumstances that one party can transfer all the risks and liabilities to the other as this can cause hardship to the other party while leaving the other free from any risks and liabilities whatsoever. Shariah advocates the principle of equal bargaining power whereby all the contracting parties are deemed to be equal at the eyes of Allah and the transaction they are involved in. As such, legal documentation should be able to translate all the principles of *al-bay'* in conformity to Shariah. The rule of construing and interpreting the provision must be obvious and clear. If it is a BBA transaction, ipso facto it must be construed as one, thereby all the rules and requirements of a sale contract will follow suit. Under no circumstances, that the provision allows that the contract to be construed otherwise. This next section attempts to elucidate how legal documentation of BBA has been formulated and to discuss whether such practice is acceptable by Shariah and if not, to offer some remedy to it in view of reform.

### 3.2 Financing Documents

Financing documentation shall be prepared and executed prior to disbursement of financing amount. For instance, when Ahmad has purchased the house from ABC Developer and the Sale and Purchase Agreement (SPA) between the two parties has been executed. The SPA requires Ahmad to pay 10 percent of the total selling price to ABC Developer. Even though the bank is yet to be the parties to the agreement, it is significant as SPA has conferred a beneficial right over the property to Ahmad which justifies for him to sell the same to a bank. Shariah scholars have ruled that after paying 10 percent as down payment to the developer, Ahmad is in fact the beneficial owner<sup>3</sup>. This opinion has been accepted by Association of Islamic Banks Malaysia (AIBIM) and pursuant to that, Novation Agreement<sup>4</sup> has been discontinued. Instead, Property Purchase Agreement (PPA) is now in place.

#### 3.2.1 Property Purchase Agreement (PPA)

PPA is the agreement between the customer and the bank wherein the bank purchased the property from the customer for the purpose of immediately thereafter selling the same to the customer upon deferred terms under the Shariah principles of BBA. Earlier, PPA provides that "the customer is the beneficial owner of the property pursuant to the Sale and Purchase Agreement". PPA further provides that "In pursuance thereof the Bank agrees to sell and the customer agrees to purchase the property and subject to the terms and conditions herein contained". So, at this juncture, there is a clear indication that the property which is purchased by the bank is intended to be resold to the customer immediately.

PPA has passed greater responsibilities, thereby transferring responsibility and liability onto the customer as follows:-

- a) For securing the payment of sale price, the customer shall execute a registrable charge in favour of the bank
- b) The customer shall take Takaful Mortgage Plan as well as fire takaful for the amount accepted by the bank
- c) The customer shall indemnify the bank against all losses that may be brought at any time by the Vendor/ proprietor or any party or parties
- d) The customer to pay all quit rents rates, taxes, assessments and other charges imposed or to be imposed by the Government or other competent authorities and other charges or levies in respect of the property whether before or after the date of the execution of the agreement
- e) All stamp duties, taxes, fares, fees, expenses and other charges in connection with PPA as well as litigation cost and solicitor costs etc. shall be borne entirely by the customer

### **3.2.2 Property Sale Agreement (PSA)**

After the execution of PPA, the parties shall immediately execute PSA to reflect the act of reselling the same property to the customer upon deferred payment which includes bank's profit margin. Besides the above-mentioned responsibilities, PSA has added more responsibilities on the customer to the extent that the bank is free from all risks whatsoever. The bank is fully covered and in a very secured position. The provisions are as follows:-

- a) The customer is to pay security deposit which shall be retained by the bank for the due observance by the customer and the customer authorises the bank to set off and utilise the same for the purpose of setting any instalments due and payable
- b) the bank is entitled to other type of securities or to be a lien holder to any property belongs to the customer in order to secure payment
- c) In the event the property at any time become subject to acquisition by the government, the bank shall be entitled at the expenses of the customer to engage advisers and agents for the said purpose.
- d) The customer shall duly observe and perform all terms conditions covenants and stipulations to be performed by the customer under the S&P Agreement s
- e) The customer shall indemnify the bank against any losses claims demands, actions, expenses, legal costs that may be made against the bank for default or breach of any provision of the S&P Agreement by the customer.
- f) Upon demand, the Customer shall promptly pay the bank all amounts so paid by the bank that derived from customer's breaching any provision of S&P Agreement.
- g) The bank, not being the developer of the property, shall not liable for any claims in respect of any defects, shrinkage or other faults affecting the property which are due to defective workmanship or materials or any other cases whatsoever of the property are not having been constructed in accordance with the specifications and plans approved by the appropriate authority. (underline is ours/emphasis added). However, the customer can make any claims against the vendor/proprietor.
- h) the bank has the right to combine and set-off the accounts belonging to the customer without his notice to satisfy the customer's liability to the bank

### 3.2.3 Charge Document (Form 16A and Annexure) or Deed of Assignment

This is an agreement made between the bank and the customer whereby the latter agrees to assign all his rights and interest over the property to the former as security for the financing granted. Charge Document will be used when the IDT has been issued while Deed of Assignment is used when the IDT is yet to be issued

The issue at hand is *Khiyar al-'Ayb* or Option of Defect. It is about the option given to the customer to cancel or annul the BBA contract when a defect on the goods sold is evident. To ensure that the contract remains valid, the bank is expected deal directly with the developer to ensure that the defects are removed and the ensuring damages rectified. It will be a violation of Shariah law when the bank forcefully impose a condition that can alter the right of option of defect in its favour. The following section will examine in greater detail the nature of *Khiyar al-'Ayb*.

### 4.0 The Concept of *Khiyar al-'Ayb*

The *Khiyar al-'Ayb* or the option of defect is a legal right i.e. the customer does not need to stipulate a special clause or reservation of the option at the time of contracting<sup>5</sup>. According to the Mejjelle, “any buyer in Islamic law has an automatic implied warranty against latent defects in the goods purchased”.<sup>6</sup> According to Kasani, “the buyer is also permitted to expressly renounce a defect which might develop in the goods during the restrictive period after having been taken into possession by him”.<sup>7</sup>

The term “latent” here must be well understood to avoid unsound claims leading to the right to cancel the contract. The Hanafi School defined a “latent” defect as, “Everything, which results in a diminution of value according to commercial custom, whether this diminution is gross or minimal”.<sup>8</sup> The Malikis term this option as *Khiyar al-Naqisa* and state that the defect must be of such a nature as to cause a “discernable” diminution of value of the goods, or to render the object less suitable for the use to which it was intended to be put<sup>9</sup>.

Before we examine further the concept of *Khiyar al-'Ayb*, the concept of *Khiyar* itself needs explanation. Option in its absolute sense is therefore the right given to both parties or to either one to accept or rescind the contract. The definition above is only the general meaning of the term Option, however, there are various kinds of option applicable but our discussion is only limited to the most important option in Islamic *Mu'amalah* ie. the Option of Defect.

The main issue raised in this paper concerns the option of defect or *Khiyar A'ib*. It is an option given to a party to rescind the contract when he discovers in the subject, defect that reduces its value or that makes it fall short of its requirements or specifications. This type of option arises only if the contract has been concluded. If the contract is still in the state of negotiation or still under discussion, the affected party cannot exercise this option. Therefore, if anything appears in the subject of the contract which does not match its original use or decreases its conventional market value, or makes it unfit to meet requirements expected of it, then the buyer have the right to exercise option of defect, as freedom from defects is the right of the buyer given in any commercial transactions.

*Khiyar 'Ayb* therefore only exists to safeguard the satisfaction and interests of both parties hence to balance between the defect the price and the interest of the buying party. It means that if a defect is found in a thing, the price should be reduced. Or to introduce fairness the buyer and given the choice to take back the money or return the thing or buy it. We should remember that Allah (s.w.t) interdicted taking the money of others illegally and commanded that trading should be conducted with mutual consent. Therefore, the reason for this option is to uphold and maintain justice among the parties who conclude the contract. The basis for rescission the contract due to defects are the word of Allah (s.w.t) in the Quran to the effect,

*“O ye who believe! Eat not up your property among yourselves in vanities: but let be there amongst you traffic and trade by mutual good will: nor kill or destroy yourselves: for verily God any hath been to you Most Merciful!”(Al-Nisa<sup>c</sup>: 29).*

Besides the authority in the Quran, there are also some hadiths by the Prophet s.a.w which state that,  
*“A Muslim is brother to another Muslim. It is unlawful for a Muslim to sell his brother a deficient thing unless he makes it clear to him”<sup>.10</sup>*

It is reported that the Prophet passed by someone selling foodstuff. He put his hand in it and found it wet, then he said, *“he who cheats us is not one of us”<sup>.11</sup>*

#### **4.1 Conditions for Option of Defect to Become Applicable**

In order for the option of defect to become applicable, the following conditions must be fulfilled:

The defect have existed in the subject matter prior to the time of sale or it occurs before the delivery and while it is still in the hands of the seller.<sup>12</sup>

The defect which existed in the subject matter decreases its value or render it unfit for the purpose to which it is intended for i.e any defect that affects the substance or the value of the thing sold in such a way as to render it unfit for the use which it is lawfully destined.<sup>13</sup>

The buyer must be unaware of the defect at the time of contracting and taking the subject matter into his possession. If the seller indicates that the defect is so manifestly obvious so as not to escape defection and the buyer accepted it without protest, he is considered to have renounced his right.<sup>14</sup>

The absence of stipulation for waiving or releasing the seller from liability for the defect in the subject matter.<sup>15</sup>

#### **4.2 Conditions under which Right of Option of Defect Cannot be Exercised.**

The right to option cannot be executed at will as some conditions must be fulfilled before the buying party can exercise his right to continue or terminate the contract arising from a defective goods sold. These requirements are given below:

- 1 When the buyer, after he has known the defect in the subject matter, insists or continues buying the thing.
- 2 When the buyer knew the defect in the subject matter but transfer or give it to other persons as a gift or as a selling thing. He loses his right of option of defect.
- 3 When the seller sell a thing with a condition that he shall not be made liable for any defect in the subject matter and the buyer agreed upon that condition<sup>16</sup>. The buyer losses his right of option of defect.
- 4 If the defect is slight and if it does not reduce the value of the object, and if it is conventional to overlook it, then the party cannot use it as a pretext to return the sold object.<sup>17</sup>

According to Islamic law, if the new defect occurs in the subject matter while it is in the possession of the buyer and he discovers that the object had an old defect while it was in the possession of the seller, then the buyer can claim the reduction of the value but he cannot return the object.<sup>18</sup> This is because it will lead to unfair treatment to the seller as the object has a defect for which he is not responsible.

In addition to this, when the buyer has known the defect in the thing sold he must return it without delay as the custom requires.<sup>19</sup> And it is absolutely forbidden to utilise a thing bought after discovering its defect.

#### 4.3 Is the Option Transferable to Heirs?

Islamic Jurisprudence agrees that the option of defect is one of the options that is transferable to the inheritors as it is attached to the subject of the contract. The option holder's death does not cause the option to be lost because the object itself is transmitted to inheritors, and thus so is the option.<sup>20</sup> This is because inheritors should inherit a sound and not a defective object.

Lastly, the right of option of defect can be applied perfectly in the contract of sale, contract of *Ijarah* (hire), contract of exchange of currency, in case of *Mahr* payment, in case of *Khulu'* and also in case of *Sulh* (reconciliation) involving agreement or setting blood money, i.e all contracts whose purpose is the exchange of counter-values. However, in contracts whose primary aim is not mutual exchange of counter-values there is no dispute that defects have no effects in them whatsoever.

#### 5.0 Conclusion and Recommendation

Based on the given rules on *Khiyar 'Ayb*, it is apparent that an Islamic bank as a selling party must hold all liability arising from all defective goods sold. But in practice, as shown in the respective legal documentations, it is evident that the bank holds no such liability. As indicated earlier, the Property Sale Agreement has already excluded all the liabilities on the part of the bank as it i.e. the bank should be seen as merely the financier and not the seller or vendor. Doing so has discounted the principle of "*al-Kharaj bil Daman*" in current Islamic banking operations and therefore putting the risk of implicating *riba* in the profit created from the *al-bay bithaman ajil* financing.

It is also observed that an Islamic bank that practices *al-bai-bithaman ajil* seems to only champion its rights without conferring duties of equivalent values to the buying party. Apparently, it has transfer relatively all the risks and liabilities to the customer thereby leaving it i.e the bank with practically no risk to bear while securing profits which is fully guaranteed by way of executing a sale contract i.e. *al-bai-bithaman ajil*.

The authors have also observed that it is not incorrect to infer that the Property Purchase Agreement (PPA) and Property Sale Agreement (PSA) is only a device to *affect al-bay' bithaman ajil* transaction. Both PPA and PSA seem to resemble a legal device or legal device (*Hilah/Hiyal*) that serve to provide an evidence that act of buying and selling is actually taking place as required by Shariah. In practice, these two agreements are merely to disguise the bank as intermediary status i.e. merely financier and not the seller.

This is held in the case of *Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* [1996] 1 CLJ 576, the judge ruled that "unlike in the instant case, it never the intention of the parties in as much as it can ever be said to within their contemplation, to involve any transfer of proprietorship". Likewise, it so happen that the execution of the Property Purchase Agreement (PPA) and Property Sale Agreement (PSA) constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facility provided by the Defendant (Bank)":<sup>21</sup>.

The above judgement has unveiled the disturbing feature of BBA transaction in which the transfer of ownership has not taken place. All along, the customer remains the proprietor. Apparently, this has violated the principle of "*Al-Ghorm bil Ghonm*" which requires the selling party to hold ownership right before he can dispose the asset. This is evident before a new and revised version of BBA legal documentation was introduced. Prior to this, a novation agreement was first concluded followed by a property sale agreement (PSA) but at this juncture the bank participated as the selling party. It evidently contravenes Shariah principles since by way of the sales and purchase agreement (S & P) as the customer holds beneficiary ownership. To qualify the banking firm as a selling party, the new BBA legal documentation was designed in such as way that the bank holds beneficiary ownership before making the sale to the customer<sup>22</sup>.

Even so, the absence of a price or consideration in the new Sales and Purchase Agreement (SPA) has somewhat marred the legitimacy of profit created from the BBA transaction. It is therefore urgent to take remedial step to impute the risk and liability component of *'iwad* in current BBA financing.

More crucial is the liability component of *'iwad* which if ignored will degrade the welfare of the buying party. As a consequence, the contract of *al-bai' bithaman ajil* is not seen able to apply Shariah law as a means to remove hardship (*raf' al-haraj*) and preventing harm (*daf' al-darar*) in economic activities. Consumer welfare will be left unattended, which is the worst crime one can commit when the business is run using an Islamic label.

#### Notes:

<sup>1</sup> See Ziaul Haque, *The Moral Economy of Usury, Interest and Profit*, pp. 10. He quoted the statement from the original work of Abu Bakar Muhammad ibn Abd Allah Ibn al-Arabi *Akham Al-Quran*, (cairo: Isa al-Babi al-Halabi), I, p. 242.

<sup>2</sup> see Saiful Azhar Rosly, 'Iwad as a Requirement of Lawful sale: A Critical Analysis of Al-Bay' as a Mode of Finance", *IJUM Journal of Economics and Management Science*, Vol 4, No. 11 2000 (forthcoming)

<sup>3</sup> Beneficial owner /interest indicates a right of substantial enjoyment or equitable interest as opposed to merely nominal ownership or legal interest. For instance, if A holds land in trust of B, A is said to be the legal owner as the land is registered in his name, while B is said to have beneficial/equitable interest or to be the beneficiary or *cestui que trust*. As such, the difference between legal/registrable owner and beneficial/equitable interest is where the former has got his name registered on the Issue Document of Title (IDT) by relevant authorities while the latter is not. The transfer of ownership is on the way and it can take some time especially when one buys the house from a developer which is on construction.

<sup>4</sup> Much of this has been discussed, for more details on Novation Agreement and problems caused by it which leads to its abolishment, see Norhashimah Mohd Yasin, "Financing Aspects of *Al Bay' Bithaman Ajil* (BBA) Contract" in [1997] 3 CLJ Supp pp viii-x.

<sup>5</sup> See S.E. Rayner, *The Theory of Contracts in Islamic Law*, pp. 327-328.

<sup>6</sup> *Majella al-Ahkam*, Art. 336.

<sup>7</sup> Kasani, *Badani*, Vol. V, p 297; See also Ibn Rushd, *Bidayat al-Mujtahid*, pp 164-169.

<sup>8</sup> Jaziri, *Kitab al-Fiqh ala al-Madhahib al-Arbaa*, Vol. 2, pp 188-189; Sarahsi, *al-Mabsut*, XIII, pp91-121; Marghinani, *al-Hidaya*, III, p 27.

<sup>9</sup> Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Vol. 2, pp 164-166; Sanhuri, *Masadir al-Haqq*, Vol. IV, pp 270-272.

<sup>10</sup> *Sahih al-Bukhari*, No. 3.

<sup>11</sup> *Sahih al-Bukhari*, No. 32.

<sup>12</sup> Ibn Rushd, *Bidayat al-Mujtahid*, II, p 166; *Majella*, Art. 340.

<sup>13</sup> Majella, Art. 336.

<sup>14</sup> Sanhuri, Masadir al-Haqq, IV, p 274.

<sup>15</sup> Majella, Art. 342.

<sup>16</sup> This kind of sale called (*bay' al-Bar' a*) is a kind of sale which takes place when the seller imposes a condition on the buyer for bearing the liability of all defects occurring in general to the subject matter of the sale.

<sup>17</sup> Ibn Rushd, Bidayat al-Mujtahid, II, p 168.

<sup>18</sup> Majella, Art. 348.

<sup>19</sup> Wasil, al-Fiqh al-Islami, Vol. 3, p 51.

<sup>20</sup> Madkhour, al-Fiqh al-Islami, pp558-568.

<sup>21</sup> The case went on appeal and the Appeal Court upheld the judgement of the High Court, see [1998] 3 *Malayan Law Journal* (MLJ) pp393-403.

<sup>22</sup> This is executed by way of the Property Sale Agreement (PSA) which assumes that the bank holds beneficiary ownership of an asset it has purchased from the customer without a consideration.