

Hibah: Recent Malaysian Shariah resolutions and its enforceability



MALAYSIA

By Abdullah Abdul Rahman

The Shariah Advisory Council of the Central Bank of Malaysia (SAC) made two decisions on Hibah at its meetings on the 27th May 2014 and the 24th June 2014.

At the meeting of the 27th May 2014, the SAC resolved that the Hibah asset must be in existence at the time the Hibah is entered into. At the meeting on 24th June 2014, the SAC resolved that a Hibah with a condition limiting it to a specified time period does not invalidate the Hibah but the condition is void and unenforceable.

The central bank's Exposure Draft on Hibah (Shariah Requirements and Optional Practices) issued on the 6th December 2013 defines Hibah as referring to a transfer of ownership of an asset from the donor to the donee during the lifetime of the donor without any consideration or reward.

According to the exposure draft, Hibah may be arranged with other contracts. For example, in a sale contract, the seller

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may give Hibah in the form of a discount in the price to the purchaser who pays the instalment on schedule or for early settlement. The exposure draft also contemplates a Hibah arrangement with an Ijarah (leasing) contract where the lessor may transfer the ownership of the leased asset to the lessee upon settlement of the rental. However, the Hibah contract is required to be separate from the Ijarah contract. Further, there is a suggestion for a Hibah arrangement with a Wakalah (agency) contract whereby the Hibah is a conditional Hibah as a performance incentive fee to the agent for exceeding a specified target in addition to the agreed agency fee. In an earlier

resolution of the SAC (BNM/RH/GL/012-2), it had been observed that the Hibah concept was also used in the Takaful industry: in Family Takaful products in which the Takaful participants may give Hibah by assigning the Takaful benefits to the nominee or Hibah recipient.

The suggestion on the wide ranging matters that Hibah may be applied to is interesting. This is because in Malaysia Hibah as a financial instrument, and indeed Islamic finance as a whole, is governed by the civil law rather than the Shariah and is enforceable in the civil courts rather than the Shariah courts. Under the civil law, section 26 of the Contracts Act 1950 provides that an agreement made without consideration is void (except under three limited circumstances). Hibah, being a transfer of asset without consideration, appears to fall squarely within section 26. Thus, the extent of the enforceability of Hibah-based instruments in Malaysia would be an exciting issue to follow in the future.☺

Abdullah Abdul Rahman is a litigation partner with law firm Cheang & Ariff. He can be contacted at abdullah@cheangariff.com.