

Commodity *Murabahah* Islamic Home Finance in Dealing with Abandoned Housing Projects in Malaysia: Features, Issues & Prospects

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Islamic Banking has been established since 1980s in Malaysia. It was initially commenced with the incorporation of Bank Islam Malaysia Berhad (BIMB) in 1983. Until today, Islamic Banking has robustly developed in Malaysia providing various kinds of Islamic transaction products including Islamic home finance. Various Islamic Home Finance products have been introduced and practised in Malaysia. Among the products are: *Bay' Bithaman al-Ajil* ('BBA'), *Musharakah al-Mutanaqisah* ('MM'), Commodity *Murabahah* ('CM') and *Ijarah Mausufah Fi Zimmah*. Nonetheless, there are many issues in these products when faced with the problems of abandoned housing projects in Malaysia. One of the issues is the inadequacy of the Islamic Home Finance products to deal with the issues of abandoned housing and give equitable and fair terms to the aggrieved purchaser consumers. This paper aims to highlight and study the terms in CM and how this Islamic Home Finance product deals with the problems of abandoned housing projects. The focus of this paper is the CM as applied by Bank Kerjasama Rakyat Malaysia Berhad ('BKRMB') in Malaysia. This paper used *shariah* (Islamic Law) and legal doctrinal and qualitative textual analysis methodologies. This paper finds that the current applicable terms in CM as practised by BKRMB in Malaysia are inadequate and warranted them to be replaced with terms that can provide equitable protection to the aggrieved purchaser consumers in abandoned housing projects thus can fully comply with the requirements of the *shariah* (Islamic Law). The outcome of this paper will help the Islamic banking industry in dealing with issues of in abandoned housing projects in Malaysia and provide protection to the aggrieved purchaser consumers.

Keywords: Commodity *Murabahah* ('CM'); abandoned housing projects; terms and conditions; grievances and losses of purchaser consumers; justice

1 Introduction

It is a trite practice in Malaysia that those who wish to purchase houses through Islamic Home Finance, particularly involving transaction that fall under the purview of Housing Development (Control & Licensing) Act 1966 and its regulations (Act 118), to apply for home financing from Islamic banks. Normally the purchasers will enter into housing contracts with the housing developers purchasing the pending completion houses. Once the relevant documents are signed, the purchasers will then apply to Islamic bank to finance the balance purchase price via any Islamic home financing products. One of these Islamic home financing products is Commodity *Murabahah* ('CM') (Md Dahlan, Mohd Nor & Shuib, 2017).

In CM, what the purchaser consumers received is the proceeds from the sale of a commodity that they sold to the commodity trader via the Islamic bank as an intermediary agent of the purchaser consumers. The transaction between the consumer, the bank and the commodity trader involves *murabahah* transaction (Md Dahlan, Mohd Nor & Shuib, 2017).

Under CM the purchaser consumer requested in writing to the Islamic bank to purchase a commodity from a commodity trader at the price similar to the price of the house that the purchaser consumer intends to buy. The Islamic bank will later buy the commodity from the commodity trader at the price similar to the price of the house. The commodity trader will deliver the commodity to the Islamic bank upon full payment of the sale price. The Islamic bank will then sell the commodity to the consumer purchaser with a mark-up price (*murabahah*). The consumer purchaser will then repay the mark-up price of the commodity to the Islamic bank, either in installment of otherwise, until full settlement (Md Dahlan, Mohd Nor & Shuib, 2017).

To ensure that the consumer purchaser has the required amount of money to buy the intended house, the consumer purchaser will appoint the Islamic bank as his representative to re-sell the commodity to the commodity trader at the price similar to the price of the house. The proceeds received through this sale will be used by the consumer purchaser to buy the house from the housing developer. To secure the repayment of the mark up price by the consumer purchaser to the Islamic bank, a legal charge will be effected against the house to secure the repayment by the consumer purchaser to the Islamic Bank as a collateral (Md Dahlan, Mohd Nor & Shuib, 2017).

2 Problem Statement

Abandoned housing projects is one of the hot topics and unending difficult issues for the Malaysian government to tackle and settle. As a result many purchaser consumers have suffered irreparable damage and losses without getting equitable and appropriate remedies.

Previously, just after Independence in 1957, the main provider for public housing was the government itself. However, as the government faced upsurges in demand for housing accommodations and suffered shortage of funds to finance the construction of public housing for public purchase, the government had opened this programme to the private sector housing developers as well to participate. The government only controls the conducts of these private sector housing developers through the Housing Developer's (Control & Licensing) Act 1966 (Act 118) and its regulations (Md Dahlan, 2009).

Despite there are federal and states' laws governing housing development through the above statute, the National Land Code 1965 (Act No. 56), Town and Country Planning Act 1976 (Act 172) and Street, Drainage and Building Act 1974 (Act 133) and Uniform Building By-laws 1984, abandoned housing projects is still cannot be totally curbed to the detriment and chagrin of the aggrieved purchasers (Md Dahlan, 2009).

In the observation of the author, the major reasons leading to the abandonment of housing projects are these: There is no mandatory system of "full build then sell" of housing delivery implemented by the developers imposed by the government; there is no mandatory requirement that the developer must possess housing development insurance serves as a support in the event the developer is unable to complete the project; and, there is no specific regulation governing rehabilitation of abandoned housing projects and protect the rights and interests of the purchasers. Apart from these, it is found that the loan agreements between the bank financiers and the purchaser consumers including the Islamic Home Finance products also do not have terms and conditions that can equitably and fairly protect the rights and interests of the purchasers if the housing projects are terminated mid-stream and abandoned by the developers (Md Dahlan, Mohd Noor & Shuib, 2017).

Among the losses that the purchaser consumers have to bear are as follows (Md. Dahlan, 2009):

- 1) They cannot obtain the duly completed houses as promised by the housing developer and as prescribed under the sale and purchase agreement on time;
- 2) They have to incur additional costs in the event new rehabilitating parties agree to undertake rehabilitation, as the end-finance funds are not adequate to cover the costs of rehabilitation;

- 3) They have to incur additional costs for renting houses pending the completion of the rehabilitation of the abandoned housing projects complete; and,
- 4) They may have to suffer irreparable damage and losses as the abandoned housing projects cannot be rehabilitated as there is no party interested to revive the project or the projects are not feasible for rehabilitation.

It is evident that the terms in Islamic Home Finance products for examples *Bay' Bithaman al-Ajil* (BBA) and *Ijarah Mausufah Fi Zimmah* are inadequate to protect the rights and interests of the aggrieved purchasers in abandoned housing projects. This tantamount to injustice and a breach of the Islamic concept of *al-Ghunmu bi al-Ghurmi* (profit must commensurate with risk) and prohibition against *gharar* (uncertainty leading to losses) in that, there is no corresponding and reciprocal responsibility on part of Islamic bank to protect the interests of purchaser customers (Md Dahlan, Mohd Noor & Shuib, 2017).

Thus, this writing intends to highlight and analyze the terms and conditions in the Islamic Home Finance Commodity *Murabahah* ('CM') prevailing in Malaysia in dealing with abandoned housing projects. Islamic law emphasizes that contracts must comply with the requirements of Islamic law for example the requirement that the contract must not contain any *gharar* elements and that the terms and conditions must be fair, equitable and just to the parties. These commands are enshrined in the Quran and al-Hadith (Traditions of the Prophet Muhammad (PBUH)).

3 Research Questions

- a. Whether CM as applicable in Malaysia is sufficient to provide protection to purchaser customers against problems, *gharar* and losses arising from abandoned housing projects?
- b. If insufficient, why?
- c. If the terms are insufficient, how to improve the products?
- d. What are new suggestions to improve CM?

4 Objectives

- a. To study the terms in CM.
- b. To study the issues in CM in face of the problems of abandoned housing projects and its consequences for example *gharar* and losses suffered by purchaser consumers; and,
- c. To propose improvement in the terms of CM in face of the problems of abandoned housing projects.

5 Research Methodology

The author used *shariah* (Islamic Law) and legal research methodology to explain and analyze the Islamic Home Finance product CM contractual terms, issues, problems and proposal in this academic paper. The legal research is in a form of hybrid in nature. It consists of applied research, academic research, analytical/critical research, descriptive research, library-type and experimental study. The research activities under this heading include the discovery of the principles, rules and case law in order to explain and resolve the identified problems guided by the set objectives (Zahraa, 1998).

The second methodology is the social research methodology using textual analysis and interviews with relevant persons. The author chose a qualitative research methodology as the authors wish to examine in detail issues and discussion in CM that involve abandoned housing projects. Qualitative methodology is concerned with exploring people's life, histories or everyday behaviour that quantitative research is unable to grasp. By using the qualitative method, information gathered will be more and enriching as it involves an in-depth and deeper understanding and study of a particular matter. The sources of data are from the accessible files of KNM Consulting Services, Jalan Medan Tuanku, Kuala Lumpur ('KNM') and a law firm known as Khamdan & Co, Advocates & Solicitors in Shah Alam, Selangor. KNM is a private agency set up with a purpose to resolve issues arising from abandoned housing projects and to help aggrieved purchaser consumers. In addition, the author also interviewed the purchasers involved, shariah advisors of Islamic banks, lawyers and bank officers as a way to achieve triangulation and multiple evidences and thus can ensure reliability and validity of the research undertaken (Silverman, 2000; Yin, 1994; Yin, 2000).

5 Findings

5.1 Murabahah

Murabahah is a particular kind of sale where the seller expressly mentions the cost of the sold commodity he has incurred, and sells it to another person by adding some profit thereon. Thus, *Murabahah* is not a loan given on interest; it is a sale of a commodity for cash/deferred price.

The *Bay' Murabahah* involves purchase of a commodity by a bank on behalf of a client and its resale to the latter on cost-plus-profit basis. Under this arrangement the bank discloses its cost and profit margin to the client. In other words rather than advancing money to a borrower, which is how the system would work in a conventional banking agreement, the bank

will buy the goods from a third party and sell those goods on to the customer for a pre-agreed price (Islamic Banking, 2017).

5.2 Manzili Financing-I Facility Agreement – Commodity *Murabahah* of Bank Rakyat Berhad

In respect of the terms of CM in Islamic Home Finance, the author managed to get an access to the sample used by the Malaysian Bank Rakyat Berhad on *Manzili Financing-i Facility Agreement* applying the concept of *murabahah* and *tawarruq*, *i.e* commodity *murabahah*.

Among the important and salient terms under *Manzili Financing-i Facility Agreement* (CM) of the Bank Kerjasama Rakyat Malaysia Berhad ('BKRMB') are as follows:

1. The purchaser/customer requested in writing to Bank Kerjasama Rakyat Malaysia Berhad ('BKRMB') to purchase a commodity at the price similar to the price of the property that he wished to buy (clause 1.2(b)).
2. BKRMB will then buy the commodity from the commodity trader at the price similar to the property price. The commodity trader will surrender the commodity to BKRMB and this is effected through a transfer certificate to BKRMB (clause 1.2(b)(c)).
3. BKRMB will then sell the commodity to the purchaser/customer at a mark-up price (clause 1.2(b)(c), 2.2).
4. The purchaser/customer will repay the mark up price in monthly installment to BKRMB until full settlement (clause 1.2(e), 2.1).
5. The purchaser/customer will appoint BKRMB as his representative/agent through a letter of *wakalah* allowing BKRMB to resell the commodity to commodity trader with the price similar to the price of the property. Payment received by BKRMB will be used by the purchaser/customer to finance the purchase of the property. To effect this matter, a security document shall be executed (clause 1.2(h), 1.5(a)(c), 2.4, 4 and Annexure).
6. The developer/vendor/land proprietor shall execute and submit a Memorandum of Transfer ('MOT') to BKRMB or the BKRMB's solicitor before any payment can be made by BKRMB to the developer/vendor/land proprietor. If the property involves land without title, the MOT shall only be executed and submitted after the title to the land has been issued (clause 6).
7. The purchaser/customer shall get a *Takaful* (Islamic Insurance) to protect the property against fire, damage and other defects as prescribed by BKRMB (clause 11).
8. If the purchaser/customer fails to pay the monthly installment and does any act which is deemed contrary to the CM, BKRMB may take any action including public auction to enforce the security and other civil action di court (clause 14).

9. The preparation costs for the CM shall be borne by the purchaser/customer himself. (clauses 38 and 24).
10. The purchaser/customer must ensure that BKRMB is free from any legal action by the developer and other parties in the sale and purchase of the property (clause 43 – Indemnity).

After due scrutiny of the above sample, it is noteworthy that if the property is abandoned during the course of construction, there is no term in the CM that can provide protection to purchasers/customers and prevent the occurrences of *gharar* and losses to the purchaser customers. For example, it is sacrosanct that there should be terms prescribing the responsibility of the developer/vendor to refund all moneys they received from BKRMB or responsibility to rehabilitate the abandoned housing project by the defaulting developer or other parties. Similarly, there is no term in the CM that obliges the developer/vendor to get any insurance as a financial support to finance the cost or rehabilitation or he be responsible to pay damages to the aggrieved parties. Further, there is no term in the CM that requires the construction of the purported houses must use 'full build and sell' and that CF or CCC, as the case may be, has been obtained before the parties enter into the CM agreement.

The above contention is made on the limitation that there is no information that the above CM as used by BKRMB had involved in abandoned housing projects. Nonetheless, certain hypothesis can be made based on the scrutiny of the terms and conditions of the CM sample that there is no term that provides purchaser consumers with protection against any losses and *gharar* due to abandonment of housing development projects.

Another issue involving CM is that the funding cost for CM is too high. This has led to a high profit rate for CM. As said by Encik Fazly bin Sampol, Senior Manager (Banking Operation) of Public Bank Islamic Berhad, Jalan Ampang, Kuala Lumpur, on 12 April 2016 (Fazli Sampol, interview by author, April 12, 2016). Thus, the profit margin rate is higher, and can be burdensome to the consumers.

6 Suggestions & Conclusion

It is submitted that the terms and conditions of CM as prescribed in the above sample does not protect and preserve the interests and rights of the stakeholders for instance the aggrieved purchasers in abandoned housing projects. Thus, CM documentations must be provided with additional terms that can provide adequate protection to the rights and interests of the purchaser customers. The current CM for example as practised by BKRMB illustrated above, it is submitted, are inadequate to deal with the problems of abandoned projects and protect the rights

and interests of the purchaser customers. This can lead to *gharar* and can cause the CM void, in the event abandonment occurs and losses suffered by the purchasers. Additional terms should be considered such as terms providing liability and responsibility of the housing developer vendor to rehabilitate or compensate the aggrieved parties in the event of abandonment. Alternatively, there should have a special mechanism that can ensure all relevant stakeholders are shielded from any losses and grievances consequential to housing abandonment, for instance the housing developer should possess housing insurance to cover the situation where housing project is abandoned. Further, the system of full build and sell should be practised in Malaysia to avoid the problems of abandoned housing projects and their consequential losses altogether.

The author also proposes that the membership of the Shariah Advisory Council (SAC) of Malaysian Central Bank and Shariah Advisory Board (SAB) of the respective Islamic banks in Malaysia should also comprise of representatives from the consumer associations (for example, Persatuan Pengguna Islam (PPIM) (Muslim Consumers' Association of Malaysia), National House Buyers Association (NHBA), Federation of Malaysian Consumers Association (FOMCA) and Consumers Association of Penang (CAP)) in order to ensure that the decision making process in these bodies is sound and inclusive, thus can ensure that the products approved are truly 'consumer friendly', practical, equitable and fair to consumer public, not just being one sided and being banker-centric. This includes calling these parties to advocate the insertion of more equitable terms in the BBA for example terms that can provide a fair rate of the sale price that the customer purchaser should repay to the bank on default or on early settlement.

These suggestions are to improve the quality of CM to give protection to customer purchasers and comply with the requirement of Islamic law in that the product is not just protecting the rights of the Islamic banks, it also is just and fair to customer purchasers.

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