TITLE:
PURCHASE UNDERTAKING ISSUES
IN MUSHRAKAH MUTANAQISAH HOME FINANCING

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Abstract

This article aims to analyse the diminishing musharakah in retail financing products by examining its features in order to determine its inclination either towards shirkah al-milk or shirkah al-'uqud. The study also examines the legitimacy of first and second promises (wa'ad) to gradually purchase bank's portion by the customer and to purchase in credit bank's portion in the event of default. The study applies qualitative research method comprises of document analysis and interviews with the players. The study shows that the house financing is a shirkah al-milk in its initial stage, but it could not be considered permanently as shirkah al-milk as it does not comply with all features of shirkah al-milk. It also found that scholars were disputed in allowing pre determined price of bank's portion or share on the house, and stipulating second promise in the event of default.

Keywords: syarikah, shirkah, musharakah, musharakah mutanaqisah, musyarakah, diminishing musharakah, shirkah al-milk, shirkah al-'uqud
Introduction

The judgement of Affin bank's case against Zulkifli in 2006 has become a milestone in diverting Islamic banks concentration in using Bay' bi Thaman Ajil (BBA) Malaysian version towards Musharakah based product for home financing. Though the said judgement had initially considered as a time bomb for Islamic banking system, it later becomes blessing to the system as Islamic banking community starts to initiate new thing in the system albeit many obstacles they have to face especially from those who are concerned with risk weight.

Latest judgements of thirteen cases on BBA in 2008 which was ended in favour of customers have become another milestone to move away from BBA based transaction. Although the Court of Appeal had overturned the decision on the favour of Islamic financial institutions in 2009, the cases have enlightened the weaknesses of murabahah based transaction in facing certain financial issues such as discretionary rebate issue in the event of default.

*Musharakah mutanaqisah* or diminishing *musharakah* is one of the alternatives which are available currently in the market. However, during the implementation of the concept, it has also raised some controversial when players include the element of capital protection for financier by declaring that this product is purely shirkah al-milk from the time where the contract had been executed until the maturity date i.e. the tenure ended. This study only focuses on retail products in Malaysian Islamic banking system.

Therefore, this article aims to analyse the diminishing *musharakah* in a way to examine its features in order to determine its inclination either towards *shirkah al-milk* or *shirkah al-taqadum*. The study also examines the legitimacy of promise (*wa'ad*) to guarantee financier capital by customer purchase undertaking in the event of default.

In achieving the objectives, the article apply qualitative research method comprises of document analysis and interviews with the players. In the initial stage of the study, it will examine the details of *shirkah* concept in classical and contemporary books especially the issue of *shirkah al-milk* and *shirkah al-taqadum*. Subsequent to that, it will analyse the
implementation of the contract in the Islamic banks' retail products, in which the study on Shari'ah compliant will be conducted.

Definition

*Musharakah mutanaqisah* is a combination of two words *musharakah* and *mutanaqisah*. *Musharakah* derived from the root word *sharaka* means one joins others. It literally means mixing one's asset with other person asset until non recognizable.

*Musharakah* or *sharikah* or *shirkah* can be defined as a form of partnership where two or more persons combine either their capital or labour together, to share the profits, enjoying similar rights and liabilities. There was a consensus of opinion among the jurists of all schools of thought (including Hanafis, Malikis, Shafi'is and Hanbalis) that *musharakah* is a valid and legitimate contract in Islam, however, they dispute on the types of permissible *musharakah* contracts.

*Musharakah mutanaqisah* is a partnership between financier and customer to acquire the property under a diminishing *musharakah* arrangement where customer agrees to rent the bank's portion and pays rental on the Bank's share. Subsequently, the customer gradually purchases bank's share in the partnership. As customer's ownership in the property grows, and bank diminishes until customer has fully bought bank's equity in the property.

Details on *al-shirkah* in Islamic law

According to the Hanafis and the Hanbalis, *al-shirkah* has two kinds as follows:

1. *Shirkah al-milk* or *al-amak* (joint ownership of non-contractual basis or co-ownership)
2. *Shirkah al-

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6. Al-Kasani, V.4, pp.73, Ibn Qudamsh, vol.5, p.109,
1. Shirkah al-milk can be divided into two types:\(^5\)

i. Shirkah al-milk al-ikhtiyari (co-ownership). It is a joint ownership of something where two of more parties jointly purchase an asset, or someone gives the partners an asset, or someone disposes to them an asset through the will, or someone donates to them an asset, thus if they accept the gift, or the will, or the donation, they become partners of the asset without any contractual partnership.

ii. Shirkah al-milk without the partners' willingness. It is a joint partnership between partners because of inheritance (mirath).

However, the Malikis categorized al-shirkah into three categories: those are shirkah al-`irith (partnership because of inheritance), shirkah al-ghanimah (partnership among army towards asset left by war opponents) and shirkah al-mubta'in (partnership among purchasers). Shirkah al-mubta'in as elaborated by the Malikis is similar with shirkah al-milk which discussed by the Hanafis though the Malikis had separated between the inheritance and the purchasers partnerships. On the other hand, the Hanbalis discussion on the categories of shirkah is similar with the Hanafis where they differentiated the shirkah into two categories; those are shirkah al-mal (capital or asset partnership) and shirkah al-`uqud (contractual partnership). In contrast, almost all scholars of the Shafi`is only discussed the permissibility of shirkah al-`inan without any reference on shirkah al-milk.\(^6\)

2. Shirkah al-Uqud (contractual partnership)

Shirkah al-Uqud can be considered as a proper partnership because parties concerned have willingly entered into a contractual agreement for joint investment and the sharing of profits and risks. It can be divided into four kinds as accordance to the Hanafis and Hanbalis: \(^7\)

a. Al-Inan (restricted authority and obligation).

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\(^5\) Al-Kasani, V.4, pp.74-75.


Al-Ina is a contract where two or more parties agree to share their capitals and efforts in a business. The profit and loss from the business must be determined at the beginning of the contract.

Therefore, al-Inan implies that all partners need not be adults or have an equal share in capital. They are not equally responsible for the management of the business. Accordingly their share in profits may be unequal, but this must be clearly specified in the partnership contract. Their share in losses would be in accordance with the capital contributions.

b. Al-Mufawadah (full authority and obligation).

In the case of Mufawadah the partners are adults, equal in their capital contribution, their ability to undertake responsibility and their share of profits and losses. They have full authority to act on behalf of the others and are jointly and severally responsible for the liabilities of their partnership business, provided that such liabilities have been incurred in the ordinary course of business.

c. Al-Abdan (labour, skill and management)

Al-Abdan is a contract among partners to share their efforts in a business and share the profit of the business which pre-agreed before commencement of the contract. Normally they agree to contribute their skills and efforts to the management of the business without contributing to the capital. For instance in tailoring dresses project, the partners jointly contribute their skill in tailoring dresses and receiving their pre agreed ratio of profit at the end of the business.

d. Al-Wujuh (goodwill, credit-worthiness and contracts).

Shirkah al-wujuh is a contract between partners to purchase goods by credit and sell on lump sum or installments any profit from the business will be share between them in accordance of their pre-agreed ratios. Normally, in shirkah al-
wujah, the partners use their goodwill and their credit-worthiness for promoting their business without contributing to the capital.

Scholars' discussion on shirkah al-milk

In discussing the shirkah al-milk, the Hanafis discussed few issues such as related to the usage of the asset by one party in the absence of other owners; the sale of one partner ownership to other partners or to third party; and the status of the asset and the permissibility to sell it if it is in other party's land e.g. a property in leased land.\textsuperscript{8}

On the other hand, the Malikis enumerated few issues, inter alia, the ways to resolve the problem where sleeping partner of co-ownership property declines on the request by active partner to use the asset and how the active partner facing few underlined circumstances; and the right of the partners to act in protecting his or her asset; and how they can ensure that their asset can be protected physically or constructively during their usage permission.\textsuperscript{9}

Common requirements for musharakah

The Hanafis deliberated two main conditions for common shirkah (including shirkah al-milk) as follows\textsuperscript{10}:

\begin{itemize}
  \item[i.] The subject matter of shirkah must fall under a matter that can be transacted under agency contract (wakalah contract),
  \item[ii.] The profit must be pre-determined in ratio or percentage. Shirkah is void if there was no pre-determined ratio or the profit is pre-determined in specific unit of value such as one thousand dollar.
\end{itemize}

In a nutshell, second condition was meant for contractual partnership i.e. shirkah al-uqud rather than shirkah al-milk. Profit in shirkah al-milk should equal to partners' portions in the partnership. No further discussion on shirkah al-milk was found in Maliki and Hanbalis literatures.

\textsuperscript{8} Al-Jaziri, pp. 654-655.
\textsuperscript{9} Al-Jaziri, pp. 657-658.
\textsuperscript{10} Al-Jaziri, pp. 662.
Practices in the industry

*Musharakah mutanaqisah* products are among new retail product in the Islamic banking system especially in Malaysia. It is due to the fact that BBA concept has caused many negative issues such as bay’ al-’inah, possession, high selling price in the event of default, legal dispute and so on and so forth.

In overcoming those problems, few banks are currently pioneering the efforts to promote new retail product using *musharakah mutanaqisah* concept. Unfortunately, the leading banks in implementing this concept are not stand alone full fledge Islamic banks as there are subsidiaries of conventional banking group. Hopefully, the full-fledge Islamic banks will move towards offering more partnership concept based financing.

The table below shows two Malaysian Islamic banks who are offering retail *musharakah mutanaqisah* product in Malaysia:

Table 1: Banks who are offering *musharakah mutanaqisah* concept

<table>
<thead>
<tr>
<th>Name</th>
<th>Product</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>RHB Islamic bank</td>
<td>Equity Home Financing-i</td>
<td>For completed and</td>
</tr>
<tr>
<td></td>
<td>works</td>
<td>under construction</td>
</tr>
<tr>
<td>Maybank Islamic</td>
<td>Home equity-i</td>
<td>For completed and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>under construction</td>
</tr>
</tbody>
</table>

Structures of *musharakah mutanaqisah*

As discussed above, *musharakah mutanaqisah* is a partnership between bank and customer to acquire the property under a *diminishing musharakah* arrangement. In the agreement, customer has agreed to rent the bank’s portion and pays rental on the Bank’s share. In the meantime the customer gradually purchases bank’s share in the partnership.

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11 The product and concept used in those banks can be accessed in their websites as follows:


As customer's ownership in the property grows, and bank diminishes until customer has fully bought bank's equity in the property.

According to the expert in Islamic banking, there are two models which have been approved by Bank Negara Malaysia for home financing under *musharakah mutanaqisah* concept. The two diagrams below describe the transactions:

**Diagram 1: 1st. Model of *musharakah mutanaqisah* home financing**

1. Bank and customer jointly purchased the house under *shirkah al-milk* concept, thus they are partners in undivided asset. By separate document, customer promises two things, firstly, to lease the house (bank portion) and paying the rental which equivalents to its portion. Secondly purchase undertaking from customer to purchase bank's share on monthly installments in stipulated time such as 20 years.

2. Customer pays monthly rental and monthly share price accordingly.

3. In the event of default of rental and share payment, bank shall auction the asset to obtain the capital. The proceeds of the auction will be divided accordingly as per

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12 The writer interviewed Mr. Jasani Abdullah, Assistant Managing Director, Hong Leong Islamic bank (HLISB) on 29 October 2008 about the current templates of *musharakah mutanaqisah* as approved by Bank Negara Malaysia.
capital ratio, subsequently bank shall use customer portion to deduct customer's default amount of rental.

Diagram 2: Second Model of *musharakah mutanaqisah* home financing

1. Bank and customer jointly purchased the house under *shirkah al-milk* concept, thus they are partners in undivided asset. By separate documentation, customer promises two things, firstly, to lease the house (bank portion) and paying the rental which equivalents to its portion. Secondly 'first purchase undertaking’ to purchase bank's share on monthly installments in stipulated time such as 20 years. Thirdly 'second customer purchase undertaking’ to buy bank's share and bank shall sell its share as credit sale in the event of default.

2. Customer pays monthly rental and payment for bank's share.
3. In the event of default of rental and share payment, customer shall buy bank’s share on credit and bank charges the property.

4. Subsequently, bank shall auction the asset to obtain the capital. The proceeds of the auction will be used to pay default amount of rental and payment of credit sale. If there is any balance, bank shall return it to the customer.

The similarities of the elements between two models are the first and second models used the concept of *shirkah milk* to form a partnership and not a *shirkah al-‘uqud*. Secondly, the customer promises two things, to rent (leasing undertaking) and to buy bank’s share during the stipulated duration (purchase undertaking of financier’s share in stages).

The main distinctive element between two models is ‘the second purchase undertaking’ in the event of default. The second purchase undertaking obliges customer to purchase bank’s share in the event of default.

**Issues pertaining musharakah mutanaqisah**

As mentioned earlier, the main distinctive element between two models is ‘the second purchase undertaking’ in the event of default, where it obliges customer to purchase bank’s share in the event of default. The question is can customer promise to buy bank’s share on credit in the event of default? Does it among capital guarantee structure?

This arrangement is made as a mean to facilitate the bank with the facility to get full amount of the proceeds from the property auction. This kind of arrangement is permitted by SAC of BNM because the musharakah mutanaqisah concept is considered permanently as *shirkah al-milk*. If the property remains under joint ownership, bank only entitles to get partial amount of the property auction proceeds which subjected to bank ratio in the property ownership.\(^{13}\)

As mentioned before, *musharakah mutanaqisah* is a partnership between bank and customer to acquire the property under a diminishing *musharakah* arrangement where

\(^{13}\)This pronouncement has been issued by SAC BNM in 2008.
customer agrees to rent the bank’s portion and pays rental on the Bank’s share. The question arises is this product purely shirkah al-milk?

i. Scholars views on shirkah al-milk

As discussed before, the Hanafis in elaborating shirkah al-milk, have highlighted few issues relating to the usage of the asset by one party in the absent of other owners: the sale of one partner ownership to other partners or to third party; and the status of the asset and the permissibility to sell it if it is in third party’s land e.g. a property in leased land. In addition the Malikis have discussed the ways to resolve the problem where sleeping partner of co-ownership property declined on the request by active partner to use the asset and how to overcome the problem; and the right of the partners to act in protecting his or her asset. In specific, their discussions were focusing on limitation of independency of each partner and giving the signal that each partner acts independently within certain limits in shirkah al-milk.

Sheikh Mustafa al-Zarqa was among scholars whom pioneered the discussion on shirkah al-milk. He had elaborated this issue within 'undivided ownership' (al-milkiyyah al-syai'ah) (ملكية الشائعة) topic in his book:

إن الملكية الشائعة إنما تكون دائما في شيء مشترك، فهذه الشركة إذا كانت في عين المال فقط، دون الاتفاق على استثماره بعمل مشترك، تسمى شركة ملك. وقابلابها شركة العقد وهي أن يتعدّد شخصان فأكثر على استثمار المال أو العمل واقتصاد الربح، كما في الشركات التجارية والصناعية.

Meaning that: Undivided ownership actually is always among jointly ownership thing, when such joint ownership is against the subject matter only, without any agreement to jointly invest it, thus it can be called as shirkah milk. In contrast to such partnership, is shirkah al-taqd (contractual partnership) where two or more people agreed to invest money, or skill for portion of profit as what were incurred in business and industrial partnership.

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14 Al-Jaziri, pp. 654-655.
15 Al-Jaziri, pp. 657-658.
There are two main factors that excluded the product from *shirkah al-īqād*, firstly, the partnership is absolutely on the subject matter. Secondly, there is no such agreement that they are jointly invested it. Therefore, according to Taqi Usmani in his book on Islamic finance, he classified it as *shirkah al-milk* as there is no such agreement that they jointly invest the subject matter. Shaykh Taqi Usmani then says 17:

*The share of financier is further divided into a number of units and it is understood that the client will purchase the units of the share of the financier one by one periodically, thus increasing his own share till all the units of the financier are purchased by him so as to make him sole owner of the property, or the commercial enterprise, as the case may be.*

The above quotation of Taqi Usmani words clearly stated that this kind of arrangement is for all kind of industries, whether for house financing or commercial partnership. However, Sheikh Taqi did not propose the promise for customer to buy bank's share in the event of default.

However, if in-depth analysis on the matter is applied, we understood that the house owners will use the house for rental purpose. Consequently both parties actually agreed to invest the asset either to lease the asset to customer himself or to others, thus indirectly such partnership has transformed itself into contractual partnership.

Moreover, the product can be considered as *shirkah al-milk* if there is no promise has been made that customer or bank will lease the asset. But, the arrangement has explicitly disclosed that the asset is to be leased. The explanation from Mustafa al-Zarqa underneath may give clearer picture on the issue. 18

فشركة المالك هي من قبل المالك الشائع وليس من العقود، وإن كانت سبها قد يكون عقدا، كما لو اشترى شخصان شيئا، فإنه يكون مشتركا بينهما شركة ملك، ولكن ليس بينهما عقد على استغلاله واستثماره بتجارة أو إجارة و نحو ذلك من وسائل الاسترباح.

17 Usmani. *An introduction to Islamic finance*, p.82.
18 Al-Zarqa, p.616.
Meaning that: *Shirkah al-milk* (joint ownership non-contractual) is among the undivided joint ownership and not a part of contractual partnership; albeit the cause of joint ownership may derive from the contract as two persons bought something; consequently it is jointly owned by them; however, it is subject to a condition that there is no contract to jointly benefiting it in profitable means, or to jointly invest it in business or leasing and etcetera from any commercial activities.

The quotation clearly stated that the arrangement must free from prearrangement to lease or invest the subject matter in order to consider it as non contractual partnership. Therefore, when there was a prearrangement of leasing, the partnership has been transformed to a new form namely contractual partnership where any promise to guarantee the capital or profit is *haram*. Thus the status of the arrangement consequently was transformed to contractual partnership when it involved any investment deals.

**ii. Issue of purchase undertaking to buy the financier’s share in stages.**

The issue of purchase undertaking to buy financier’s portions in the property has been discussed widely by scholars. For instance, Uthman Syubair in his book dictated that this kind of undertaking is permissible however he did not discuss the issue of market value.¹⁹

Shaykh Taqi Usmani repeated this stance in his books and spelt out the details of the arrangement. Apart from that he reminded that “it will be preferable that the purchase of different units by the client is effected on the basis of the market value of the house as prevalent on the date of the unit, but it is also permissible that a particular price is agreed in the promise of purchase signed by the client”.²⁰

He then insisted that ‘the requirements of Shari’ah (in car *musharakah* financing) regarding the promise are the same as explained in the case of house financing with one very important difference. Here the price of units of the financier cannot be fixed in the promise to purchase, because if the price is fixed before hand at the time of entering into

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²⁰ Usmani. *An introduction to Islamic finance* p.90.
Musharakah, it will practically mean that the client has ensured the principal invested by the financier with or without profit, which strictly prohibited in the case of musharakah.

Notwithstanding the same, Shaykh Taqi deems to permit the fixing of purchase price for the purchase undertaking in house financing as it falls under shari'ah al-milk plus basic needs of the society. However, when many institutions structured the sukuk under the same arrangement, i.e. joint ownership by purchasing the property and leasing it after the purchase with purchase undertaking to buy back the property at the fixed price, he rejected the structure and dictated that 'there are few recent brothers who are held the view that the prohibition of purchase undertaking at par value to guarantee the capital is specific to shirkah al-‘aqd and not to the shirkah al-milk. Then they declared that the partnership in sukuk (especially the sukuk which are representing subject matter) is a shirkah al-milk, and not a shirkah al-‘uqud (contractual obligation).

Then he lists out the features which distinguish between shirkah al-milk and shirkah al-‘uqud as follows:

a. The intention (from shirkah al-‘aqd) is to gain joint profit, where the intention in shirkah al-milk is limited to the ownership and usufruct.

b. Shirkah al-‘uqud makes all partners as agents to other partners in investment activities, but partners in shirkah al-milk are independent in their transactions on their own portion. All agents are outsiders of other people portions.

c. The partners are free to decide a ratio of the profit in shirkah al-‘uqud, in contracts, all partners in shirkah al-milk are independent to gain profit from their own portions only. If one decides to use his portion himself, he will obtain the profit for himself only.

Shaykh Taqi insisted that sukuk had those entire features, therefore any purchase undertaking on fixed purchase price is considered as capital guarantee. In fact, from my point of view, house financing is shirkah al-milk in its initial stage, but it could not be considered permanently as shirkah al-milk as it did not comply with all the above features of shirkah al-milk as follows:

a. The intention in *shirkah al-milk* is limited to the ownership and usufruct and not to gain joint profit as mentioned by Shaykh Taqi.\textsuperscript{22} This feature may suit the client, but may not suit the financier as its intention is not to own and to use it but to invest by leasing it in order to get a profit. In other circumstances, client may lease back the property to other lessee, thus he will gain profit from the property.

b. In *shirkah al-milk* the partners are independent in their transactions on their own portion while in house financing, the partners are not free as they already tied with earlier arrangement.

c. All partners in *shirkah al-milk* are independent to gain profit from their own portions only, however in this financing, as in undivided ownership, one could not independently invest his portion without consent from others. Some scholars such as Shaykh al-Zarqa suggests that the property has to be sold or to be used by both of them alternatively.

The Shariah Committee of the Dalal Barakah Group resolved in its meeting in 2003 that 'it is not permissible to the partners to agree with the price of other partner's portion on the basis of its face value or premium value, but it is permissible to purchase partner's portion on the agreed price at dissolution day, or transaction day, or market price, or the price that determined by experts'.\textsuperscript{23} Similar pronouncement can be seen from the Shariah Standards of Accounting and Auditing Organization for International Finance (AAOIFI).\textsuperscript{24} Hence, as those two committees have many Shariah scholars as members, the decision obviously is shared by many eminent scholars. Further discussion on their decision and evidences will be discussed in next sub title.

Subsequent to that, the purchase undertaking originally should be at market value either to commercial partnership or house financing. However, as the floating price of house value will extremely affect the client, and house is among basic needs in protecting human lives, dignity and religion, an exception for the purpose of house financing may be needed such as purchase undertaking at the original price of the remaining bank's share.

\textsuperscript{22} Usmani (2008), p.11.


iii. Issue of second purchase undertaking to buy the financier's share in the event of default.

As mentioned above, the second model of *Musharakah mutanaqisah* has 'the second purchase undertaking' when, in the event of default, it obliges customer to purchase bank's shares.

According to the interview with the industry players, the financiers need this kind of undertaking in order to protect them from ownership risk when disposing the assets as there are few possibilities regarding disposing process of the asset, such as the value of the asset depreciated. Hence the financier's portion price may not sufficient to top up the financier's capital, or customer's portion price may not be able to cover both unpaid lease payments and financier's capital.

They believed that second undertaking i.e. undertaking by customer to purchase the asset in the event of default, is permissible due the following reasons:

i. Almost all scholars agreed with the permissibility of purchase undertaking by customer to gradually purchase bank's share in normal circumstances, hence definitely second undertaking is extension from the permissibility of the first undertaking.

ii. The basis in *muamalat* is permissible unless if there is evidence shows otherwise. Thus, no evidence shows prohibition.

iii. the current 'urf tijari' (current customary practice) needs this kind of protection for financial institutions and Islamic law recognizes the custom as a secondary source of ruling.

From the study point of view, the second purchase undertaking in the event of default are as follows:

a. The Qur'anic verse explicitly propagates lender to postpone debt repayment or to free the debtor from the debt when he or she genuinely unable to pay, and implicitly prohibits imposing and pressuring the debtor by any mean as stated in *surah al-Baqarah*, verse 280 which means:

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25 These are among the reasons that disclosed by bankers through informal conversations with them in 2009.
If the debtor is in a difficulty, grant him time till it is easy for him to repay. 
But if ye remit it by way of charity, that is best for you if ye only knew.

In this arrangement, by stipulating customer to sign second purchase undertaking in the event of default, the financier clearly imposes bigger hardship to the customer by obliging them to purchase its portion in credit though he or she is ‘handicap’. Hence, it contradicts with the verse commandment.

b. The second purchase undertaking seems as a kind of capital guarantee structure as this arrangement was made as a mean to facilitate the bank with the facility to get full amount of the proceeds from the property auction. If the property remains under joint ownership, bank only entitles to get partial amount of the property auction proceeds which subject to bank ratio in the property ownership. This arrangement is totally contradicted with the hadith: al-Kharaj bi al-dhaman²⁶, meaning that the revenue comes with taking risk. The financier is avoiding ownership risk which derived from musharakah contract.

c. It is oppressive and unacceptable when customer who is unable to pay the rental and first purchase undertaking arrangement (purchasing bank’s share in stages), has to bear bigger obligation i.e. by imposing compulsory credit purchase of the property in order to make it as a charge for the credit sale by the financier, subsequently enable the financier to obtain solely the selling price from the auction.

d. Among the essences of musharakah contract is the partners are facing equal rights and liabilities. However, by stipulating customer to promise purchasing the asset in the event of default, it becomes a mean to escape from partnership liability. Hence, it contradicts with the essence of musharakah contract. Since the practice of such undertaking is prohibited, any claim of customary practices should be put under the carpet.

Therefore, this arrangement seems prohibited as it facilitates the capital guarantee concept which is prohibited (haram) in both co-ownership and contractual partnership contracts. In fact the second purchase undertaking in the event of default is a huge oppression on the

²⁶ The hadis was narrated by al-Tirmizi in his al-Jami', no.4414 and declared that the status of the hadis is hasan sahih., and by Al-Nasai in his Sunan, no.3044, and by Ibn Majah in his Sunan, no.2233.
customer as he or she has to bear bigger obligation and contradicted with Islamic spirit in the event of default when customer has to bear bigger obligations.

On the other hand, it is not true that risk in musharakah could not be mitigated without second purchase undertaking as the bank already underwent thorough scrutiny process on customer capability to pay such as credit scoring. In addition, the bank already included certain risk premium prior to deciding musharakah profit sharing ratio and lease payment. So, how many steps must be taken by the bank to avoid risks and at the end, it still try to avoid totally musharakah risk and still named it 'musharakah'? Moreover, at the end, compulsory differed purchase may result same consequences of current BBA transaction problem.

**Conclusion**

To conclude this article, the study found that the house financing is shirkah al-milk in its initial stage, but it could not be considered permanently as shirkah al-milk as it did not comply with all features of shirkah al-milk. Subsequently, the purchase undertaking should be at market value either to commercial partnership or house financing. An exception for the house financing may be needed such as purchase undertaking at the original price of the remaining bank’s shares as the floating price of house value will extremely affect the client in current pricing situation, and because of the house is among basic needs in protecting human lives, dignity and religion.

It also found that the second purchase undertaking is explicitly contradicted with the Quranic verse which propagates debtor to postpone debt repayment when borrower is genuinely unable to pay.

However, scholars have to consider the industry players’ concerns as the financiers need this kind of undertaking in order to protect them from ownership risk when facing default cases and disposing the assets. Few possibilities regarding disposing process of the asset are genuinely existed, such as the financier’s portion price may not sufficient to top up the financier’s capital, or customer’s portion price may not be able to cover both unpaid lease payments and financier’s capital.
Therefore, BNM effort was correct when it provided both solutions to the Islamic financial institutions whether to impose second purchase undertaking or otherwise. At the end, it is up to the Islamic financial institutions to decide between the two views. For the bank who is ready to face ownership risk, it should choose to avoid second purchase undertaking and applies the view that proposed by the majority of Shariah scholars.

Allah Taela knows best.

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