



# Inadequacy of Consumer Protection from Unfair Contract Terms in *Musharakah Mutanaqisah* Home Financing In Malaysia

Syuhaeda Aeni Mat Ali<sup>a</sup>, Rusni Hassan<sup>b\*</sup> and Ahmad Azam Othman<sup>c</sup>

<sup>a</sup> Universiti Teknologi Mara, Shah Alam

<sup>b</sup> IIUM Institute of Islamic Banking and Finance (IIiBF)

<sup>a,c</sup> Ahmad Ibrahim Kulliyah of Laws, IIUM

\*Corresponding author: hrusni@iium.edu.my

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## Abstract

*Musharakah Mutanaqisah* is one of the Islamic home financing products which has gained popular demand from the public in Malaysia. However, the terms and conditions of legal documentation of *Musharakah Mutanaqisah* Home Financing which were usually prepared by solicitors for Islamic financing institutions (“IFIs”) may have affected the welfare of consumers especially when most of the terms and conditions of legal documentations favoured the IFIs. In these circumstances, the consumers have no choice but to abide by the terms stipulated by the IFIs. This paper examines the adequacy of present legislation in Malaysia namely Islamic Financial Services Act 2013, Financial Services Act 2013, *Shariah* Standard and Guidelines: Prohibited Business Conduct policy, Consumer Protection Act 1999, Consumer Protection (Amendment) Act 2010 and the Contracts Act 1950 relating to unfair terms of contract in *Musharakah Mutanaqisah* Home Financing. The methodology adopted in this paper is statutory analysis whereby the relevant legislation are analysed. The analysis reveals that the legislation are not sufficient to regulate unfair terms of contract in *Musharakah Mutanaqisah* Home Financing in Malaysia. To ensure the protection of the consumers in *Musharakah Mutanaqisah* Home Financing, this paper recommends the present legislation, particularly Consumer Protection Act 1999 and Contracts Act 1950 be reformed.

Keywords: *Musharakah Mutanaqisah* Home Financing, reform, legislation, standard form of contract.

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## 1. Introduction

The growth of Islamic finance in the recent decade is phenomenal. *Musharakah Mutanaqisah* being one of the predominant Islamic home financing contracts in Malaysia was first offered by Kuwait Finance House (Malaysia) Berhad in 2006 (Osmani and Abdullah, 2010). It was then extended to other local and foreign Islamic financial institutions (“IFIs”) in Malaysia such as RHB Islamic Bank Berhad (Shuib, Tomkin, and Md. Hussein, 2011), Citibank Malaysia, Shuib, Tomkin, and Abu Bakar, 2011), Maybank Islamic,<sup>1</sup> OCBC Al Amin Bank<sup>2</sup>, Standard Chartered *Sadiq* Islamic Bank,<sup>3</sup> Affin Islamic Bank Berhad<sup>4</sup> HSBC Amanah Malaysia Berhad (Lung, 2013) and Public Islamic Bank Berhad.<sup>5</sup> *Musharakah*

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<sup>1</sup> [http://www.maybank2u.com.my/mbb\\_info/m2u/](http://www.maybank2u.com.my/mbb_info/m2u/)

<sup>2</sup> <http://bernama.com/finance/news.php?id=457278>

<sup>3</sup> <https://www.sc.com/my/sadiq/myhomeone-i.html>

<sup>4</sup> <http://www.affinislamic.com.my/Business-Banking/Financings/Term-Financing-i/Musharakah-Mutanaqisah-Term-Financing-i.aspx>

<sup>5</sup> [http://www.publicislamicbank.com.my/pibb/en/en\\_content/personal/term.html](http://www.publicislamicbank.com.my/pibb/en/en_content/personal/term.html)

*Mutanaqisah* Home Financing product has been suggested by various studies to be a better alternative to *Al- Bai Bithamin Ajil*. (Meera and Abdul Razak, 2009)<sup>6</sup>. The practice of *Musharakah Mutanaqisah* home financing by Islamic financial institutions ('IFIs') involves various legal documentation. These legal documentations are usually unilaterally drawn up by the solicitors for Islamic financial institutions. It is also known as standard form contracts. According to Edwin (2005) such contracts have become a popular mode of transacting as they promote efficiency because of the high volume of transactions struck on a daily basis. The predicament is still that the standard form contract can be abused, as it restricts the other's rights i.e. the customer is unable, due to the lack of time or skills, to understand the nature of the terms (Beale, 1978). Thus, these contracts which have a very 'take it or leave it' attitude towards consumers, serve as fixed term which they are to sign and subsequently to be bound by these contracts. The terms contained in *Musharakah Mutanaqisah* home financing contracts such as '*compulsory purchase imposes on the customer in the event of default*', '*unequal bargain position in the case of stamp duty and taxes payment and exclusion of IFIs liability from occupier's liability and environmental liabilities*' in *Musharakah Mutanaqisah* home financing contracts may turn out to be unfair and burdensome which result in the customer suffering the consequences of such terms upon signature. In these situation, the customer has no choice but to abide by the terms stipulated by the IFIs. Admittedly, the IFIs are in stronger bargaining power as compared to a customer, being the weaker party in these contracts (Kessler, 1943). It is apparent that some of the terms in these standard form of *Musharakah Mutanaqisah* contracts may be unfair to customers. Any inequity or unjust act or conducts are never tolerated in *Shariah* jurisprudence. Hence, the protection for the public or customer is necessary.

Therefore, this paper examines the adequacy of the present legislation in Malaysia relating to unfair terms of contract in *Musharakah Mutanaqisah* Home Financing. The methodology adopted in this paper is statutory analysis whereby the relevant legislation are analysed.

## **2. Consumer Protection on Unfair Terms of Contract *Musharakah Mutanaqisah*: Legislative Analysis**

### *1) Islamic Financial Services Act 2013 and Financial Services Act 2013*

Both Islamic Financial Services Act 2013 ("IFSA 2013") and Financial Services Act 2013 ("FSA 2013") provides specific provisions on the consumer protection.<sup>7</sup> Among the protection that can be seen in IFSA 2013 is the restriction on use of certain words to prevent misleading to the consumer. Both Acts place much emphasis on ethical business conduct and consumer protection by empowering Bank Negara Malaysia ("BNM") to specify standards of business conduct to ensure that the financial institution is fair and responsible when dealing with consumers.<sup>8</sup> These standards include fairness of terms in a financial consumer contract for financial services or products, transparency and disclosure requirements including the provision of information to consumers that is accurate, clear, timely and not misleading.<sup>9</sup> Therefore, the IFIs which offer *Musharakah Mutanaqisah* Home Financing are to observe the above business conduct standards as prescribed by these Acts.

Furthermore, both Acts prohibit a financial service provider from engaging in any business conduct which is deemed to be inherently unfair to financial consumers.<sup>10</sup> Such prohibited business conduct is set out in Schedule 7 of both Acts. Examples of prohibited business conduct include misleading and deceptive information in connection with a financial service or product, exerting undue pressure in relation to the provision of any financial service, demanding payments from a financial consumer for unsolicited financial services or colluding with any other person to fix or control the features or terms of any financial

<sup>6</sup> See: Zainal Abidin, Md Nassir and Khoderun (n.d), Azahari (2009), and Mohammed (2008).

<sup>7</sup> Section 147 – 151 of IFSA 2013 and Section 135 – 139 of FSA 2013

<sup>8</sup> Section 135 of IFSA 2013 and Section 123 of FSA 2013

<sup>9</sup> Section 135(2)(a)(b) of IFSA 2013 and Section 123(2) (a)(b) of FSA

<sup>10</sup> Section 136 of the IFSA 2013 and Section 124 of the FSA 2013

service or product to the detriment of a financial consumer, other than any tariff or premium rates or policy terms which have been approved by BNM. Likewise the IFIs in *Musharakah Mutanaqisah* Home Financing are prohibited from engaging in any business conduct which is deemed to be inherently unfair to financial consumers.

This paper submits that despite the fact that both IFSA 2013 and FSA 2013 give emphasis to consumer protection against any unfair trade or conduct of the financial institutions, however, being regulatory laws in nature, both Acts are more towards regulating the financial institution in terms of its administration and governance. Thus, the issue of unfair contract terms particularly in *Musharakah Mutanaqisah* home financing is not specifically dealt with therein.

## 2) Shariah Standards and Guidelines

*Shariah* standards and guidelines refer to published rulings of the SAC of BNM. These *Shariah* Standards are issued pursuant to power granted by Section 52 of Central Bank of Malaysia Act 2009 which have been reinforced by both Section 29 of IFSA 2013 and Section 15(2) of FSA 2013. Therefore, BNM may issue *Shariah* standards in consultation with the SAC of BNM.

*Shariah* standards and guidelines which are relevant for consumer protection in *Musharakah Mutanaqisah* Home Financing in Malaysia are as follows:-

### a) *The Concept Paper of Musharakah*<sup>11</sup>

The Concept Paper of *Musharakah* requires IFIs to ensure fairness in the contract terms at all times including any amendments to the terms during renegotiation or extension of tenure.<sup>12</sup> This policy document outlines key operational requirements governing the implementation of *Musharakah* that are in line with *Shariah* to ensure sound financial practices and consumer protection throughout the life cycle of *Musharakah*. Hence, the IFI is required to establish policies and procedures on proper consumer and market conduct to ensure *Musharakah* venture is conducted in a fair, transparent and responsible manner, in line with *Shariah* requirements.<sup>13</sup> In this regard, IFI shall ensure sufficient effort have been given in facilitating the contracting parties' understanding of the concept of *Musharakah* contract.<sup>14</sup> At the point of entering the contract, the IFI shall disclose salient features of the *Musharakah* in legal documentations to facilitate the contracting parties' in understanding the terms and conditions of the *Musharakah* contract.<sup>15</sup> Similarly, these requirements are applicable to the IFIs in *Musharakah Mutanaqisah* Home Financing to guarantee consumer protection. However, unfairness of the terms of contract is also not covered by this concept paper of *Musharakah*.

### b) Policy document of Prohibited Business Conduct

Policy document of Prohibited Business Conduct ("PBC policy document") complements and reinforces Schedule 7 of the FSA and IFSA 2013 by providing guidance on descriptions of prohibited business conduct as set out in the said Schedule 7.

<sup>11</sup> Concept Paper on *Shariah* Requirements, Optional Practices and Operational Requirements of *Musharakah*

<sup>12</sup> S26.5 of Concept Paper of *Musharakah*

<sup>13</sup> S26.1 of Concept Paper of *Musharakah*

<sup>14</sup> S26.7 of Concept Paper of *Musharakah*

<sup>15</sup> S26.8 of Concept Paper of *Musharakah*

PBC policy listed prohibited business conduct which provides as follows:-

12.1 An Financial Service Provider (hereinafter referred to “FSP”) will be regarded to be engaging in prohibited business conduct if it colludes in a way that impacts financial consumers negatively, whether financially or non-financially. For the purpose of paragraph 6 of Schedule 7, collusion is a contract, arrangement or understanding, whether or not legally enforceable, between an FSP and any other person, including any association, another FSP, or any individual. The features or terms of any financial service or product include, among others, interest/financing rates or premium/contribution rates.

Based on the above provision, colluding refers to contract or arrangement between IFI and other person to fix terms that caused disadvantage to the customers such as financing rates or premium/contribution rates would amount to prohibited business conduct.

PBC policy further provides guideline in determining collusive practice that detrimental to financial consumer as follows:

12.2 In determining whether an FSP is engaging in collusive practices that are detrimental to financial consumers, consideration will be given to the net benefits of the arrangement to financial consumers. An arrangement that results in significant benefits to financial consumers that could not be achieved otherwise may not be considered as prohibited business conduct. For example, the standardisation of common terms and definitions used in contracts or agreements that helps financial consumers compare similar products across different providers or which improves processing efficiency without impinging on the ability of an FSP to determine its own rates, features or terms of a financial service or product would not be considered a prohibited business conduct. Similarly, the pooling of industry resources to provide a specific financial service or product to financial consumers which could not be reasonably provided by individual FSPs is not regarded as prohibited business conduct.

The above provision gives consideration to the net benefits of the arrangement to consumers to determine whether it amounts to prohibited business conduct. For instance, the standardization of common terms and definitions used in contracts is not considered as prohibited business conduct as it helps consumers to compare similar products between IFIs or improves processing efficiency without encroaching on the ability of an IFI to determine its own rates, features or terms of a financial service or product. Therefore, it can be inferred that the IFI’s right to determine its own terms of a financial service or product is protected under the said policy. Based on the above provisions, this paper submits that unfairness of the terms of contract is also not covered by PBC policy. This is understandable as the policy is not centered on consumer protection relating to unfairness of terms of the standard form of the contract.

### **3) Consumer Protection (Amendment) Act 2010<sup>16</sup>**

Prior to the introduction of Consumer Protection (Amendment) Act 2010 (‘CPA (Amendment) Act 2010’) which serves as an amendment to the Consumer Protection Act 1999 (‘CPA 1999’), there was no specific legislation regulating unfairness of consumer contract terms in Malaysia. There is no legislation equivalent to the United Kingdom’s Unfair Contract Terms Act 1977 (UCTA) that afforded protection against unreasonably unfair exclusion clauses, and the Unfair Terms in Consumer Contract Regulations 1999 provided protection to consumer against contractual unfairness and oppression in consumer

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<sup>16</sup> The Consumer Protection Act 1999 (‘CPA 2009’) was amended in 2010 by the Consumer Protection (Amendment) Act 2010 (CPA (Amendment) Act 2010) which inserted into the Act Part IIIA entitled ‘Unfair Contract Terms.’ The CPA (Amendment) Act 2010 was gazetted on 1 February 2011.

contracts (Trakic, 2016). Subsequently, in 2015, the UCTA and the Regulations 1999 were replaced with Consumer Rights Act 2015.

After the introduction of CPA (Amendment) Act 2010, there are several provisions that deal with consumer protection relating to unfair contract terms. Among others are Section 24A of CPA (Amendment) Act 2010 that deals with general interpretation in connection with the Part. ‘Standard form contract’ is defined as ‘*a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry*’.

The relevant provision also defines an “unfair term” as ‘a term in a consumer contract which, having regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer.’<sup>17</sup> The CPA (Amendment) 2010 also provides the effects of unfair term whereby the court may declare it to be “unenforceable or void”.<sup>18</sup> Alternatively, the court may exercise its power to sever the offending term if the remaining terms of the contract can stand without the unfair term.

Furthermore, it can be deduced that an unfair term is classified into two namely “procedural fairness” and “substantive fairness”.<sup>19</sup> “Procedural unfairness” refers to the process of creating a contract between the supplier and the consumer which has resulted in an unjust disadvantage to the consumer. “Substantive unfairness”, on the other hand, relates to the content of the contract, where a contract would be considered substantially unfair if it is harsh, oppressive, unconscionable, or excludes or restricts liability for negligence or for breach of contract.

However, the preamble of the Consumer Protection Act 1999 states that the Act provides for the protection of consumers only. On the contrary, Section 24B of CPA (Amendment) Act 2010 states that the provisions of unfair contract terms shall apply to all contracts. It is apparent that CPA (Amendment) Act 2010 fails to appreciate the limited application of the CPA 1999. Section 2(4) of the CPA 1999 reads as follows:

The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations

Despite the fact that Section 24B states ‘*the provisions of this Part shall apply to all contracts*’, it is obviously confined to consumer contracts based on the very purpose of the introduction of the CPA 2009 to protect consumers only. However, it is unclear whether Part IIIA applies to all types of consumer contracts or if it is just confined to matters within the ambit of the CPA 2009.

Therefore, it is pertinent to identify whether *Musharakah Mutanaqisah* Home Financing is a consumer contract which is protected under the CPA 1999.

Section 3(1) of CPA 1999 defines consumer as:

any person who acquires goods and services for personal, domestic or household use. This definition does not apply to any person acquires goods and services for commercial use such as trade, manufacturing for trade or consumption for trade purposes.

A customer in *Musharakah Mutanaqisah* Home Financing usually acquires house for personal or domestic use. However, to qualify himself as ‘consumer’ in the above provision, it is imperative to identify whether house or home financing comes within the meaning of either ‘goods or services’ under the CPA 1999.

<sup>17</sup> Section 24A(c) of CPA (Amendment) 2010

<sup>18</sup> s. 24A of CPA (Amendment) 2010

<sup>19</sup> Sections 24C and 24D of CPA (Amendment) 2010

Section 2 of CPA 1999 defines 'goods' follows:

"goods means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes:

- (a) goods attached to, or incorporated in, any real or personal property;
- (b) animals, including fish;
- (c) vessels and vehicles;
- (d) utilities; and
- (e) trees, plants and crops whether on, under or attached to land or not, but does not include choses in action, including negotiable instruments, shares, debentures and money;"

From the above definition, it is obvious that a house does not fall within the definition of 'goods' within the meaning of the Act. Meanwhile, the word 'services' is broadly defined in s. 3(1) of CPA 1999 to include '*any rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of services*'. The definition generally refers to a pure service contract which does not result in any tangible products, such as laundry, parking, entertainment, recreation etc (Amin, 2004).

However, it is apparent that Section 2(2) (d) of CPA 2009 does not apply '*in relation to land or interest in land*'.<sup>20</sup> Thus, a person who buys a finished house from a developer which is defective due to poor workmanship has no remedy under the CPA 1999 due to the fact that their relationship relates to land or interest in land especially in the form of transfer of ownership (Amin, 2004). It has been argued that this exclusion does not extend to an installer, repairer or builder who is called by a consumer to do home repairs or improvements because such services do not involve the creation or disposal of an interest in land (Amin, 2004). However, it has been argued that the definition of services does not provide readily ascertainable types of services within its ambit but may widely be interpreted to cover banking services (Amin, 2004).

Based on the above discussion, this paper submits that the meaning of 'services' does not include banking service of *Musharakah Mutanaqisah* home financing as it is evident that the CPA 1999 does not apply '*in relation to land or interest in land*'. On the contrary, house or home financing is the main subject matter of *Musharakah Mutanaqisah*. Thus, this paper concludes that *Musharakah Mutanaqisah* Home financing is neither 'goods' nor 'services' within the meaning of consumer contract, hence it is not governed by CPA 1999 and CPA (Amendment) Act 2010.

Notwithstanding the introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010 has to some extent resolved the problems associated with the use of unfair terms in consumer contracts in Malaysia. However, it is unfortunate that the Act is not applicable to consumer contract of *Musharakah Mutanaqisah* home financing. Hence, the protection from unfair terms of contract as provided by the Consumer Protection (Amendment) Act 2010 is unavailable against *Musharakah Mutanaqisah* home financing.

#### 4) Contracts Act 1950

The Contracts Act 1950 ("CA 1950") is a statute of general application which governs the contractual relations in Malaysia. Section 2(h) of the CA 1950 defined contract as "*an agreement which is enforceable by law.*"

The CA 1950 contains no provision on standard form. It is also silent on contractual unfairness. According to Nik Ramlah Mahmood (1993):

<sup>20</sup> See Section 2(2) (d) of CPA 1999 (2) This Act shall not apply :-(d) in relation to land or interests in land except as may be expressly provided in this Act. See also Naemah Amin, *Guarantees In a Contract of Supply of Services to Consumers* [2004] 5 CLJ ix

The Contracts Act 1950 attempts to codify only the basic principles of contract law. As such it does not have specific provisions dealing with contents or the terms of a contract. Hence no mention is made of clauses which limit or even exclude one party's liability, clauses which incorporate terms in other documents into the contract ... It is perhaps for this reason that the Malaysian Judiciary has, hitherto, upheld the validity of clauses that seem to be unfair to consumers.

It is obvious that the CA 1950 is not consumer protection oriented (Issa, Abdul Aziz and Yusoff, 2011). Therefore, the issue to be determined is whether the CA 1950 is sufficient to deal with unfair terms of contract in *Musharakah Mutanaqisah* home financing. Thus, the pertinent part to be analysed are in relation to the doctrine of free consent and unequal bargaining power.

### ***Free consent and unequal bargaining power***

Under the law of contract, all agreements are contracts if they are made by the free consent of parties competent to contract. Consent is deemed "free" when it is not caused by coercion, undue influence, fraud, misrepresentation, and mistake. The issue arises on the standard form contracts whereby the terms being "dictated" that there is a lack of negotiation, and this raises the question of whether there has been "free consent" in such a contract.<sup>21</sup> It is obvious that a contract entered into where one party with no real bargaining power is confronted with a "take-it-or-leave-it" situation cannot be said to be arrived at by free consent.

Thus, the issue arises whether unequal bargaining position would vitiate free consent? The case laws indicated the fact that parties merely in unequal bargaining position would not amount to harshness and unconscionable transaction. This is illustrated in the case of *Alec Lobb (Garages) Ltd. v. Total Oil GB Ltd*<sup>22</sup> where England Court of Appeal held that :-

Where one party had acted extortionately, oppressively or coercively towards the other, the court would in fairness set aside a transaction so made. However, a transaction was not rendered harsh or unconscionable merely because the parties were of unequal bargaining power and the stronger party had not shown that the terms of agreement were fair, just and reasonable. Furthermore, a transaction was not unconscionable merely because a party was forced by economic necessity to make it. On the facts, although the plaintiffs had no realistic alternative, no pressure had been exerted on them by the defendant, which was reluctant to enter into the transaction, and furthermore the plaintiffs themselves had sought the defendant's assistance to avert financial collapse and had sought the prior advice of their solicitors and accountant, which they had chosen to ignore. Accordingly, the judge had been right to find that the defendant's conduct was not unconscionable or oppressive...

Similarly, in *Pengiran Othman Shah bin Pengiran Mohd Yusof & Anor v. Karambunai Resorts Sdn. Bhd.* (formerly known as *Lipkland (Sabah) Sdn. Bhd.*) & Ors<sup>23</sup> the Appellants inherited substantial tracts of land in Karambunai, Sabah. They contended that they had been unduly influenced to part with the main bulk of their land on the grounds that they had no independent legal advice when they executed the various documents and also they were placed in an unequal bargaining power. However, the Court of Appeal found that the Appellants had executed the documents freely and without protest.

Likewise, in *RHB Bank Bhd v Lim Boon Huat*,<sup>24</sup> the Defendant contended that they were placed in unequal bargaining power when they signed the agreement of repayment of debt. The reason was that they

<sup>21</sup> Cohen, Morris, R. "The Basis of Contract." *Harvard Law Review* 46 (1933): pp 575-78).

<sup>22</sup> [1985] 1 All E R303

<sup>23</sup> [1996] 1 CLJ 257; [1996] 1 MLJ 309)

<sup>24</sup> [2013] 3 CLJ 1235

were deprived of opportunity to obtain legal advice prior to signing. However, the High Court held since the Defendant has failed to prove the existence of coercion under Section 15 of the CA 1950, hence, the agreement was valid and enforceable.

It is evident that the decided cases in Malaysia indicate generally that the courts were reluctant to interfere with the contract entered on the ground of unequal bargaining power between parties. They argued that any interference with the content of 'freely' concluded contract would be tantamount to re-writing of contract on behalf of the parties.<sup>25</sup>

### ***Doctrine of inequality of bargaining power and unconscionability***

In *Saad Marwi v. Chan Hwan Hua & Anor.*<sup>26</sup> the issue before the Court of Appeal was whether the doctrine of inequality of bargaining power, falling short of undue influence, was recognised in Malaysian jurisprudence. Gopal Sri Ram JCA recognised the applicability of the doctrine of inequality of bargaining power in Malaysia and in adopting the English doctrine of unconscionability and applying it in a broad and liberal way as in Canada, hence, has brought Malaysian law nearer to the common law jurisprudence on the doctrine of unconscionability.<sup>27</sup> Furthermore, The Court of Appeal noted that the Canadian courts "appear to favour a more general doctrine of unconscionability in terms wider than that entertained in England".<sup>28</sup> The Court cited *Paris v Machnick* as a case demonstrating the flexibility of Canadian equity in the remedial field (Trakic, 2016). In this case, an illiterate farmer sold her farm worth \$9000 for \$2500. Hart J upheld the Plaintiff's claim of unconscionability on the ground of illiteracy. However, he ordered the payment of additional compensation in lieu of rescission.<sup>29</sup>

It is evident that while there is no statutory provision that provides for the unconscionability or inequality of bargaining power for contracts in general, the matter is left for the judiciary. The Court of Appeal in *Saad Marwi's* case has adopted the doctrine of unconscionability to overcome situations of inequality of bargaining positions in Malaysia (Fong, 2005)

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<sup>25</sup> Adnan Trakic, *The Inequality of Bargaining Power: Does Malaysia Need This Doctrine?* Australian Journal of Asian Law, 2016, Vol 17 No 1, Article 2: 1-19

<sup>26</sup> [2001] 3 CLJ 98

<sup>27</sup> See generally, A H Angelo & E P Ellinger, "Unconscionable Contracts: A Comparative Study" (1979) 4 Otago L Rev 301-339; Steven R Enman, "Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law" (1987) 16 Anglo-Am LR 191-219.

<sup>28</sup> *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ at p 108. The position in Canada regarding the doctrine of inequality of bargaining power which the Court of Appeal referred to in *Saad Bin Marwi* is summed up in Professor Waddam's *The Law of Contracts* 2nd Edn. pp 382-4 as being this: "*any situation which results in the weaker party being 'overmatched and overreached' will qualify for relief if the stronger party secures an immoderate gain*". Where such a situation obtains, the result is that the agreement is an unconscionable bargain and, as such, unenforceable at common law or in equity.

<sup>29</sup> After referring to the Canadian cases, the Court of Appeal in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ98 also cited the book by S M Waddams that "[t]he factors held to indicate the necessary inequality include old age, emotional distress, alcoholism and lack of business experience. It appears that any situation that results in the weaker party's being 'overmatched and overreached' will qualify for relief if the stronger party secures an immoderate gain." (*The Law of Contracts* (Toronto: Canada Law Book Inc, 2nd ed, 1984) at pp 382-384) The Court of Appeal further concluded that the Indian authorities appear to interpret the section as housing a doctrine of inequality of bargaining power but that there must be some objective unfairness in the bargain, some oppression or victimisation that can be garnered from the circumstances existing at the time the agreement is made. See Cheong May Fong, *A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After Saad Marwi?*[2005] 4 MLJ i

On the contrary, the Court of Appeal decided in *American International Assurance Co Ltd v Koh Yen Bee*<sup>30</sup> where Abdul Hamid Mohamad JCA stated:

We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provision of s 14 of the Contracts Act 1950 which only recognizes coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent. Secondly, the restrictive wording of s 3(1) of the Civil Law Act 1956, in particular, the opening words of that subsection, the cut-off date and the proviso thereto. Thirdly, the fact that the court by introducing such principles is in effect 'legislating' on substantive law with retrospective effect. Fourthly, the uncertainty of the law that it may cause.<sup>31</sup>

However, it is pertinent that having expressed the above doubts, Abdul Hamid Mohamad JCA continued as follows:

Be that as it may, there is a lot to be said for the decision of this court in *Saad* in view of the facts therein and the justice that the court should do. *Saad* is a very clear case where a farmer... [the facts of the case was summarized] The facts of that case clearly support such a decision if justice were to prevail. The facts of this case is nowhere similar to the facts in *Saad*. Here the respondent was an insurance agent. The contract was perfectly understood by her. It was not a one-off contract, but was subsisting for about ten years and there was no complaint by her of the terms thereof. The clause which is now challenged is applicable to both parties. If it is not unconscionable to the appellant if she exercises that right, why should it be unconscionable to her when the appellant exercises that same right? In this kind of case, we think that the court should be slow to interfere with the freedom of the parties to contract unless it is contrary to the clear provisions of the law, in this case, in particular the Contracts Act 1950.<sup>32</sup>

It is argued that *American International Assurance Co Ltd v Koh Yen Bee* has rejected the decision in *Saad Marwi's* case (Fong, 2005). The Court emphasized on the freedom of contract between parties unless it is contrary to the law.

However, the judicial trend shows that the principle of *Saad Marwi* are adopted in subsequent cases. In *Standard Chartered Bank Malaysia Bhd v. Foreswood Industries Sdn Bhd & Anor*,<sup>33</sup> the learned Clement Skinner J said:

... To render a transaction as being unfair and unconscionable there must be some evidence of victimisation or taking advantage of another's weakness or of actual or constructive fraud or other circumstances that will lead the court to come to that conclusion.

Similarly, in *Low Sook Yee v. Galaxy Music Sdn Bhd*<sup>34</sup> the High Court held that whether or not "unconscionability" had been made out is largely dependent on the facts of each case. In every case where "unconscionability" was made out, there would always be an element of unfairness or some form of

<sup>30</sup> [2002] 4 MLJ 301.

<sup>31</sup> [2002] 4 MLJ 301. At p 319 (emphasis added).

<sup>32</sup> *American International Assurance Co Ltd v Koh Yen Bee* At pp 319-320.

<sup>33</sup> [2004]6 CLJ 320

<sup>34</sup> [2013] 7 CLJ

conduct which appears to be performed in bad faith. On the facts, there was an element of unfairness on the part of the defendant. The defendant has taken advantage of the Plaintiff and the evidence clearly pointed out that there was a gross unfairness and unequal bargaining powers.

Based on the above discussions, it is evident that the courts are starting to become more proactive in the interest of justice. At present, there is judicial trends that adopt doctrine of unconscionability transaction in Malaysia due to *lacuna* of law.

### 3. Recommendations

With regard to the above issue of inadequacy of consumer protections from unfair contract terms in *Musharakah Mutanaqisah* home financing in Malaysia, several recommendations by various literatures can be adopted to fill the gap on unfair terms of contract. Firstly, amending the Contracts Act 1950 by adding provision(s) on standard form consumer contracts (Aziz and Yusoff, 2010). Secondly, by incorporating the doctrine of unconscionability in the Contracts Act 1950 to provide certainty of law (Abdullah and Ab. Rahman, 2015). This paper submits that the above recommendations would benefit in the context of *Musharakah Mutanaqisah* home financing especially in unfair term of standard form contracts.

Alternatively, by the inclusion of the meaning of ‘consumer’ in Consumer Protection Act 1999 to include a consumer for home financing, hence, unfair terms of standard contract of *Musharakah Mutanaqisah* home financing would subsequently be governed by Consumer Protection (Amendment) Act 2010.

### 4. Conclusion

The issues of consumer protections in unfair contract terms of standard form contract in *Musharakah Mutanaqisah* home financing in Malaysia has been identified and discussed by analysing the relevant legislation. The analysis revealed that the existing legislation are not sufficient to regulate unfair terms of contract in *Musharakah Mutanaqisah* Home Financing in Malaysia. To ensure the protection of the consumers in *Musharakah Mutanaqisah* Home Financing, the present legislation, particularly Consumer Protection Act 1999 and Contracts Act 1950 should be reformed either by adding provision(s) on standard form consumer contracts, incorporating the doctrine of unconscionability in the Contracts Act 1950 or inclusion of the meaning of ‘consumer’ in Consumer Protection Act 1999 to include a consumer for home financing.

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