

GOOD FAITH AND FAIR DEALING IN HIRE PURCHASE CONTRACT IN MALAYSIA

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ABSTRACT

This paper aims to highlight the importance of the element of good faith and fair dealing in a hire purchase contract. This is because the attributes of honesty, reasonableness and fairness should be the underlying principles in every distinct hire purchase contract to connote the notion of "fair dealing" transaction whereby the contract's sanctity is performed thus satisfying the demand of the parties in the contract.

Introduction

In Malaysia, hire purchase financing is one of the credit sale facilities which is offered by the local banks and financial institutions. The law on hire purchase in Malaysia is regulated by the Hire Purchase Act 1967 (HPA) (Act 212),¹ as amended by the Hire Purchase (Amendment) Act 1976, and recently by the Hire Purchase (Amendment) Act 1992 (Act A813). The Malaysian hire purchase trade actually originated from the early development of banking system, where goods were exchanged in return for a promise of future payment by installment.

The Chinese money lenders and chettiers (Indian money lenders) played an important role in hire purchase transactions long before finance companies became popular. Though they charged exorbitant interest rates, they were welcomed because their credit facilities were easily available.² The last decade had shown a rapid development

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¹ Wu Min Aun & Beatrix Vohrah, (2003), *The Commercial Law of Malaysia*, 2nd Edition, Kuala Lumpur: Longman, p. 257.

² Consumer's Association of Penang, (1986), *The Hire Purchase Trap - How You Can Be Cheated And What To Do About It?*, Penang: Consumer's Association of Penang, p. 8.

in the number of hire purchase transactions, which previously were most popular among the lower income groups; but now these transactions are widely practiced by middle income groups and by commercial circles as well. Due to the fact that demands for a better lifestyle in society comes hand in hand with economic progress in the country.

Before the enactment of the Hire Purchase Act in 1967, all hire purchase transactions in Malaysia were governed by the Common Law and the Contract Act 1950.³ Later on, as the authorities recognized hire purchase transaction as an efficient method to acquire assets by consumers, the Hire Purchase Act 1967 (HPA) was enacted⁴ to regulate and control the form and contents of hire purchase agreements and to define the legal rights, duties and liabilities of hirers, owners and other parties to hire purchase agreements. Since its introduction, the local statute has been strengthened to give better protection to the consumer's goods and specified items, including imposition of sanctions such as fines and imprisonment and the establishment of an enforcement agency in the form of the office of the Controller of Hire Purchase.⁵

Definition

As discussed earlier, the Malaysian hire purchase contract is heavily based upon the Common Law. To many people, 'hire purchase' and 'installment buying' and 'credit-sale' all mean the same thing i.e. buying goods in installments for over period of time. To the legal practitioners, 'hire purchase' is described as an agreement with certain well-defined characteristics.⁶

Under the Common Law, a hire purchase transaction is a contract whereby one party (called "the owner") lets goods on "hire" to "the hirer", the hirer, and agrees that the hirer may (at his own option) either return the goods when he no longer needs them and terminate the hire, or elect to purchase the goods on completion of the necessary payments agreed in the contract.⁷ In simple terms, a hire purchase transaction is hire, coupled with an option to buy, provided that all the conditions are fulfilled until the end of the hiring contract. On the other hand, it is only a contract of hire when the

³ *Ibid.*, p.8

⁴ It was considered as a "painless" method of acquiring assets by consumers as cited in Salleh Buang (2001), *Malaysian Law On Hire Purchase*, 2nd Edition. Petaling Jaya: Sweet & Maxwell, p. 1.

⁵ Salleh Buang (2001), *Op.cit.*, p. 258.

⁶ Audrey L. Diamond, (1971), *Introduction To Hire Purchase Law*, London: N.P.N, p. 3.

⁷ Salleh Buang (2001), *op.cit.*, pp. 5-6.

intention is only to hire without exercising the option given. For as long as the hiring contract exists, the “ownership” of the property is with the lessor, unless it has been passed on to the lessee.

Scope

The scope of the implementation of hire purchase is embodied in the local statute. Apart from the Hire Purchase Act 1967, references are also to be made to the following regulations:

- a) Hire Purchase (Terms Charges) Regulations 1968;
- b) Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976; and
- c) Hire Purchase Order 1980.

As a result of the recent amendment, which came into force on the June 1, 1992, the Act applies throughout Malaysia to hire purchase agreements in respect of the following goods as listed in the First Schedule to the Act:

1. All consumer goods; and
2. Motor vehicles, namely
 - (a) Invalid carriages;
 - (b) Motor cycles;
 - (c) Motor cars including taxi cabs and hire cars;
 - (d) Goods vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms);
 - (e) Buses, including stage buses.

Prior to the 1992 amendments, apart from motor vehicles as described above, the Hire Purchase Act only applied to the following goods-

1. Radio sets, television sets, gramophone sets, tape recorders and any combination thereof;
2. Refrigerators and deep-freeze food preservers and any combination thereof;
3. Sewing machine other than those used for industrial purposes;
4. Washing machines;
5. Vacuum cleaners;
6. Air-conditioning units other than those used for industrial purposes;
7. Electric or gas cookers and ovens;
8. Video tapes / cassette recorders;

9. Typewriters;
10. Organs and piano;
11. Photostat machines / copies
12. Hi-fi systems

The term “consumer goods” provided in the new law covers a wider range of goods than those specified under the previous law. For example, by virtue of the new law, personal computers and mobile hand phones are categorized as consumer goods.

Under section 2 (1) of the Hire Purchase Act 1967 (HPA) a hire purchase agreement is defined as follows:

“Hire purchase agreement” includes a letting of goods with an option to purchase and an agreement for the purchase of goods by installments (whether the agreement describes the installments as rent or hire or otherwise), but does not include any agreement—

- a) *whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before delivery of the goods; or*
- b) *under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement.”*

From the above definition, it is clear that the first limb of the definition reflects the position under Common Law, but the second limb of the statutory definition goes further.⁸ A hirer of goods under the Act only has possession of the goods, and no more. He does not have ownership of the goods, as would be the case where goods are sold on credit, unless, the hirer exercises the option to purchase the goods.

Under the Common Law, when a hirer committed a breach of his contractual obligations under the hire purchase agreement, the owner is entitled to recover possession of the goods let on hire. However, the HPA 1967 imposes restrictions on the owner to recover possession of goods as a means of protecting the interests of the hirer.

The process of repossession in HPA 1967 is governed by sections 16-20 as well as the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976, much practiced by most banks and financial institutions in Malaysia,

⁸ Salleh Buang (2001) *op.cit.*, p. 7.

both Islamic and Conventional. Although these procedures are different, they maintain the same aim, which is, to execute repossession in an ethical manner in case of defaults of payment.

The Procedure of Repossession

Under the HPA 1967, an owner can only repossess the goods if there had been “two successive defaults of payment” or “default in respect of the last payment” and the hirer has been served with a notice in the form set out in the Fourth Schedule. The period fixed by the notice has expired (which shall not be less than 21 days after the service of the notice).⁹ It is also provided that where a hirer is deceased; the owner cannot repossess the goods unless there had been “four successive defaults of payment”.¹⁰

The owner is exempted from complying with section 16(1) where there are reasonable grounds to believe that the goods will be removed or concealed by the hirer contrary to the provisions of the agreement.¹¹ The onus of proving the existence of those grounds lies upon the owner. Section 16(2) is deemed appropriate, because hirers, who have defaulted in their monthly installments, have been known to disappear and to remove the goods or conceal them in order to prevent the owner from repossessing them.

Within 21 days after repossession of the goods, the owner is required to serve on the hirer and every guarantor of the hirer, a notice in the form set out in the Fifth Schedule.¹² The owner is also required, to deliver to the hirer a document acknowledging receipt of the goods.¹³ The document must contain a short description of the goods, the date, time and place the goods were possessed. If the owner fails to serve the notice in the form set out in the Fifth Schedule, his rights under the hire purchase agreement “thereupon cease and determine”.¹⁴ However, if the hirer then recovers the goods so repossessed, the hire purchase agreement is deemed to continue in force between the parties.

⁹ Sect.16(1) of the Hire Purchase Act (Act 212).

¹⁰ Sect.16(1A) of the Hire Purchase Act (Act 212).

¹¹ Sect 16(2) of the Hire Purchase Act (Act 212).

¹² Sect 16(3) of the Hire Purchase Act (Act 212).

¹³ Sect 16(4) of the Hire Purchase Act (Act 212).

¹⁴ Sect 16(6) of the Hire Purchase Act (Act 212).

A hirer who returns the goods to the owner within 21 days of receiving the notice in the form set out in the Fourth Schedule is not liable to pay the cost of repossession, the cost incidental to taking possession and the cost of storage.¹⁵

It is provided that before the owner or his agent repossesses the goods, he must, in addition to complying with the provisions of the Act, comply with any regulation as may be prescribed.¹⁶ Under the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976, Rule 3 (1) requires the owner to send a notice to the hirer informing him that the owner intends to repossess the goods. A copy of this notice must be sent to the Controller of Hire Purchase. This notice is in addition to the notice contained in the Fourth Schedule.

Retaining Possession

Under the HPA 1967, it is provided that where the owner has taken possession of the goods under section 16; he must not, without the hirer's consent, sell or dispose them of, or part with possession thereof until the expiration of 21 days after the date of the service of the notice as set out in the Fifth Schedule.¹⁷ An owner who sells or disposes of any hired goods or parts with possession of such goods in contravention of section 17 (1) shall be guilty of an offence.¹⁸

Rights of Hirer after Repossession

Under the HPA 1967, within 21 days after the goods have been repossessed by the owner, the hirer can, if he so desires, send a notice in writing to the owner requiring him:¹⁹

- (a) to re-deliver to the hirer, or to the hirer's order, the goods that have been so repossessed ; or
- (b) to sell the goods to any person introduced by the hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods as set out in the notice under the Fifth Schedule.

Alternatively, the hirer may claim from the owner, in the event that the value of the goods exceeds the net amount payable. For the purpose of this section, the expression

¹⁵ Sect 16(A) of the Hire Purchase Act (Act 212).

¹⁶ Sect 16(7) of the Hire Purchase Act (Act 212).

¹⁷ Sect 17(1) of the Hire Purchase Act (Act 212).

¹⁸ Sect 17(2) of the Hire Purchase Act (Act 212).

¹⁹ Sect 18(1) of the Hire Purchase Act (Act 212).

“value of the goods” means “the best price that could be reasonably obtained by the owner” at the time of taking possession of the goods, or if the hirer had introduced a person who has bought the goods for cash, the amount paid by that person,

- (a) such reasonable costs incurred by the owner in taking possession of the goods;
- (b) costs of storage, repair or maintenance; and
- (c) reasonable expenses incurred in selling the goods.²⁰

The expression “net amount payable” means “total amount payable less the statutory rebate for the term charges and insurance”.²¹ It is also provided under the HPA 1967 that when the owner intends to sell the goods by public auction, he must serve on the hirer a copy of the notice of such public auction not less than 14 days from the date the said auction is to be held.²² If the owner intends to sell the goods otherwise than by public auction, he must give the hirer an option to purchase the goods at the price which he intends to sell if the price is less than the owner’s estimate of the value of the goods repossessed. If the owner fails to comply with this requirement, he shall be guilty of an offence.

The hirer will not be able to recover anything from the owner unless he acts fast, he must within 21 days of receiving the notice under the Fifth Schedule, give to the owner a notice in writing, setting the amount which he claimed under this section.²³ The notice can either be signed by the hirer himself or by the solicitor or agent. After sending the notice to the owner, the hirer must then commence action in court not later than three months after the notice had been sent to the owner. At any time before the proceedings against him have been commenced by the hirer, the owner can make an offer in writing to the hirer any amount in satisfaction of the hirer’s claim. If this offer is accepted by the owner, the dispute ends; but if the offer is rejected by the hirer, the owner is entitled to pay the amount into court.

If the hirer intends to regain possession of the hired goods, i.e. where he has sent a notice to the owner (as mentioned above) to deliver the goods to him, he must pay or tender to the owner any amount due under the hire purchase agreement in respect of the period of hiring up to the date of payment or tender. In addition, he is required to remedy any breach of the agreement and pay or tender to the owner the reasonable costs and expenses incurred in taking possession of the goods and redelivering them to the hirer.²⁴ If the hirer is able to do all, the law then requires the owner to “forthwith

²⁰ Sect 18(1)(b) of the Hire Purchase Act (Act 212).

²¹ Sect 18(3) of the Hire Purchase Act (Act 212).

²² Sect 18(4) of the Hire Purchase Act (Act 212).

²³ Sect 18(5) of the Hire Purchase Act (Act 212).

²⁴ Sect 19 of the Hire Purchase Act (Act 212).

return” the goods to the hirer, and thereafter the relationship between the hirer and the owner shall be as if the breach had not occurred and the owner had not repossessed the goods.

Power of the Court

Under the HPA 1967, the court has power to vary existing judgment or orders when goods are repossessed.²⁵ It is submitted that even after the owner has taken possession of the goods, the court before which the proceedings are brought may vary or discharge any judgment or order of any court against the hirer for the recovery of money so far as is necessary to give effect to section 18.

Element of Good Faith and Fair Dealing In Contract

It is a well established principle in law that a party to a contract is not obliged to disclose all the facts concerning the subject matter of which he has knowledge. The maxim of “*caveat emptor*”,²⁶ which is applicable to buyers, imposes duty on the buyer to exercise certain care and diligence to be alert on any defects of the goods or bad bargain before entering into a contract.

As time passed by and mainly due to the civilization of the people who are always seeking for their rights, the maxim of “*uberrimae fidei*”²⁷ (utmost good faith) is introduced to make a contract more approachable and reliable. Under this maxim, the

²⁵ Sect 20 of the Hire Purchase Act (Act 212).

²⁶ Elizabeth, A. Martini (edit.) (2003), *Oxford Dictionary Of Law*, 5th Edition, Oxford University Press: Oxford, p.70. *Caveat Emptor* means ‘let the buyer beware’, a Common Law maxim warning a purchaser that he could not claim that his purchases were defective unless he protected himself by obtaining express guarantees from the vendor. The maxim had been modified by a statute under the Sale of Goods Act 1979, (a consolidating statute); contracts for the sale of goods have implied terms requiring the goods to correspond with their descriptions and samples and, if they are sold in the course of business are to be of satisfactory quality and fit for any purpose and made known to the buyer. Each of these implied terms is a condition in the contract. However, in most commercial contracts, the implied terms are excluded. This is usually valid unless the exclusion is unreasonable or unfair by the law relating to unfair contract terms.

²⁷ *Ibid*, p. 513. *Uberrimae fidei* means ‘of the utmost good faith’, describing a class of contracts in which one party has the preliminary duty to disclose material facts relevant to the subject matter to the other party. Nondisclosure makes the contract voidable. Examples of this class are insurance contracts, in which knowledge of many material facts is confined to the party seeking the insurance.

nature of the contract and all the existing contractual relations therein are taken into consideration. A good example of an “*uberimae fidei*” contract is the insurance contracts, whereby full disclosure by the party concerned plays an important role in the enforcement of the claim.

Historically, the English law did not recognize the elements of good faith and fair dealing as pre-requisites in the making of a contract.²⁸ Nonetheless, these elements were enforced by the Court of Chancery on the grounds of conscience²⁹ through the system of writ and the forms of action. In the 15th century, the basic position on the obligation of good faith from promises was approved and adopted by the Chancellors whereby the Court of Chancery was prepared to give the litigants a remedy due to the non-performance of a promise.

In the seventeen and eighteen centuries, good faith and fair dealing were regarded only as piecemeal solutions. The legal principle encompasses the basic rule “*pacta sunt servanda*”,³⁰ generally associated with the concept of morality, including the concepts of honesty, fairness and reasonableness. The basic obligation of good faith arising from a promise or an agreement, which was enforced on the ground of conscience in the Court of Chancery, became the basis of the general remedy for the breach of contract in Common Law today. As a result, the following provisional or working definition has been adopted:

Element of Good Faith And Fair Dealing In Contract : English Law

Under the English law, the principle of good faith is derived from the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness, which supplements or supersedes normally applicable rules when this is necessary to ensure that the standards of honesty, fairness and reasonableness which prevail in the community also prevail in English law.³¹

²⁸ Hence, John H. Baker, in his celebrated text, *An Introduction To English Legal History*, (2002), 4th Edition, London: Butterworths, makes no reference to good faith and fair dealing in his history of Common Law.

²⁹ J.F.O, Connor, (1990), *Good Faith In English Law*, p. 18.

³⁰ A. Martini (edit.) (2003), *Op.cit.*, n. 26, p. 351. *Pacta sunt servanda* means ‘agreements are to be kept; treaties should be observed’.

³¹ O, Connor (1990) *Op.cit.*, p.12.

This provisional definition has been used as the focus for a survey of manifestations of good faith in a number of different areas of English law and the most important thing is to identify what might be labelled as 'Good Faith Rules'. Now, the provisional or working definition has crept slowly into the legislation as an important element to be considered.

Nevertheless, good faith and fair dealing may not be relevant in all contracts; because they depend on each individual contract. For instance, in the hire purchase contract of a secondhand car, the element of disclosure is very important to the purchaser to come out a fair dealing transaction. Thus, the invention of these principles is more often used to supplement or supersede existing rules where the demands of honesty, fairness and reasonableness are so required.

In conclusion, the elements of good faith and fair dealing were constructed to exist side by side with the basic elements of a contract as pivotal principles. The main elements of a contract which consist of offer, acceptance, consideration and intention to create legal relations are, however generally more dominant than the elements of good faith and fair dealing.

Under the Malaysian law, the application of good faith and fair dealing developed similarly as the Common Law. It is treated as an implied principle where the law gives equal concentration in enforcing a valid contract. Thus, the court will look into the unfairness of the case to ensure the inviolability of the contract.

In the case of *PN Pillay & Co v Kah Motor Co Ltd*,³² the plaintiff entered into a hire purchase agreement on August 6, 1963 with the defendant. It was provided in Clause 4 of the agreement that in the event of default by the hirer to pay the monthly installments, the owners may "immediately terminate the hiring and they shall thereupon without previous notice on demand become entitled to the immediate possession of the vehicle". When the hirer defaulted in his payment, the defendant took possession of the car without giving notice of termination of the hiring. The plaintiff commenced an action for damages for unlawful seizure of the car.

The issue before the court was whether a notice of termination is essential or whether the action of taking possession of the car constitutes a valid termination. Abdul Aziz J held that the repossession by the defendants was unlawful. He held that the owners

³² [1965] MLJ 47.

could not repossess the car until they had terminated the hiring. To do so, there must be “some independent act indicating that the hiring has been terminated e.g by the issue of notice to the hirer”. On the evidence, the court held that the hiring had not been terminated before seizure, the important principle of law gleaned from this case, is that the rights and duties of the parties are governed by the terms of the agreement concluded between them.

In *Sino-British Engineering Corp. (M) v MA Namazie Ltd*,³³ the appeal raised the question of the proper construction of paragraph 4 of the appellants’ letter to the respondents dated 17th April 1946, which read as follows;-

“In the event of Bangkok not being interested we will sell locally or else where and in the very unlikely event of the lot not being disposed of by the time your next shipment arrives about a couple of months later, you will agree to take it over from us at landed cost.”

The issue is whether there is an implied term that the respondents were under obligation to do nothing to prevent the arrival of their next shipment, about a couple of months later, upon which the appellants’ right depended. Brown J. held that it is abundantly clear no such obligation can be implied. When the contract was made the market was overstocked. But the appellants were placing this order for 1,200 tons of cement without having found a buyer for it, and it was to be delivered with a further 1,000 tons from the previous order, making 2,200 tons in all. If they were unable to dispose of it before the respondents’ next shipment arrived, their chances of disposing of it, when the market would be further stocked by the cement from the next shipment, would be considerably reduced. It seemed that the appellants desired to impose upon the respondents a contractual obligation to secure the arrival of the shipment of cement in two months’ time.

The judge held that, it was not a term of the contract that can be implied which was not necessary to the expressed contract and would manifestly have been assented to if propounded. Furthermore, in this case there being no such term as contended for the appellants, could be read into or implied from the contract and therefore the appeal must be dismissed. This is to secure the client from being trapped in the business due to dishonesty and oppressiveness.

³³ [1949] MLJ 212.

Element of Good Faith And Fair Dealing In Contract: Islamic Law

Under the Islamic law, the Prophet Muḥammad (P.B.U.H) always encouraged the Muslims to do business as it is considered a part of *'ibādah*. This can be seen from a verse of the Qur'an, *Sūrah al-Jumū'ah*: 10

فَإِذَا قُضِيَتِ الصَّلَاةُ فَانْتَشِرُوا فِي الْأَرْضِ وَابْتَغُوا
مِنْ فَضْلِ اللَّهِ وَاذْكُرُوا اللَّهَ كَثِيرًا لَعَلَّكُمْ تُفْلِحُونَ

"And when the Prayer ended, then disperse in the land and seek of Allah's bounty, and remember Allah much, that you may be successful".

Nonetheless, under the Islamic law a Muslim must be honest and fair in his business. He must shun fraud, deceit and perfidy to gain wealth from healthy sources. For example, a Muslim businessman is requested to be honest with regard to weights and should give full and exact measure as mentioned in the *Qur'an*, *Sūrah al-Shu'arā'*: 181- 182

أَوْفُوا الْكَيْلَ وَلَا تَكُونُوا مِنَ الْمُخْسِرِينَ

"Give full measure and be not of those who cause others to lose"

وَزِنُوا بِالْقِسْطَاسِ الْمُسْتَقِيمِ

"And weight with an equal balance"

Prophet Muḥammad (P.B.U.H) had approved and confirmed transactions, which do not conflict with the principle of the *Sharī'ah* and prohibited those business practices which were against the purpose and aims of the *Sharī'ah*. The prohibitions included business which involved the element of fraud or deceit, exorbitant profit or injustice to one of the contracting parties as contrary to the overriding principle of good faith and fair dealing as mentioned in the *Qur'an*, *Sūrah al-Shu'arā'*: 183

وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تَعْتُوا

فِي الْأَرْضِ مُفْسِدِينَ

“And defraud not people of their things, and commit not corruption in the earth.”

The elements of good faith and fair dealing are not new in the Islamic terminology because they are the integral part of the contract. The attributes of truthfulness, honesty, justice and righteousness are among the fundamental principles, which Islam imposes on every Muslim, in every aspect of life. Without these elements, a contract of business is regarded as lacking of perfection in accordance with Islamic good manners, decency and ethical standards.³⁴ It was clearly stated in the *Qur'ān*, generally every kinds of contract should be dealt with mutual consent including in the hire purchase contract. It is evidently clear in the *Qur'ān*, *Sūrah al-Nisā'*: 29

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ
تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ
بِكُمْ رَحِيمًا

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.”

Next, again the element of mutual consent was emphasized in the *Ḥadīth*:³⁵

لَا يَحِلُّ مَالُ امْرِئٍ مُسْلِمٍ إِلَّا بِطَبِئَةٍ
مِنْ نَفْسِهِ

It is unlawful to possess the property of a Muslim without his expressed consent.

As evident from the *Qur'ān* and *Ḥadīth*, Islam has laid down an ethical discipline in Islamic commercial transactions for the believers to follow. On the contrary, dishonest traders are blameworthy on the Day of Judgment. The Prophet (P.B.U.H) had strongly promoted generosity to purify wrongfulness, malpractices and unsuitable acts while transacting business. It was emphasized that the seller and buyer should explain the good and bad points of the transaction to gain the blessing of the Almighty in the transaction.

³⁴ Abdullah Alwi Haji Hassan, (1997), *Sales And Contracts In Early Islamic Commercial Law*, New Delhi: Kitab Bharan, p.15.

³⁵ Al-Baiḥāqī (1999), *Sunan al-Kubra*. Bayrut: Dar al-Kutub al-‘Ilmiyyah: Ḥadīth no. 11325, Vol.6, p.100.

In short, Islamic law emphasizes on Islamic good conduct, decency and ethical standards of law and morality as a part of the contract. These must be moulded together to ensure that justice is served to parties, the purchaser and the seller. Only then the objective of the *Shari'ah* can be achieved.

Disclosure Requirement and Good Faith

Generally, the requirement of disclosure is important in relation to the elements of good faith and fair dealing, where it served to satisfy the essence of the contract. The Malaysian and Islamic law recognized it as a paramount consideration as to upheld the inviolability of the contract. Under the Malaysian Law, there are some contracts which emphasize a duty on the party to exercise the good faith and fair dealing in the form of disclosure of all material facts to the contract, for example, in the contract of insurance, sale, loan and scholarship.

The main purpose of disclosure of a material fact is to guarantee that the buyer is safe from being misled by the seller in entering into contracts. Thus, the seller is not only obliged to disclose to the buyer all those facts which are in his knowledge but is also obliged to be accurate, even though the honest disclosure will stop the other party from entering into contract or cause in the lowering of the price.³⁶ Although, disclosure is not requested by the buyer but it is an obligatory under the general moral duty. The legal implication of non-disclosure will affect the contract as a whole; in a situation where failure to disclosure in the contract is treated as void resulting the defrauded party has the right to rescind or affirm the contract.

Disclosure Requirement And Good Faith : Islamic Law

Under the Islamic law, a vital element which relates to disclosure of good faith and fair dealing on contracts is the element of "non-disclosure" known as "*kitmān*".³⁷ It is described as a situation where in the absence of disclosure from the other party, misrepresentation can take place in adducing the other party to conclude the contract.

³⁶ Abdur Rahman I. Doi, (1984), *Shari'ah : The Islamic Law*, London: Ta Ha Publisher, p. 119.

³⁷ Mohd.Ali Baharum, (1988), *Misrepresentation: A Study Of English And Islamic Contract*, Al- Rahmaniah, p.122.

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The legal implication of non-disclosure will affect the contract as a whole; in a situation where failure to disclosure in the contract is treated as void resulting the defrauded party has the right to rescind or affirm the contract.

Nevertheless, non-disclosure is permitted where unimportant facts of the contract are involved and where such facts are for one party's knowledge only. Further, having knowledge of a defect in the subject matter and failing to disclose, it is not treated as a pre-requisite for granting rescission. This is because the right to rescind or affirm the contract is still available even if the seller didn't realize the defect at the time of conclusions of the contract. On the other hand, when the buyer notices a defect which he did not know before entering the contract, he has an option to rescind or affirm the contract regardless of whether the buyer had the knowledge before contract and concealed it, or had no knowledge at all.

Under the Islamic law, several conditions need to be fulfilled before exercising an option of defect known as *khiyār al-ʿayb*. First, the existence of the defect at the time of the sale, or subsequent to it but before delivery. Secondly, its existence with the purchaser after he has taken possession of the thing sold; for its existence with the seller alone is not sufficient to establish the right of return in all cases. Thirdly, ignorance on the part of the purchaser, at and prior to the sale, of the existence of the defect; for if he knew it at either time he has no option. Fourthly, the absence of any stipulation for waiving, or releasing the seller from liability for defects in the thing sold; for if there were any condition to that effect the purchaser has no option.³⁹

All schools of thought agreed that concealment of defect is a prohibited act (*haram*) and will cause the contract to be voidable.⁴⁰ The Mālikī, however, added the

³⁸ *Op.cit.*, p.119.

³⁹ *Op.cit.*, p.118.

⁴⁰ *Ibid.*

qualification that defect must be a serious one, but according to the other schools, it is enough to prove the existence of defect, regardless whether it is severe or not.⁴¹

Therefore, it is cleared from the Ḥadīth as mentioned below, why the Prophet Muhammad (P.B.U.H) put a strict punishment to the seller who did not inform the buyer about its defects.

عَنْ وَائِلَةَ بْنِ الْأَسْقَعِ قَالَ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: مَنْ بَاعَ عَيْبًا لَمْ يُبَيِّنْهُ لَمْ يُزَلْ فِي مَقْتِ اللَّهِ وَمُ تَزَلِ الْمَلَائِكَةُ تَلْعَنُهُ

*Wāthila b. al-Asqaf (Allāh be pleased with him) reported that he heard the Messenger of Allāh (PBUH) saying : He who sold defective thing and did not inform (the purchaser) about its defect, will ever remain under the anger of Allāh or (the reporter thinks that he Holy Prophet (PBUH) said: The angels curse him incessantly.*⁴²

In short, there are two types of disclosure that are important to the party; firstly, disclosure of all defects affecting the subject-matter of the contract which are in the knowledge of the other party at the time of concluding the contract. Secondly, is the disclosure of the facts in certain contracts which are regarded in Islam as an *ūberrimae fidei*". The reason behind is to preserve the inviolability of the contract, which Islam put much weight on achieving the target of the transaction.

Practical Perspective of Good Faith & Fair Dealing

From the practical aspects, it is observed that the good faith and fair dealing elements are implemented in both Islamic hire purchase contract and Conventional hire purchase contracts to curb common fraudulent practices, for example, non-existence of vehicles, non-existence of hirers or guarantors, hirers and guarantors who purportedly did not sign agreements, financed stolen goods, forged common seals and fictitious transfers.

⁴¹ *Ibid*, p. 121.

⁴² Muḥammad bin Yazīd Ibn Mājah, (n.d), *Sunan Ibn Mājah*, Vol.2, Dār al-Fiqh: Beirut, p. 755, Ḥadīth no.2247,.

In the Conventional hire purchase contracts, the HPA 1967 is thoroughly applied whereby it covers two types of goods, i.e. consumer goods and motor vehicles.⁴³ In practice, most of the hire purchase financing is on motor vehicles as compared to consumer goods.⁴⁴ This is mainly due to the facilities provided to buy consumer goods is a kind of benefit only offered to the staff of the bank or financial institution and to large companies, which have good reputation with the bank or financial institution.

In some circumstances, there are banks and financial institutions, which provide hire purchase facility on selected consumer goods, for example computers. This exclusive facility is known as a '*Blanket Hire Purchase*'.⁴⁵ This type of facility is given mainly to large and trusted companies, where the amount of goods is huge in number, for example, computers where the order reaches millions. The credit facility given is based upon the reputation of the company. It also depends on the working paper prepared by the company including information on the paid up capital, the duration of the establishment of the company and all necessary information to show that the company is stable and reliable. In this transaction, it is observed that the credit facility given requires a high standard of honesty, reasonableness and fairness.

Fair Dealing in Repossession: Conventional And Islamic Banks And Financial Institutions

Both the conventional and the Islamic banks and financial institutions appoint authorized reposessor. The main requirement of a reposessor; is that he must be a registered member of the Association of Hire Purchase Companies in Malaysia (AHPCM) and is issued with an authority card. Non-panel members may also be engaged subject to their being registered as member of AHPCM.⁴⁶

Apart from the procedures and process, there is also a Code of Ethics on Repossession⁴⁷ that the authorized repossessors need to comply with:⁴⁸

⁴³ Sect.2 of the Hire Purchase Act (Act 212).

⁴⁴ Mohd.Nor Syafii b.Sabtu (2005), interviewed by the writer, Kuala Lumpur.

⁴⁵ Badron Hisham b.Dol Kamis (2005), interviewed by the writer, Kuala Lumpur.

⁴⁶ Hire Purchase Training Manual on Credit Control by Azman Ahmad, (n.d), issued by Arab-Malaysian Finance Berhad.

⁴⁷ Bank Bumiputra Commerce Finance Berhad, (2004), Handout on the Law and Practice of Hire Purchase in Malaysia, p. 10.

⁴⁸ Code of Ethics on Repossession, (n.d), introduced by the AHPCM, the Association of Finance Companies of Malaysia and the Ministry of Domestic Trade and Consumer Affairs.

- As far as possible the number of authorized repossessioners must be minimized unless circumstances warrant any additional assistance.
 - Repossessor should only gain entry into premises with the knowledge and consent of the occupant.
 - Repossessor should be well mannered and decently dressed. They should ensure the practice of professionalism and dignity in carrying out their work.
 - The use of ‘strong arm tactic’ of any kind is strictly prohibited in the performance of their work.
-
- At the time of repossession, the repossessioner should give a standard notice to the hirer informing him of the following:
 - The address and telephone number of the finance company and the authorized officers he can contact immediately to resolve any problems.
 - The repossessioner must give a reasonable time to the hirer to inspect the vehicle and remove his personal items and belongings.
 - As far as possible repossession should be undertaken in the presence of the hirer or any person authorized to that vehicle.
 - Repossessor should at all time act in accordance with the laws and regulations in the performance of their work.

From the above exposition, it is clear that the repossessioner must exercise fair dealing in execution of his duties.

Good Faith and Fair Dealing elements in Hire Purchase Contract (Motor vehicles)

In order to discuss the implementation of the good faith and fair dealing elements in hire purchase contracts, the writer look into contract of motor vehicles as it is the most common type of financing which involved hire purchase contracts.⁴⁹

Hire Purchase Contract for motor vehicle

For the **first hand vehicle**, the presumption applied is that the vehicle is free from any defect or flaw. Even if defects occur not by reason of misuse but because the vehicle itself defects, the vehicle is still guaranteed by the warranty valid for 2 years as provided by the vehicle manufacturer.⁵⁰ The implication here is that the vehicle manufacturer

⁴⁹ *Op.cit*, n.45

⁵⁰ *Ibid.*

must exercise good faith and fair dealing in its business transaction to ensure that the product is guaranteed and the quality is maintained.

For second hand vehicle or used vehicle, the said vehicle needs to be inspected by PUSPAKOM⁵¹ to ensure that it is in a good condition and to reduce risks such as jointed car. PUSPAKOM will confirm whether the registration card and the vehicle are genuine or not and the report will also be sent to the bank or financial institution for loan approval. In the Hire Purchase Agreement, it is stated that the customer should know the status of the car. Everything must be transparent in the Hire Purchase Agreement. In short, the customer possess the elemetof good faith and fair dealing to conduct a fair dealing transaction to thebank or financial institution.

Observation on the Practical Aspect

It is important that preventive measures be taken to curb fraudulent. It is suggested that more stringent practices in processing and loan disbursement be carried out including the verification of information in the application form through indirect questions as one of the strategies. Original document must be verified and sufficient documents to support the application must be submitted. During the communication, the bank officer concerned should always be alert during the communication with the customer and make CTOS, FIS, CCRIS and CDIS checking mandatory.⁵²

It is advisable that a subdivision of duties be implemented among the officers so that no one person should handle a transaction from beginning to end to prevent abuse of power or position. As physical inspection of vehicles is mandatory to ensure the vehicle in a good condition, it is submitted that a regular assessment and review of Jabatan Pengangkutan Jalan (JPJ) Runner, must be reviewed regularly. Any exceptional findings provided by the FIS unit on JPJ random checks must be investigated thoroughly. It is important that brokers performances be constantly monitored.⁵³

⁵¹ *Core service*: Initial Inspection : Inspection to determine vehicle status before registration with the Road Transport Department or before transfer of ownership for commercial, Routine inspections: routine half yearly checks to gauge roadworthiness of commercial vehicle and ensure compliance with Road Transport Act 1987, Re-Inspection: to be conducted after failed initial or routine inspection, Special Inspection: to determine the roadworthiness of modified vehicles as well as verification of imported vehicles and Accident Inspection : in aid of police investigation of fatal accidents involving vehicles.

⁵² *Ibid.*

⁵³ *Ibid.*

Another factors, that is equally important is recruitment and training where the key control features at recruitment level should include screening character references and past employment records. On the part of the staff, it is worthy to have regular trainings to equip them with the up-to-date knowledge and skills so that they would be competent and well-versed in their jobs. The duties of the staff should also be rotated; the supervising staff must ensure that the existing guidelines and internal procedures are strictly adhered to.⁵⁴

Internal control should be constantly reviewed to ensure its effectiveness. It is further noted that, no internal control will work without the effective enforcement by the supervisory staff. Hence, firm and punitive actions should be taken against those staff who has compromised their positions including police reports.

It is observed that disclosure is an important element in ensuring that the hire purchase contract is concluded in good faith and fair dealing. Thus, a transaction is not dealt with good faith and fair dealing when weak controls, inadequate and ineffective supervision exist. Nevertheless, a strong system of internal control alone may not eliminate the commission of *mala fide*; there must be constant self-appraisal along the way to minimize the incidence of malpractices. From the stage of application, the process of obtaining and rechecking the information given by the customers until the final settlement of the payment appears to be well prepared. Even though in the case of repossession certain criteria must be complied with to ensure that the noble attributes of honesty, fairness and reasonableness are upheld.

Suggestion and Proposal

Some of the provisions of the Hire Purchase Act 1967 (Act 212) & Regulations Guideline clauses are considered rigid by the banks and financial institutions. It was commented that Bank Negara Malaysia should give more emphasize on the Islamic products because the advantages are more acceptable as mentioned earlier.

On the whole, as Malaysia pursues towards the status of a fair and reliable country, Islamic products should be actively imbued into the banking system steadily and surely replacing the conventional banking products which cause unfairness, injustice and oppression on the society at large. It is hereby recommended; only one Hire Purchase Act should be offered in the market, one that comprehensively covers both the Conventional and Islamic Hire Purchase transactions.

⁵⁴ *Op.cit.*, n.45

It is proposed that prospective buyers and customers in hire purchase transactions should consider the following aspects before entering a hire purchase contract:

- Firstly, before a customer enters into a hire purchase agreement, he needs to check his own financial capability. This means that he has to plan his financial expenditure and avoid repossession of his assets by the owner.
- Secondly, before signing the agreement, the hirer must read all the terms and conditions contained therein. It is provided by the legal maxim *ignorantia juris non excusat* which means ignorance in law is no excuse, implying that there is no defense against criminal or other proceedings arising from its breach.⁵⁵

It is also suggested that the HPA should introduce a provision which states that the front page of the contractual document shall contain in large conspicuous print a warning admonishing the hirer to read the document before signing. Should the hirer has any difficulty understanding the legal jargon or the language used, he should ask for help from other in qualified persons.

Conclusion

It is submitted that good faith and fair dealing are two crucial elements in the Hire Purchase contracts both in the Conventional and Islamic systems. This is because the attributes of honesty, reasonableness and fairness, the underlying principles in every distinct of hire purchase contract, connote the notion of fair dealing transactions whereby the contract's inviolability is performed to satisfy the demand of the parties in the contract. Despite the differences in terminology and legal structure, both are based on the same foundation of fairness and common sense.

Nonetheless, the recognition of these two elements differs from one jurisdiction to another jurisdiction due to the historical background and economic stability. It is observed that even though the HPA is silent on the elements of good faith and fair dealing, the court treats them as paramount considerations in enforcing a valid contract of hire purchase. This can be seen in the procedures of entering a hire purchase contract.

One main observation, which can be seen when comparison is made between the conventional and Islamic practices of hire purchase in Malaysia, is the elements of

⁵⁵ *Op.cit.*, n.26, p. 240.

good faith and fair dealing are enforced through the duty of disclosure. It is obligatory for contractual parties to disclose all relevant facts which they have knowledge.

In the documentation process, the disclosure requirement is applied in the standard form whereby a few sections had to be fulfilled with utmost good faith, for example descriptions of goods; effective date of agreement; the address where the goods under hire purchase are kept; cash price of the goods; deposit (not less than 10% of the cash price); freight charge (if any); vehicle registration fee; term charges; table of payment; description of consideration provided other than cash; the annual percentage rate for term charges; balance originally payable; total amount payable; the number of installments and the amount of each installments; the time, place and the person to whom the installments is to be paid; name and address of hirer and owner; and signatures of hirer and owner.

Non-disclosure of the aforementioned particulars means the bank or financial institution could not process the form. This is because the bank or the financial institution relies heavily on the information given by the customer before verifying it. The checking systems used by the banks and financial institutions to ensure the reliability of the information given by the customer are the Credit Tip Off System (CTOS); the Financial Information System (FIS); the Central Credit Information System (CCRIS); and the Credit Data Information System (CDIS).

During the repossession, the bank or financial institution must first issue an order directly to the customer or buyer and may only execute its rights within the ambit of the jurisdiction conferred by the Association of Hire Purchase Companies in Malaysia (AHPCM).

Hence, it can be seen that the element of Good Faith and Fair Dealing is important and clearly emphasized in both Islamic and Conventional hire purchase transaction.