
'BBA concept is unacceptable in Middle East countries'

The Musyarakah Mutanaqisah, or declining balance partnership, has a more universal acceptability in the Islamic world

By **HABHAJAN SINGH**

THERE has been a flurry of judgements concerning Islamic banks coming out of the Kuala Lumpur High Court's commercial division, all carrying the July 18 date stamp and signed by Justice Datuk Abdul Wahab Patail.

The Malaysian Reserve has seen at least four judgements, including three dealing with the widely used Islamic home financing contract under the concept of Al-Bai' Bithaman Ajil (BBA).

The judgements, especially

one running into 54-pages, has caused a stir in the fast-growing Islamic finance industry.

The BBA, in essence, is a contract of deferred payment sale (the sale of goods on a deferred payment basis) at an agreed selling price, which includes a profit margin agreed on by the customer and the bank.

It is widely used in various Islamic financing instruments, including for bridging finance, cash line facilities, contract financing, project financing and letters of credit.

"You can say that the whole industry was practically built on BBA, especially in the earlier days.

"And it is still features prominently in many transactions," says an industry executive.

In a recent report, Kuwait Finance House (KFH) Research noted that the BBA concept is not acceptable in Middle East countries such as

Saudi Arabia, Bahrain and Dubai since the contract is similar to Bai Inah that is a buy and sell arrangement that involves only two parties — the financier and the customer.

"Unlike BBA, Musyarakah Mutanaqisah (declining balance partnership) has a more universal acceptability in the Islamic world.

Musharakah Mutanaqisah is widely practised in the Middle East, US, Canada, UK and Australia, but has yet to dominate the Malaysian market," KFH Research said.

In his 54-page judgement, Justice Abdul Wahab ruled that the application of the BBA is contrary to the Islamic Banking Act 1983, taking note that the sale element in the BBA is "not a bona fide sale" and bringing into question the profit portion of the facility.

The written judgement — made available to lawyers involved in the case late last

month — was a collective judgement for 11 cases involving Bank Islam Malaysia Bhd and Arab-Malaysian Finance Bhd, separately, as the plaintiffs.

"This Court holds that where the bank purchased directly from its customer and sold back to the customer with deferred payment at a higher price in total, the sale is not a bona fide sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility rendered the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be," Justice Abdul Wahab said in his judgement (point No. 69).

In his reasoning earlier, the judge pointed out that "there is no dispute that the concepts" of BBA and several other contracts are "in principle, Islamic in nature since no interest is involved".
