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## Analysis of Responsibility toward Leased Asset in Ijarah Financing from the Shariah Perspective: A Special Focus on Al-Ijarah Thumma Al-Bay<sup>c</sup>

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### Abstract

This article aims to examine Islamic jurists' views on the issue of responsibility towards *ijarah* (lease) assets in *Al-Ijarah Thumma Al-Bay<sup>c</sup>* (AITAB) financing from the perspective of fiqh. AITAB is one of the hybrid products that combine *ijarah* (lease) and *bay'* (sale) contracts. According to the Shariah, during the financing period, the AITAB product must comply with the *ijarah* ruling. However, in the current practice, the application of this product is still subject to legal provisions that may not be in line with the rules of *ijarah*. This scenario can be observed in the issue of asset maintenance responsibility and the issue of responsibility to bear the cost of takaful. In terms of the issue of asset maintenance, all responsibilities are transferred to the lessee, whereas according to fiqh, the responsibility only needs to be borne by the lessee if the damage to the asset is due to his negligence or to its use out of custom. Similarly, in the issue of responsibility to bear the cost of takaful, the lessee also has to bear the cost, while according to the Shariah, the lessor i.e. the bank, that has to bear the cost. Accordingly, this paper aims to identify the responsibility towards assets in AITAB financing from the fiqhi perspective. The paper also examines the compliance of the current implementation of AITAB financing with the Shariah. This study is qualitative using a content analysis approach in examining fiqhi views. The results show some issues related to asset responsibility in AITAB financing have to be analysed further from the fiqh perspective.

**Keywords:** Responsibility, Assets, AITAB, Ijarah, Ownership, Vehicle, Financing

### Introduction

Islamic finance has emerged as an important financial system. It has gained worldwide recognition because it offers a variety of products and develops alternative financial instruments compatible with Shariah and suits the need of the people. Among the important components of the Islamic financial

system is the Islamic banking sector because Islamic banking offers a variety of products to meet the needs of customers among the general public, especially retail banking products (retail banking).

In the context of Islamic retail banking, the products offered are usually to meet cash needs or own assets, such as homes and vehicles. For vehicles, a popular product offered in Malaysia is *al-ijarah thumma al-bay'* (lease ended with sale) known as AITAB. Although this product is widely implemented in the industry, it also does not escape the problems related to the lack of a Shariah regulatory framework that administers it. Accordingly, in ensuring that the application of *ijarah*-based products is in line with Shariah requirements, several market regulators and Islamic financial institutions have issued Shariah resolutions and guidelines regarding *ijarah*. Thus, the objective of this study are as follows:

- To examine several issues related to asset responsibility in AITAB products according to fiqh ruling in addition to referring to the resolutions and views of current scholars.
- To analyse some of these responsibilities in the AITAB product from the Shariah perspective

### Concept of *ijarah* from the Shariah Perspective

*Ijarah* is derived from the word *al-ajr*, which means *al-iwad'*, i.e. reward or compensation for work or service performed (Al-Fairūzabadi, 1953; Al-Sabiq, 1999). Technically, from the *fiqh* perspective, it refers to a contract of exchange of usufruct. According to the Hanafi School, it is defined as a contract for the transfer of ownership of usufruct for compensation (Abidin, 1966). Malikis (1992) views *ijarah* as a sale of a known usufruct for a consideration.

Al-Sharbini (1997), a prominent jurist of Shafi' defines it as a contract of a determined usufruct that is known, deliverable and legitimate for a specific consideration. The Hanbali School defines *ijarah* as a contract for a specified permissible usufruct that is taken gradually for a particular consideration over a specified period. These definitions show that *ijarah* is a contract of usufruct and thus, it is not valid to lease anything that has benefits that cannot be taken while the article itself remains; i.e., its use consists solely in its consumption. This type of article is known as consumable goods (*mal istihlaki*), such as food and drink, whereas non-consumable goods (*mal isti'mali*) are commodities that can be used numerous times, such as houses, vehicles and shops.

Muslim jurists unanimously agree *ijarah* is approved and allowed in Islam. However, some jurists, such as Abu Bakr al-Asam, Ismail bin Aliyyah, Hasan al-Basri, al-Qasyani, al-Nahrawani and Ibn Kaysan, do not allow this contract. They disallow *ijarah* on the grounds that it is selling of usufruct, in which it is a non-deliverable thing. Moreover, the usufruct is only acquired gradually according to the times prescribed in the contract. In fact, from the original sale ruling, a sale contingent on a future date is not allowed. However, this premise is rejected by Ibn Rushd because it has been a customary practice that usufruct could be acquired although it does not yet exist at the time of contract (Ibn Rushd, 1978).

Majority of jurists allow the contract of *ijarah* based on the Quran, Sunnah and *ijma'*. In the al-Quran, Allah S.W.T states the following:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مَنْ وُجِدِكُمْ وَلَا تُضَارُّوهُنَّ وَلَا تُضَارُّوهُنَّ لِيُضَيِّقُوا عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أَوْلَاتٍ حَمَلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۚ وَأَتَمِّرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۚ وَإِن تَعَاَسَرْتُمْ فِى صَبْرٍ فَلْيَصْبِرْ لَهُ أَخْرَىٰ

“Let the women live (In ‘iddat) in the same style as ye live, according to your means: annoy them not, so as To restrict them. And if they carry (life in their wombs), then spend (your substance) on them

until they deliver their burden: and if they suckle your (offspring), give them their recompense: And take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) On the (father's) behalf."1.

The Prophet SAW says:

احتجم النبي صلى الله عليه وسلم واعطى الحجام أجره

*When the Prophet was cupped, he paid the man who cupped him his wages.*2

The legality of *ijarah* reached a consensus during the time of companions of the Prophet (pbuh). It is allowed because of the need of people for usufruct is similar to their need for a physical good. (Ibnu Qudamah,1989).

### **Responsibility in *Ijarah* from Fiqhi Perspective**

Responsibility is the obligation to answer for an act done and to repair any injury it may have caused. In the Arabic term, responsibility is known as *mas'ūliyyah*. The root word for *mas'ūliyyah* is derived from the verb *sa'ala* (سأل) which means to ask or to interrogate. Responsibility related to the asset in *ijarah* can be divided into two, namely, responsibility for leased asset and responsibility for usufruct (which is the benefit from the leased asset). However, this paper emphasizes only on responsibility for *ijarah* asset. According to Sulayman (2000), three important rulings may arise from the *ijarah* contract, namely *ṣiyanah* (maintenance), *ḍaman* (commitment to bear liability) and *fasakh*. Responsibility towards a leased asset that is the main focus of this article is related closely to *siyanah* and *ḍaman* rulings.

*Ṣiyanah* or maintenance refers to a work that must be fulfilled to ensure that *ijarah* assets can be used and benefited as intended by the lessee within the agreed contract period (Sulayman, 2000).

An *ijarah* is a contract that transfers the usufruct of the asset only, while the ownership of the asset belongs to the lessor. Thus, the owner (lessor) is responsible for maintaining the leased asset in good condition. Therefore, Sulayman (2000) argues that *ijarah* assets should be from *isti'mali* property. In other words, *ijarah* assets should not be something that can be destroyed quickly. The *ijarah* asset should also not be a *musha'* asset, i.e. an asset shared between the lessor and the other party because the lessor is unable to hand over the asset except with the portion of the other party.

Meanwhile, the root word *ḍaman* comes from the word *ḍamina* (ضمن), which indicates making something in another thing that covers it. *Ḍaman* can also be translated as responsibility (Baalbaki, 1988). From another perspective, *kafalah* (guarantee) is also called *ḍaman* because a guarantor will include the liability of the guaranteed person and commingle it into his guarantee. According to *al-mawsū'ah al-fiqhiyyah*, *ḍaman* conveys several meanings, including *iltizam* (commitment to an obligation such as financial obligations), *kafalah* (guarantee) and *taghrim* (paying compensation).

In terms of its technical meaning, *ḍaman* has several meanings:

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1 Al-Quran, Surah *al-Talaq*, verse 6.

2 Al-Bukhari, Sahih Bukhari, *Kitab al-Ijarah*, No 2278; Muslim, Sahih Muslim, *Kitab al-Hajj*, , No 1202

- a) *Ḍaman* refers to *kafalah*, which means combining one's liability with another liability in terms of a claim to perform an obligation whether *kafalah al-nafs* or *al-mal* (ISRA, 2010; Wizarat al-awqaf wa al-Shu'un al-Islamiyyah al-Kuwaytiyyah, 1983).
- b) Scholars also use the term *Ḍaman* to indicate the meaning of *iltizam muṭlaq* (absolute commitment) such as a commitment to the responsibility to bear compensation for destroyed assets (ISRA, 2010). This definition is commonly referred to in the case of *gharamat al-mutlafat*, *al-ghuṣūb*, *al-ta'yibat* and *al-taghyirat al-tari'ah* (compensation for damaged property, usurpation, causing defect, and causing a new alteration to a property). Scholars also often use the term *gharamat al-talif*, which is expressed as the obligation to pay compensation due to encroachment and the act of *ta'addi* (misconduct), which results in the destruction of property (Al-Ḥaqq, 1430H).
- c) The third meaning of *Ḍaman* used by the majority of fuqaha (in matters other than *kafalah*) according to Al-Ḥaqq (1430H) is *tahammul al-tabi'ah* (bearing liability) and commitment to bear it whether it is a kind of demolition, perishment, deficiency or defect in any muamalat transaction. This definition is what is meant in the hadith of *al-kharaj bi al-Ḍaman* (the right to profit depends on responsibility).

Based on the above discussion, it can be safely concluded that the term *Ḍaman* in the case of *ijarah* assets could be used with a general meaning referring to responsibility toward an asset either in terms of its maintenance or liability because of asset destruction, damage and defects. In this case, al-Tilmisani (1998) explains *Ḍaman* in *ijarah* refers to the responsibility of bearing *ḍarar* (harm) that may occur to an *ijarah* asset. In other words, responsibility for *ijarah* assets is a commitment to bear the cost of maintenance and the risk of loss and damage to an asset.

Therefore, to describe the responsibility for assets in *ijarah*, the following points need to be examined critically.

#### **i. Lessee is a trustee of the *ijarah* asset (leased asset)**

The *ijarah* contract is intended to utilise the usufruct (*manfa'ah*) of a defined object against a determined consideration without owning it, then the person who leases the object is considered a trustee and the *ijarah* assets become trust held by the trustee. In other words, the lessee who is a trustee must carefully hold the asset. Therefore, the lessee will bear nothing in the event of destruction of *ijarah* asset unless it is due to his negligence, misconduct or breach of stipulated terms and conditions (Sulayman, 2000). This principle is agreed upon by the fuqaha Hanafi, Maliki, Shafi'i and Hanbali (Al-Kasani, 1986; Al-Mawaq, 1994; Al-Nawawi, 1991; Ibn Qudamah, 1985) because the lessee receives the *ijarah* asset and holds it with the consent of the asset owner.

#### **ii. Conditions that change the concept of *amanah* into *Ḍaman* in *ijarah***

Originally, *ijarah* asset was considered a trust. As such, the lessee is obliged to ensure that he shall use the leased asset solely for the purpose that has been mutually agreed upon between the contracting parties, which shall not contravene Shariah principles. In other words, the lessee holds the asset on a trust basis. However, some circumstances may change its original concept, i.e. the trust into the *Ḍaman* as follows:



a) Negligence

The jurists unanimously agree that in some cases, *amanah* (trust) may turn into *daman* when negligence occurs. Thus, when a *musta'jir* (lessee), for instance, is careless in ensuring the safety of the *ijarah* asset, then he would be liable for any impairment that has occurred due to his negligence. (al-Zuhaili,2005). Negligence or *tafrit* that causes *daman* is everything that is considered according to customary practice as negligence in the protection and preservation of asset, which a wise person will not do.

b) Misconduct

The jurists also unanimously agreed that misconduct shall make the lessee liable for any impairment that occurs due to that matter. al-Zuhayli (1999) stated that if a person who is a lessee intentionally causes the damages on the leased asset, such as hitting the item until it is damaged, then he would be obliged to pay compensation. If the damage occurs accidentally, then he cannot be held liable provided that he is *al-ajir al-khas* (a hired worker who is contracted to perform a specific task for a specific time by one party). This view is agreed upon by all jurists from the different schools of thought. However, according to Abu Hanifah and his two students (Abu Yusuf and Muhammad), if the lessee or hired person is *al-ajir al-mushtarak* (a worker, such as a tailor, who offers his services to many and thus may be contracted by several clients at once), then they will have to pay compensation for the damage caused. As for the Shafie school of thoughts and Zufar's view, they are not obliged to pay compensation as long as the damage is not intentional or not due to negligence.

c) Breach of stipulated terms and condition by the lessee.

When it has been proven that damage to the *ijarah* asset is caused by the lessee's breach of terms and conditions, the lessee shall be liable and responsible for restoring the asset. The breach could occur in many ways such as a breach in terms of types, specifications, place and time etc.

### Ownership of the *ijarah* asset in AITAB

*Ijarah thumma al-bay'* or AITAB is an innovative product designed as an alternative to the conventional hire-purchase product. The *ijarah* is the main underlying contract in this product. AITAB is normally applied in the Islamic financing facility products for asset acquisition, such as vehicles and equipment.

The term *al-ijarah thumma al-bay'* (AITAB) is a combination of three words, namely, *ijarah*, *thumma* dan *al-bay'*. A combination of these three words creates a special term, i.e. *al-ijarah thumma al-bay'*, which refers to a financing contract that begins with the *ijarah* (lease) and ends with *bay'* (sale). Under this contract, a lessee (customer) leases an asset owned by the bank for an agreed rental price for an agreed period. By the end of the lease period, the lessee and lessor agree to execute a sale contract whereby the lessee purchases the leased asset for an agreed price. Both contracts must comply with the conditions stipulated by jurists in terms of the contract's combination, i.e. both contracts must be executed separately and arranged in a correct sequence. Hence, during the financing period of AITAB, the product must be compliant with the rules of *ijarah* prescribed by the *Shariah*.

Because ownership is the basis of any rights and responsibilities in an asset, the determination of ownership must be clear in the context of AITAB practice. The term ownership in fiqhi term is

known as *milkiyyah*. It is derived from the root word *al-milk*, which etymologically means the authority to control something. It also means something owned (property). Muhammad Abu Zahrah defines *al-milk* as the exclusivity of a person over an object according to the Shariah, which gives him the right to act independently and to process the use of its benefit as long as no legal impediment exists from the Shariah perspective (Abu Zahrah, 1962). In other words, when a person owns a property that is legal according to the Shariah, the person is free to act on his property, such as to sell or pledge it, whether by himself or through another person (an agent).

In the *ijarah* contract, a physical *ijarah* asset is legally owned by the lessor, while the usufruct of the asset is owned by the lessee. *Ijarah* is a form of a contract of exchange (*mu'awadah*) and the ownership of the usufruct begins immediately as soon as the contract is executed between the contracting parties. If the contract is in an absolute form (without limitation of conditions) then the ownership of both goods of exchange (usufruct and rental price) is established after the contract is concluded similar to a case of sale contract whereby the seller has the right to the price after the execution of sale and purchase contract. This is the opinion of the Shafie and Hanbali sects. However, for the Hanafi and Maliki sects, the rental price is not owned only based on the contract itself but it is effective gradually according to how much usufruct is utilised by the lessee (al-Zuhaili, 2005)

In the context of AITAB practice, the bank is the lessor providing a vehicle to the customer. Therefore, the bank must own the asset first before leasing it out to the customer (Nurul Azuma, Mahfuzur & et.al, 2014). This is one of the important pillars of *ijarah* (Muhammad Rawwas, 1999). The ownership of *ijarah* asset reflects the rights and liabilities of the parties involved in this contract. As a result, the bank holds ownership and has few rights and is responsible for several liabilities and asset-related risks including the right to repossess such assets from defaulted customers, maintenance responsibilities and liabilities for taxes (Weist, 2000).

However, the practice of AITAB in Malaysia indicates otherwise, where the bank only becomes the beneficial owner of the asset while the customer becomes the legal owner as stated by Md. Abdul Jalil (2013), Seif & Irwani (2007) and Nurul Azuma and Mahfuzur et al. (2014). Davies (1995) stressed that in the current practice, the name of the bank a lessor is not stated in the certificate of registration as the owner of the asset. It is instead expressed as a claimed title. As discussed previously, in *ijarah* contracts, the lessor is the owner of the *ijarah* asset while the lessee only has the right to the usufruct of the asset.

Accordingly, the Shariah Advisory Council of Bank Negara Malaysia has decided that Shariah recognizes both legal ownership and beneficial ownership, in the context of AITAB, the lessor has beneficial ownership even if the owner is not stated in the property registration certificate. Nevertheless, this ownership shall be proven through the documentation of the *ijarah* agreement signed between the lessor and the lessee (BNM, 2010).

However, based on the original concept of *ijarah*, the responsibility for the asset is under the bank because the asset is its property. Furthermore, as an owner, Islamic banks that offer AITAB product must bear all reasonable risks relating to the ownership of the asset (Bank Negara Malaysia 2010). Nonetheless, the current application of AITAB is still criticised, particularly concerning its adherence

to the above issue, i.e. the issue of ownership of the leased asset and its registration, which triggers Shariah non-compliance issues that must be analysed thoroughly without neglecting the legal constraints and problems faced by Islamic banks in the current practice of AITAB. Thus, the following section will conduct a critical examination of the issue of responsibility towards leased assets in AITAB products.

### **Responsibility towards assets in AITAB vehicle financing products**

Based on the issue of ownership of *ijarah* assets in AITAB vehicle financing products in Malaysia, the two important issues that arise from ownership of assets are the issue of responsibility for the maintenance of *ijarah* assets and the issue of the cost of takaful protection for *ijarah* assets.

#### **i. Issue of responsibility for the maintenance of *ijarah* assets**

The issue of asset maintenance in *ijarah* is important because it reflects the level of responsibility of the owner towards the leased assets. Based on the original concept of *ijarah*, the responsibility for the asset shall be borne by the owner i.e. the bank, because the asset belongs to him. In the event of damage and loss to the leased asset, it must be fully borne by the owner of the leasing asset unless negligence on the part of the tenant in handling the rental assets is proven (Seif & Irwani, 2007).

In contrast, if there is total damage to the leased assets, the *ijarah* contract is considered void because the usufructs, which is the main objective of *ijarah*, no longer exist and the responsibility to pay the rental price by the lessee also disappears. Therefore, the owner (lessor) is not allowed to force the lessee to pay the rental during the period. Moreover, the owner cannot ask the lessee to pay the cost of the damage (Yahya, 2010).

However, according to current practice, the application of *ijarah* in AITAB is not criticised for not fully complying with the original ruling of *ijarah*. Once the lessee has leased the asset from the lessor, it has been claimed that risks associated with the asset are under the responsibility of the lessee, which might be attributed to the AITAB being legally required to comply with the same regulations that govern the conventional hire-purchase such as Hire-Purchase Act 1967 (HPA, 1967) and Contracts Act 1950 (CA, 1950). This view was further affirmed by Othman (2010), who explains that with relevance to the current Islamic finance practice in Malaysia, no special legal provisions and laws governing AITAB products exists (Othman, 2010).

From the fiqhi perspective, the issue of responsibility of asset, especially the maintenance issue, can be examined as follows:

#### **a) Damage caused by the lessee.**

If the damage occurs while the leased asset is in the hands of the lessee as a result of the act being included in the permitted work, then he is not liable to pay compensation. However, if the damage to the asset is due to misconduct or negligence, the lessee should be responsible for compensating the damages. The same must be borne by the lessee if the use of the leased asset does not comply with the original purpose of the contract of *ijarah*. However, if the lessee places the leased asset in a safe area and the damage occurs suddenly, then the lessee does not have to be responsible for any damage. Similarly, the lessee should be responsible if he utilises the *ijarah* asset after the tenure of



the ijarah is over or when the lessee does not return the asset to his owner although the tenure has expired (Majid, 1998).

b) Damage caused by the third party.

If the damage of assets is caused by the third party, then it must be examined from two scenarios, namely damage caused by natural disasters and damage caused by a third party. If the damage to the leased asset is due to a natural disaster, then the lessee is not responsible for any compensation because the damage is not due to his conduct and out of his control as explained by al-Nawawi (2004). Meanwhile, if the damage is caused by a third party, then the one who causes the damage must be responsible.

In the context of the current practice of AITAB, maintenance costs are borne by the customer. Similarly, damage and loss to the leased assets are also borne by the customer. As mentioned previously, this practice is due to some legal constraints. Currently, AITAB products are still subject to the Hire Purchase Act (HPA), whereby the lessee (customer) is responsible for bearing the cost of the takaful or insurance because the customer uses the vehicle (Othman 2010). This practice is somehow not consistent with the concept of ownership in the Shariah. The owner of the asset must be liable for any ownership related cost of the asset.

Section 26 (1) HPA requires vehicle owners to insure vehicles for the first year under the name of the lessee (customer). Meanwhile, Section 26 (2) of HPA states that the lessee is responsible for insuring the vehicle for the subsequent years as long as the vehicle is still under the financing tenure. Failure to comply with these provisions becomes an offence under the HPA, which is due to the lack of proper rules and specific parameters for Islamic hire purchase transactions in Malaysia. The parties involved in Islamic ijarah financing have to comply with the existing law, which is HPA.

In addressing this issue, currently, most Islamic financial institutions have appointed their customers to pay the costs on behalf of the IFI. These costs will set-off with future rental payments. This practice is also agreed by several Shariah Advisory Councils including the AAOIFI Shariah Council (AAOIFI, 2008).

The Shariah Advisory Council of Dallah al-Barakah has proposed to use *ujrah idafiah* (additional rental) as a solution to the issue of maintenance costs where the lessee will pay the additional rental which is in fact to cover the main maintenance cost.

However, before submitting the usufruct of the asset, all costs shall be borne by the owner because the usufruct is still under his liability before the delivery is completed (Ellias, 2012).

## ii. Issue of responsibility of takaful cost in AITAB

The Islamic Financial Services Act of 2013 defines *takaful* as an arrangement based on mutual assistance under which *takaful* participants agree to contribute to a common fund that provides mutual financial benefits payable to the *takaful* participants or their beneficiaries on the occurrence of adverse events.

Generally, in conventional hire-purchase products, any costs, including maintenance and insurance, are borne by the customers. This arrangement is based on the assumption that at the end of the loan period, the assets will be transferred to the lessee (Yahya, 2010). As previously elaborated, the issue of takaful or insurance for the vehicle under the AITAB product is still subject to the HPA 1967. Accordingly, the lessee is responsible for bearing the takaful or insurance cost (El-Din. S. T. & Abdullah, N. I., 2007). This practice appears to be inconsistent with the concept of ownership (milkiyyah) in Shariah. Section 26 (1) of the HPA 1967 requires a vehicle owner to bear the insurance costs for the first year under the name of the lessee. Under S. 26 (1) of the HPA 1967:

*“An owner shall cause to be insured in the name of the hirer – (a) motor vehicles comprised in a hire-purchase agreement, for the first year only and (b) all other goods comprised in a hire-purchase agreement, for the duration of time that the goods remain under hire-purchase”*

Section 26 (2) of the Act states that the lessee must insure the vehicle for the second and subsequent years if the vehicle is still under the agreement of hire-purchase. A failure to comply with this requirement is considered a violation of the HPA 1967. Hassan et. al (2012) claim that this failure is because of the lack of Shariah framework in the implementation of AITAB.

From the Shariah analysis, the bank is responsible for bearing the cost of takaful or insurance for the financed vehicle because the bank is the owner of the ijarah asset. This finding is consistent with the concept of *“al-kharaj bi al-dhoman”*. Based on this principle, the lessor who is the owner of the leased asset is responsible for bearing the risk on the property he owns (Mohammed Obaidullah & Wilson, 1999). However, this principle is contrary to the provisions of the Hire Purchase Act 1967, section 26 (4) which states that any failure to comply with the provisions under sections 26 (1) and 26 (2) shall be an offence that cannot be excluded from taking effect in the AITAB agreement. If the provision is rejected, it may also cause the agreement to become void as stipulated in section 34 (g) that any hire purchase agreement that exempts, changes or limits any provision of the Hire Purchase Act 1967 will be void or has nothing that is powerful (Othman, 2010). Based on the above statement, it is clear that such an application triggers Shariah concerns.

Interestingly, Dr Ali Muhyiddin Qurrah Daghi opines that the lessee who bears the cost of insurance should not contradict the Islamic law. It could be considered as *tabarru* for the importance of ijarah contract (Yahya, 2010).

However, the Shariah Advisory Council of BNM has decided that transferring the obligation to bear the maintenance costs of the leased assets and the cost of takaful protection to the lessee is not allowed. However, the asset owner may also delegate to the lessee to bear the cost of asset maintenance and takaful protection costs which will be deducted during the sale and purchase transaction at the end of the rental period (BNM, 2010).

### **Conclusion**

AITAB financing is an ijarah-based product offered widely to the masses. It is also an important financing instrument in Islamic banking operations. AITAB is a viable alternative product to conventional hire purchase. However, because of the lack of specific legal provisions related to this

product, a discrepancy in the current practice of this product has been observed, especially in terms of its compliance with Shariah in the issue of asset responsibility. Among the issues of compliance is the issue of assuming the risk of takaful and the responsibility of damage on ijarah asset. Those issues are related to ownership issues that stem from the issue of legal documentation. In the current practice, the bank only becomes the beneficial owner of the asset while the lessee (customer) is the legal owner (registered owner). This issue has been raised by most modern studies in ijarah-based financing especially vehicle financing. It appears that the practice somehow contradicts the principle of *al-kharaj bi al-daman* introduced by Islamic scholars. The scholars rely on this premise while confirming that the lessor who is the owner of the leased asset is responsible for bearing the risk on the property he owns. However, an in-depth analysis should be conducted in the future, especially from the aspect of the willingness of the customer (lessee) to bear the responsibility and the aspect of legal harmonization between Shariah and the applicable law in regulating ijarah contracts.

Finally, the present study contributes to existing literature by enhancing the current understanding of how the implementation of ijarah contract differs from that in early time. Some of the ijarah practices do not appear to be line with the ijarah as written in classical books due to legal constraints. However, this study can be extended in various ways. Future research could take each ijarah financing products in banking as a case study with a specific sample of a financing facility. An analysis may also be conducted more comprehensively than what was conducted in this study.

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