IMPLEMENTATION OF MU'ĀMALAH HIRE-PURCHASE BILL IN MALAYSIA: CHASING A MIRAGE?

*N. Irwani Abdullah**

ABSTRACT

Islamic hire-purchase (Al-Ijârah Thumma Al-Bai' or AITAB) is one of the innovative products of Islamic banks in Malaysia. Since its first inception more than 10 years ago, AITAB has been governed by the Hire-Purchase Act 1967 (hereinafter referred to as 'the HPA'). Notwithstanding the surge in popularity of AITAB amongst the general public, the product has received much criticism due to its inherent limitations especially with regard to its regulatory framework. Critics of AITAB posit the inherent limitation of the HPA to effectively and efficiently govern AITAB transactions particularly when dealing with Sharī'ah issues. Consequently, Mu'āmalah Hire-Purchase Bill had been proposed to the Malaysian government to overcome certain limitations of the HPA. The issue was, whether AITAB would be best governed by having an independent regulation (known as Mu'āmalah Bill), or by simply incorporating Sharī'ah principles within

* Assistant Professor, Department of Business Administration, Kulliyyah of Economics and Management Sciences, International Islamic University Malaysia.

the existing regulation (HPA). Unfortunately in recent years, the Attorney General has rejected the idea of an independent Mu'āmalah Bill due to certain factors. To better comprehend the rationale for this rejection, this paper discusses the overall regulatory framework of AITAB operations in Malaysia based on 46 expert interviews. In particular, the paper provides important insights into the advantages and disadvantages of implementing either a distinct Mu'āmalah Bill or harmonising the existing HPA with Sharī'ah principles of hire-purchase.

INTRODUCTION

Islamic hire-purchase is one of the most important Islamic financial products offered by Islamic banks in many ways.¹ Since its inception in Malaysia more than 10 years ago, Islamic hire-purchase, more popularly known as AITAB, has expanded tremendously partly due to the overwhelming acceptance and increased demand by customers, either individuals or corporations including non-Muslims. The continuous support of the Malaysian government towards AITAB has also added to its flourishing development.

Notwithstanding its heightened popularity and demand, AITAB is still lacking in terms of regulatory framework as it adopts conventional rules enunciated by the Hire-Purchase Act 1967 (hereafter referred to as 'HPA'). It is observed that if AITAB is continuously controlled by the HPA, it has to face three basic problems; **firstly**, the HPA does not provide a *Sharī'ah*-compliant agreement which clearly spells out a contract of *ijārah* and a contract of sale; **secondly**, the HPA contains a provision of interest-bearing term charges which is clearly prohibited by the *Sharī'ah*; and **thirdly**, the HPA is known as a rigid law and hence could affect the validity of the Islamic hire-purchase agreement.²

¹ Although its common application is in car financing, some banks adopt the same concept in industrial hire-purchase facility to finance non-Act goods such as machinery and vessels.

² Islamic hire-purchase agreement has been modified to comply with *Sharī'ah*, but such modification violates the statutory form of the hire-

To overcome these shortcomings, the Malaysian government had proposed a new Bill known as *Mu'āmalah* Hire-Purchase Bill (*Mu'āmalah* Bill). The proposed bill was expected to remedy the inconsistencies in certain HPA provisions particularly when dealing with *Sharī'ah* issues arising in the AITAB transaction. Unfortunately in recent years, the Attorney General has decided that implementation of the *Mu'āmalah* Bill cannot be realised taking into account many factors needed to support the new law, such as an enforcement body, the availability of *Sharī'ah* experts and *Shar'ī* judges, the acceptance of regulators and bankers, and also the possible prevalence of the Hire-Purchase Act 1967 over the Bill.

This paper will address the above significant issue which requires a thorough examination of the Hire-Purchase Act 1967 in order to identify its potential strengths and level of weaknesses in view of *Sharī'ah* discipline. The actual impediments to implementing the *Mu'āmalah* Bill as a *Sharī'ah* framework for Islamic hire-purchase transactions will also be presented. In addition, to get a better insight into the actual scenario of AITAB in Malaysia especially with respect to its legal and operational issues on the ground, the study will provide empirical evidence based on in-depth interviews conducted with providers of AITAB facility (financial institutions), and experts in Islamic hire-purchase business in Malaysia. There are 46 respondents involved in the interviews representing different backgrounds ranging from Islamic bankers, *Sharī'ah* advisors, *Sharī'ah* scholars, economists, legal experts and government officers. The interviews cover pertinent issues such as the legal framework governing AITAB practice, mechanism and operation of AITAB, its strength, problems and weaknesses.

The next section analyses the governing law for AITAB, i.e. the Hire-Purchase Act 1967 in respect of its strengths and weaknesses. This is followed by an examination of the *Mu'āmalah* Hire-Purchase Bill which includes the prospects and impediments of realizing the Bill. The overall analysis and recommendations for improving the *Sharī'ah* framework of Islamic hire-purchase are summarised in the final section.

purchase agreement as per HPA 1967. If argued in the Court, the Judge may hold it as a violation of the HPA and thus, HPA rules does not apply to the Islamic hire-purchase transaction because it does not conform to the rules for the formation of agreement as provided by the HPA.

Section 1

HIRE-PURCHASE ACT 1967

The Hire-Purchase Act 1967 is currently the main governing law of hire-purchase activities in Malaysia. The HPA came into force on 11th April 1968. It regulates only hire-purchase agreements in respect of the goods specified in the First Schedule which can be amended by the Minister from time to time. There are 58 sections, and 9 parts in which the last consists of interrelated regulations and schedules.

The subject matter of the hire-purchase contract must be in existence and be certain when entering into the contract.³ If the contract is concluded without specifying clearly its subject matter, such contract will rendered void *ab initio*.⁴ Subject matter of a hire-purchase contract refers to goods, assets or property which are to be let and then purchased by the hirer. These goods are listed in the First Schedule of the HPA, which are as follows:

1. All consumer goods; and
2. Motor vehicles, namely invalid carriages,⁵ motor cycles, motor cars including taxi cabs and hire cars, goods vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms), and busses, including stage buses.

The expression “consumer goods” covers an extensive range of goods. Section 2(1) of the HPA defines ‘consumer goods’ as goods purchased for personal, family or household purposes. Accordingly, goods that are normally regarded as consumer goods but purchased for business purposes are excluded from the HPA. The second type of goods is a

³ This requirement is in agreement with *Shari’ah*.

⁴ From a Latin word which means void at the very beginning. A void contract has no legal force from the moment of its making *Oxford Dictionary of Law*, ed. Elizabeth A. Martin, Third ed. (Oxford: Oxford University Press, 1994). It occurs due to several factors, namely breach of the essentials of a contract, lack of capacity to contract, mistake and illegality.

⁵ An invalid carriage is a low cost, low maintenance vehicle, designed specifically for people with physical disabilities. <http://en.wikipedia.org/wiki>

motor vehicle, which is usually used for transportation, either for personal or public use.

This paper proceeds to examine whether HPA is fully competent to regulate AITAB transactions. Detailed examination has revealed that almost all HPA provisions are in line with the *Shari'ah* principles, except in certain aspects that expose HPA's deficiencies in terms of *Shari'ah* and legal application.

Strengths of HPA: Provisions of Hire-Purchase Act 1967 which are in conformity with *Shari'ah*

The main objective of the Hire-Purchase Act 1967 is to protect the hirers and guarantors against unscrupulous dealers who directly handle the transaction. Such protection constitutes a major strength of the HPA. Several requirements and penalties are imposed against non-compliance. HPA does not entirely contradict *Shari'ah* principles. For instance, the following provisions of the HPA are, in fact, in harmony with the spirit of *Shari'ah*:

- (a) **The preparation and service of statements in Part 1 of the Second Schedule HPA.** By this written statement, a customer discloses particulars of the goods, his financial obligations and particulars relating to payment to be made under the proposed hire-purchase agreement. This requirement is deemed to be in line with *Shari'ah* because it results in clear supply of information relating to goods and customer's obligation, and such information is documented in a standard form for future reference.
- (b) **The preparation and service of statements in Part 2 of the Second Schedule HPA.** This statement is prepared by a dealer in order to obtain consent from the prospective owner (financial institution) of the goods to be a party in the proposed hire-purchase agreement. A clear indication of consent (*ridā*) by a party to a transaction is a vital pre-requisite in a contractual transaction. However, unlike the principles of contract,⁶ the party's consent

⁶ In the Law of Contract, the existence of a contractual obligation can be presumed by the nature of relationship between the parties in question

cannot be simply presumed in Islamic law of contract. It must be made expressly by either an oral statement, or conduct, or even putting into writing. This *Shari'ah* requirement is very important as it prevents confusion relating to parties to a hire-purchase transaction, where most customers wrongly view a dealer,⁷ instead of the financial institution, as the owner of the goods.

- (c) **Requirements relating to the formation of hire-purchase agreements** (section 4, 4A, 4B, 4D and 5). Such requirements include strict imposition of preparing the Second Schedule forms as discussed earlier; the hire-purchase agreement must be in writing and signed by all parties to the agreement; a separate hire-purchase agreement must be prepared for every item of goods; and a copy of the agreement must be served on the customer and guarantors within fourteen days after the making of the agreement. These procedural requirements are necessarily encouraged by the *Shari'ah* in order to avoid misleading information which will cause dispute among the parties in the future.
- (d) **Contents of hire-purchase agreement** (section 4C). The HPA requires every hire-purchase agreement to specify in detail the commencement date, number and amounts of instalments, time

and their intention to create legal relations, Syed Ahmad S. A. Alsagoff, *Principles of the Law of Contract in Malaysia* (Kuala Lumpur: Malayan Law Journal Sdn. Bhd., 1996).

⁷ It is important to note that a dealer is not a party to the hire-purchase agreement, though he plays a significant role in the formation or conclusion of the agreement. He attracts and deals directly with the customer at a preliminary stage, while the financial institution has not come into view yet. Thus, the dealer is usually seen as a negotiator and sometimes an agent (although he might be one) of the institution. It is necessary for a dealer to state to the hirer in writing the cash price of the goods and deliver the copy of the agreement and other relevant documents to the hirer. He also takes deposit from the hirer. Then he sends all documents relating to the purchase of the goods to the financial institution. If the institution approves the transaction, it will buy the goods from the dealer and then let them on hire to the hirer.

for payment, description and location of the goods, description of the consideration to be provided other than in cash (if any) and other particulars as contained in the written statements in the Second Schedule of the HPA. If the hire-purchase agreement contravenes these requirements, it will become void and the owner will be guilty of an offence under the HPA. The specific contents of the hire-purchase agreement as provided by the HPA are in fact in line with the *Sharī'ah* requirements of contractual transparency in agreements which must be spelt out in detail to avoid any ambiguity and potential dispute.⁸

(e) **Conditions and warranties for the protection of hirers and guarantors** (Part 3). In addition to the earlier express contents of a hire-purchase agreement, the HPA also provides implied conditions and warranties which are imposed on the owner in order to safeguard the interests of the customer (hirer) and guarantors. The protection encompasses the following:

- Warranty to have and enjoy quiet possession of the goods throughout the period of the hire-purchase agreement. If the owner wants to inspect the goods, he must obtain the hirer's permission and do so during the time specified by the hirer. This warranty is an important provision of leasing which guarantees peaceful possession and privacy to the hirer, hence conforming to *Sharī'ah* principle of *ijārah*.
- Condition that the owner has good title to the goods so that he is able to sell it to the hirer at the end of the hire-purchase agreement. This requirement is compatible with *Sharī'ah* rules for transferring ownership from the legal and absolute owner of the goods.
- Warranty that the goods are free from any charge or claim by a third party before the ownership is transferred to the hirer. The *Sharī'ah* views that this encumbrance will affect the hirer's absolute ownership and complete

⁸ For example, a hire-purchase price must be fixed and made clear to the parties.

enjoyment of the goods, thus violating the principles of *ijârah*.

- Condition that the goods must be of merchantable quality that is valuable for the hirer's use and worth of sale to other parties. This condition is warranted by *Sharî'ah* principles of *ijârah* and sale in which the subject matter must have some value.⁹
- Condition that the goods must be fit to render benefit to the hirer is upheld by the *Sharî'ah*. If the goods cease to provide the intended benefit, the purpose of renting it is not attained, hence, the hirer may terminate the contract.¹⁰

If the above requirements are not specified in the agreement, they can be invoked if the owner does not comply with any of them. If there is a misrepresentation by the owner or dealer in respect to the goods and the earlier-stated requirements, the hirer shall be entitled to rescind the agreement and claim damages. These requirements protect the user (hirer) of the goods against

⁹ The subject matter of sale must be something which satisfies the characteristics of property or *mâl*, Hasbullah Haji Abdul Rahman, "Concept of Contract ('*Aqd*) in Islamic Law," *The Islamic Quarterly* XLV, no. 1 (2001), which are as follows; (a) It must have some value; (b) It must be a thing which provides lawful benefits. In other words, the subject matter must be a lawful property in *Sharî'ah*, thus sale of liquor or a casino building is prohibited by *Sharî'ah*; and (c) It must be possessed, meaning that the subject matter is a lawful property of the seller. The subject matter of lease must have a valuable use. Therefore, things having no usufruct at all cannot be leased, Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (The Hague, London, New York: Kluwer Law International, 2002).

¹⁰ Mâlikîs and Shâfi'îs view that *ijârah* is terminated by a defect ('*ayb*) affecting the leased object, and also if the purpose of the lease has disappeared. Ḥanbalîs hold that termination takes place if the leased object is destroyed or affected by a material defect, Nabil A. Salleh, *Unlawful Gain and Legitimate Profit in Islamic Law; Ribâ, Gharar on Islamic Banking* (Cambridge University Press, 1986).

injustice and oppression, and thus are in line with the *Sharî'ah* principles.

- (f) **Rights and obligations of hirer.** Part 4 of the HPA provides statutory rights to a hirer (customer) which include, right to a copy of a statement relating to his financial position, right to early completion of agreement, right to terminate agreement, right on repossession by owner and many more. The hirer also owes principal obligations including, to place the goods in the place as specified in the hire-purchase agreement, to pay regular instalments and not to sell or dispose the goods to any other party. These rights and obligations give the hirer complete enjoyment of the goods and convenience in commercial transactions which are paramount considerations in the *Sharî'ah*.
- (g) **Rights and obligations of guarantors** (Part 5). Sections 21 and 22 of the HPA deal with the extent of guarantors' liability in respect of a hire-purchase agreement; section 23 spells out rights of guarantor against the owner, while section 24 states his right against the hirer. These provisions also aim to protect a party to the hire-purchase transaction, which are encouraged by the *Sharî'ah*.
- (h) **Rules for repossession.** Sections 16 to 20 of HPA contain detailed provisions spelling out the rights and obligations of both hirer and owner in the event of repossession of the goods. Among the hirer's rights are entitlement to be served with a notice before and after repossession taking place; exemption from paying costs of repossession if he returns the goods; requirement for owner to redeliver the goods or sell it to any person introduced by the hirer; and entitlement to recover from the owner the difference in amount where the value of the goods exceeds the debt. These rights do not, in principle, contradict *Sharî'ah* principles in the treatment of the debtor by which he must be given sufficient and reasonable time to pay his debt.
- (i) **Insurance liability on the owner** (Part 6). A very significant rule relating to insurance responsibility which is in conformity

with *Shari'ah* principles is found in section 26 of the HPA. Section 26(1) requires an owner to take out an insurance¹¹ cover in the name of the hirer. In case of motor vehicles, the obligation is limited to the first year of the agreement; the hirer will have to renew the insurance for the subsequent years. For other goods, the owner is obliged to bear the insurance cost for the duration in which the goods remain under hire-purchase agreement, and such cost is included in the hire-purchase price. The owner cannot insist the hirer to insure with a particular insurer, thus, the hirer has complete freedom to choose an insurance company which he desires. Non compliance with this rule on the part of the owner or hirer will constitute an offence under the HPA.

- (j) **Avoidance of the agreement if any of the above-mentioned requirements are not met** (section 34). The protection of the hirer is strengthened by section 34 which declares certain provisions in a hire-purchase agreement to be void. These provisions attempt to remove or reduce rights conferred on the hirer by the HPA, for example, the provision requiring the hirer to pay more than a fixed rate on overdue instalments.

- (k) **Collection of payments** is an important stage in any commercial transaction. In Islamic transactions, payment constitutes a consideration of contract; ignoring it will amount to avoiding the contract. In this respect, the HPA appears to be in harmony with the *Shari'ah* rule of transaction by putting down certain rules for collection of hire-purchase payments. Section 36A prohibits any collection of payment other than those listed in the Second Schedule of the HPA, or stated in the hire-purchase agreement. Section 36B again prohibits any collection of payments by persons other than owner, dealer, agent or other authorised persons. Section 36C requires the collector of hire-purchase payment to issue a receipt to the hirer in relation to every payment collected; if he does not do so, he shall be guilty of an offence

¹¹ In case of AITAB, the owner must subscribe to a Takaful policy. When hire-purchase becomes a mode of financing, the owner here refers to the bank giving the financial assistance to the customer (or hirer).

under the HPA. Section 36D further requires the owner to inform the hirer if the dealer or other authorised collector has ceased to be authorised to collect payment, thus, no payment should be made to such dealer or collector.

- (l) **The imposition of penalties for violation of the above requirements.** Section 46 of the HPA spells out punishment for any person who is found guilty of an offence under the HPA. The punishment covers a fine not exceeding three thousand ringgit or imprisonment for a term not exceeding six months or both fine and imprisonment.

The above HPA provisions clearly spell out procedural rules and requirements which aim to make a hire-purchase transaction a success, and at the same time, to protect the hirer and guarantors by imposing certain duties onto the owner. These rules are clearly in line with the spirits of *Shari'ah* which promote justice and forbid oppression while engaging in commercial transactions. Therefore, the AITAB facility should not be prevented from adopting these rules and incorporating them in the agreement. Even in terms of management, it is permitted to refer to the conventional hire-purchase and the prevailing practice (*'urf*) at a particular place, as long as such practices are not against the *Shari'ah* principles.

Deficiencies of the Hire-Purchase Act 1967 within *Shari'ah* and Legal Application

Despite having numerous advantages, HPA, like any other law, is not perfect and does contain certain loopholes, either in *Shari'ah* or legal requirements of Islamic transaction.

- ***Deficiencies within Shari'ah requirements***

- (a) In Islamic contracts, intention and understanding of parties entering into a contractual obligation are paramount requirements for validity. In the AITAB transaction, the parties

must know and understand the nature of leasing (*ijârah*) and sale (*bay'*) contracts, the effects and consequences of which result in different relations, rights and obligations. The Hire-Purchase Act 1967, however, fails to specify this vital requirement; it merely emphasises the formation and contents of a hire-purchase contract without mentioning the substantial element of leasing and sale contracts.

- (b) The AITAB agreement should specify precisely the terms of leasing (*ijârah*) and sale (*bay'*); when these contracts become effective; and how the contract of leasing (*ijârah*) is turned into sale (*bay'*). In other words, how the transfer of ownership takes place. In this instance, the HPA is completely silent in distinguishing both contracts. It only acknowledges some requirements, formalities and contents of a standard hire-purchase agreement.
- (c) One of the important deficiencies of the HPA is making the hire-purchase facility as a financial lease (full pay-out lease). A true model of Islamic hire-purchase does not totally adopt the financial lease concept because of its contradicting principles to leasing (*ijârah*) and sale (*bay'*) contract.¹²
- (d) The HPA does not only allow interest (*ribâ*) but also to a certain extent makes provisions for it, for example, section 4C requiring the amount of term charges to be stated in the hire-purchase agreement; and section 34 stating about paying an interest on overdue instalments. In respect of term charges, although the HPA guarantees a fixed rate of annual charges, the calculation of the charges is made based on a pre-determined interest-bearing benchmark.¹³ The dependence on

¹² Among the features of a financial lease are its non-cancellable nature, hirer's liability for full rent even though the goods ceases from rendering its benefit and construction of future sale.

¹³ The Sixth Schedule of the HPA provides the calculation of term charges, and the Seventh Schedule states the calculation of the annual percentage rate.

an interest-based mechanism in commercial transactions is against the principles of *Shari'ah*.

- (e) Hire-Purchase Act 1967 provisions fail to specify the extent of the parties' rights and responsibilities and the consequence of transferring any right or responsibility from one party to the other. For example, the transfer of maintenance and insurance responsibility from the owner to the hirer (customer) for a particular consideration is often not explained to the hirer. In practice, maintenance and insurance responsibilities are usually passed to the hirer in consideration of reducing the amount of payment paid to the bank (owner). As such, the hirer can save the cost of maintenance and insurance by utilising the most reasonable deal that he could afford from the market. Therefore, this matter must be clarified to the hirer or it will amount to uncertainty and unknown (*gharar and jahâlah*) elements which could invalidate a hire-purchase agreement.¹⁴

- ***Deficiencies within Legal requirements***

- (a) Hire-Purchase Act 1967 is known to be a very rigid law. It applies strong restrictions in law and agreement, in which any contravention or non-compliance will invalidate the agreement or amount to an offence under the Act. Even a minor procedural offence will invoke a penalty as prescribed in section 46 of the HPA. For example, an owner or dealer who does not comply with a requirement to serve on the hirer a written statement of financial obligation will be guilty of an offence. If convicted,

¹⁴

Jahâlah means to sell something which exists but its quantity is unspecified, and *gharar* means to sell something whose availability is unknown. Both *gharar* and *jahâlah* may render a contract void or voidable. Thus, a contract should not contain any element of either *gharar* or *jahâlah* because otherwise, the contract will become void or voidable depending on the degree of *gharar* or *jahâlah* respectively. Mohd. Daud Bakar, "Contracts in Islamic Commercial and Their Application in Modern Islamic Financial System (Unpublished Article)," (2000).

they will be liable to a fine not exceeding RM3,000 or to imprisonment for a term not exceeding six months or to both.

- (b) The strict rules of the HPA 1967 strongly bind the hire-purchase agreement, to the extent that if there is any inconsistency between the agreement and the HPA, a party may challenge the validity of the contract and apply to the court to nullify the whole transaction. For example, an Islamic hire-purchase agreement containing the additional provision of ‘*aqd* (offer and acceptance)¹⁵ can be strictly regarded as inconsistent with the HPA. This strict rule may enable an irresponsible customer to nullify the agreement in order to avoid further obligations in the transaction, thus, causing injustice to the other parties such as the bank and guarantors.
- (c) Limited application to certain goods is another drawback of the HPA. Hire-Purchase Act 1967 shall only apply to goods specified in the First Schedule, which covers consumer goods¹⁶ and motor vehicles.¹⁷ The latter goods are usually used for transportation, either for personal or public use. Other types of vehicles will not be subject to the HPA. To illustrate, in the case of *MBf Finance Bhd. v. Ting Kah Kuong & Anor.*,¹⁸ the issue was whether a particular heavy lifting machine, for instance a crane or forklift, can be regarded as a motor vehicle,

¹⁵ Some banks provide additional documents such as purchase undertaking, agency note, etc. to support the master hire-purchase agreement.

¹⁶ Section 2(1) of the 1967 Act defines ‘consumer goods’ as goods purchased for personal, family or household purposes. Accordingly, goods that are normally regarded as consumer goods but purchased for business purpose are excluded from the 1967 Act. By virtue of section 2(1), goods also include any replacements or renewals by the hirer of any part or parts and any accessories added by the hirer during the period of hiring.

¹⁷ Some banks provide financing for the purchase of machinery which is known as non-Act goods. As such, this transaction is not governed by the Hire-Purchase Act 1967.

¹⁸ [1993] 3 MLJ, 73.

and thus subject to the Hire-Purchase Act 1967. The court held that a forklift was not a motor vehicle and therefore the agreement was not subject to the Hire-Purchase Act 1967.

- (d) Another recognised loophole in the HPA is section 22 which exempts a guarantor from his liability as a consequence of limited application of the HPA. Section 22 expressly provides that a guarantor is not bound to perform an obligation in respect of goods other than goods comprised in the First Schedule of the HPA. Hence, if a hirer enters into a hire-purchase agreement in respect of industrial equipments, in the event of default, the guarantor is not responsible to make any payment on the hirer's behalf. The reason being, the industrial equipments are not included in the list of goods which are covered by the HPA.

The above analysis has expounded that despite having numerous advantages, the HPA is incompletely competent to regulate AITAB transactions. To overcome these shortcomings, the government has proposed the *Mu'āmalah* Hire-Purchase Bill (*Mu'āmalah* Bill) which is expected to remedy the inconsistencies in certain HPA provisions particularly those dealing with *Sharī'ah* issues arising from the AITAB transaction.

Section 2

***MU'ĀMALAH* HIRE-PURCHASE BILL**

Despite rejection against its implementation, it is worth understanding the initial groundwork for the aspiration of the *Mu'āmalah* Bill. The *Mu'āmalah* Hire-Purchase Bill was initially drafted by a group of members of the *Sharī'ah* Supervisory Council of Bank Islam Malaysia Berhad (BIMB) consisting of Dr Abdullah Haji Ibrahim, Dr Shahbari @ Sobri Salamon, Tan Sri Prof. Datuk Ahmad bin Mohamed Ibrahim (deceased), Dr Othman Ishak and Mustafa Hamat. It was then passed to the Management of BIMB for amendment. In 1991, the draft Bill was submitted to the Ministry of Domestic Trade and Consumer Affairs (KPDN) and the Central Bank of Malaysia for thorough examination.

Before presenting the Bill in Parliament, it was referred to the Attorney General's Chambers. In 2000, the Bill was passed onto the Attorney General's Chambers and then was examined by *Shari'ah* experts in the Islamic Division of the Prime Minister's Department. In principle, the government was in support of the Bill, but was not certain of ways to implement it and its drafting style; whether to come with a separate and new law (*Mu'amalah* Hire-Purchase Law) or to incorporate Islamic hire-purchase principles into the Hire-Purchase Act 1967. In other words, the HPA needs to be amended to meet certain *Shari'ah* requirements.

A special committee was formed to re-examine the above issues. The committee comprised members of the *Shari'ah* Advisory Council of the Central Bank, representatives from Central Bank, Ministry of Domestic Trade and Consumer Affairs, Islamic Development Department of Malaysia (JAKIM), Attorney General Chambers and Association of Hire-Purchase of Malaysia. Their tasks covered thorough analysis on provisions of the Bill, adding some rules that were deemed necessary and amending provisions which clearly contradicted *Shari'ah* principles. The Bill was meant to be substantive and exhaustive so that it would be in a proper position to call for institutional and individual involvement having expertise in *Shari'ah* rules and procedure.

Contents of the Bill

The Bill was mainly drafted by reference to the Hire-Purchase Act 1967. It is therefore, not surprising to find that most of its provisions are identical to the HPA. The Bill is divided into 9 parts as follows:

- **Part 1** is a preliminary section outlining the short title and application of the Bill, interpretation of certain key words in the Bill and provisions for appointment of officers as controller of Islamic hire-purchase transactions.
- **Part 2** consists of provisions for the formation, contents of Islamic hire-purchase agreements and requirements relating to the agreements.
- **Part 3** provides for protection of hirers and guarantors which comprise implied conditions and warranties in the hire-purchase agreement and liability of the owner and person acting on his behalf for misrepresentation.

- **Part 4** prescribes rights and liabilities of hirers during the hire-purchase transaction and repossession.
- **Part 5** outlines matters relating to guarantors, comprising provisions as to guarantors, exemption of liability in certain cases, guarantor's rights against owner and hirer and their limitation from seizure.
- **Part 6** stipulates requirements for insurance or *takâful* for goods in Islamic hire-purchase agreements, powers of the court and contents of the insurance or *takâful* contract.
- **Part 7** sets out the powers of enforcement in the Islamic hire-purchase agreement in respect of power of investigation, proof of identification, inspection with warrant, inspection and seizure without warrant, warrant admissible notwithstanding defects, list of seized goods, information by accused persons admissible in evidence, prosecution, compounding and protection of officers.
- **Part 8** provides matters relating to offences comprising false statement by dealers in proposals, hirer to state the location of goods, fraudulent sale or disposal of goods by hirer, obstruction of officers, disclosure of confidential information and penalty.
- **Part 9** states general provisions in respect of profit margin, deposits, power of court to reopen certain Islamic hire-purchase transactions, avoidance of certain provisions, provisions relating to securities collateral to Islamic hire-purchase agreements, certain alterations of agreement, second-hand goods, power of court to extend time and order delivery of goods unlawfully detained, service of notice, proof of service, size and type required in certain documents, liability of responsible officers of company and liability of principal for acts of agents.

In addition to the above main provisions, the Bill is supported by six schedules. These schedules are to be read in reference to certain provisions of the Bill.

- **First Schedule** lists down goods comprising a house, the value of which is not more than RM250,000.00, consumer goods, motor vehicles and machinery. The schedule must be referred to according to section 2(1) of the Bill.
- **Second Schedule** states definition of Arabic words or phrases used in the Bill, for example, '*aqd*', '*bay' al-Murâbahah*', '*ibrâ'*'

Mu'āmalāt and *takāful*. The schedule is based on section 2 (4) of the Bill.

- **Third Schedule** which is to be read with section 11(1) provides a summary of the hirer's financial obligations under the Islamic hire-purchase agreement.
- **Fourth Schedule** provides a notice to be given to the hirer under section 12(1)(b).
- **Fifth Schedule** states a notice of intention to re-possess as prescribed by section 24(1)(a).
- **Sixth Schedule** sets down notice to hirers under section 24(2) of the Bill.

These schedules contain supplementary matters including a list of goods covered by the Bill, statement of financial obligation, explanation of Arabic terms and notices to be served during the hire-purchase transaction. By having been equipped with specific provisions and schedules, the Bill aims to provide substantial rules to govern the operation of Islamic hire-purchase transactions.

Advantages of *Mu'āmalah* Hire-Purchase Bill

One of the most significant advantages of the *Mu'āmalah* Hire-Purchase Bill is its wider scope of application as compared to conventional hire-purchase. The law applies to all goods stated in the First Schedule. In addition to consumer goods and motor vehicles, the Schedule in the Islamic hire-purchase law also includes houses of not more than RM250,000 and machinery. In the current practice, houses are purchased using deferred payment sale or *bay' bithaman ājil* (BBA); while machinery equipments are usually offered through industrial hire-purchase financing which are governed by the principles of contract.

Due to its wider scope of application, a specific advantage of the Bill applies to the customer and developer in house-financing. Under the *Shari'ah* concept of hire-purchase, only completed houses can be used as a subject matter of the transaction. In other words, the house must exist before the hire-purchase transaction takes place. Hence, when a customer enters into a hire-purchase agreement, he can physically possess and live in the house without having to wait for several years until the house is completed. Indeed, this facility gives an opportunity to

low-income groups to buy houses without having to bear much cost.¹⁹ This law protects the customer against unscrupulous developers who tend to misuse the deposit money paid by the customer. They either use low quality construction materials which later cause defects to the house; or in the worst case, abandon the uncompleted construction. The customer often suffers monetary loss and is also unable to own a dream house. By requiring the house to be in existence first before any transaction takes place, this law enables the customer to inspect and choose the house before making any decision to purchase it.

As far as developers are concerned, the law does not negatively affect their business. They can apply for financial assistance from any financial institution for the purpose of constructing houses or a residential area. When completed, only then they can sell the houses to the customer. This kind of arrangement indirectly imposes a duty on the developer to build a good quality house according to the customer's demand.

Another significant strength of the Bill is providing *Shari'ah*-compliant mechanisms in respect of AITAB transactions and its documentation. Basically, the Bill specifies that any AITAB transaction must be carried out in avoidance of interest-bearing (*ribâ*) elements and contractual ambiguity and uncertainty (*gharar*). The Bill states clearly the purpose, calculation, method and procedure of payment and other essentials relating to monetary matters. These cover the calculation of profit margin, penalty for late payment, pre-payment or deposit, fees and charges, (for example, administrative fees, stamp duty charges etc.) and rebate (*ibrâ'*) payment.

In terms of documentation, the Bill clearly provides that AITAB agreement shall comprise two distinct contracts (*'aqd*); leasing (*ijârah*) and sale and purchase contracts. The sequence and procedure of entering the contracts also emphasized so that the contracting parties understand how the transaction works, when transfer of ownership takes place and how to indicate proper offer and acceptance.

Apart from operational aspects, it is believed that the Bill will bring certain impacts on the Malaysian legal framework. The Bill, if

¹⁹ Buying a house usually burdens the low income group, because they have to pay for the uncompleted house for a certain period of time, and at the same time they also need to pay monthly rent for their current rented home.

successfully implemented and enforced will be a comprehensive *Shari'ah*-compliant regulation that will work side by side with conventional law. It will make a positive impact towards upgrading the position of *Shari'ah* law and institutions in Malaysia. It is also expected to become a milestone for other areas of the law to come up with a *Shari'ah* alternative in order to promote a truly dual legal system in the country.

Impediments to Implementing the *Mu'āmalah* Hire-Purchase Bill

Despite having some positive concerns, the implementation of the Bill seemed to be almost impossible, mainly because most provisions in the Bill still refer to the conventional law in many areas. Thus, implementation based on the *Shari'ah* law will be limited. If there is a loophole in the Islamic law, reference is usually made to the Hire-Purchase Act 1967. Even if the *Mu'āmalah* Hire-Purchase Bill is to be passed, it would be redundant with the Hire-Purchase Act 1967, as in the case of the Islamic Banking Act 1983 (IBA) and Banking and Financial Institutions Act 1989 (BAFIA). The IBA is said to be a carbon copy of the BAFIA. IBA is also not an exhaustive law governing Islamic banking businesses in Malaysia. Many references in procedure and documentation are still made to the BAFIA. Likewise, *Mu'āmalah* Hire-Purchase Bill appears to be very similar to the Hire-Purchase Act 1967, except in certain aspects.

The Bill is also silent on many provisions significant to safeguarding the interests of the hirer. For example, the hirer's right during repossession as provided by the HPA in respect of exemption from paying cost of repossession if he returns the goods within the prescribed period;²⁰ rights and immunities when goods are repossessed, including the right to require the owner to sell the goods to any person recommended by the hirer and the right to recover certain amount from the owner;²¹ and power of the hirer to regain possession of goods in certain circumstances.²² The Bill's failure in providing such protection

²⁰ Section 16A of HPA.

²¹ Section 18(1) and (2) of HPA.

²² Section 19 of HPA.

amounts to obvious inadequacies which will affect public confidence in it, and hence, impede its implementation.

Another potential impediment of executing the Bill is with respect to a possible ambiguity in determining the profit margin of the Islamic hire-purchase transaction. The Bill merely provides a statement indicating that the profit margin has to be calculated based on the concept of cost-plus sale (*bay' al-murābahah*), without specifying any formula or elaborating on its mechanism. This would indeed be insufficient for a law that is going to be the main reference governing the operation of AITAB. Hence, the determination of profit-margin needs to be clearly defined and delineated in the proposed Bill especially with respect to its definition and calculation methods. This is important to avoid any confusion and misunderstanding especially when it comes to interpretation of the Bill and executing it.

The Bill also fails to provide a proper legal structure to decide any dispute with certainty and flexibility based on *Shari'ah* principles. Such legal structure could include a specialised law enforcement body which comprise police, prosecution and judiciary. This drawback restricts the law from being implemented successfully, because a law without a proper legal structure or enforcement body hardly obtains public confidence and assurance. Thus, whenever there is violation of the law, but the law cannot be enforced, the public will not respect the system. There is uncertainty as to which court should have the final decision in deciding Islamic hire-purchase cases. At the moment, the High Court is the forum for Islamic banking disputes (including hire-purchase cases) and the basic law used to try Islamic banking cases is the Law of Contract. In case of AITAB transactions, reference is made to the existing Hire-Purchase Act 1967, thus, the case which may involve *Shari'ah* issues will be decided according to the civil law, not *Shari'ah* principles.

Another drawback is the inadequacy of experts in the AITAB transaction including enforcement officers, lawyers and judges who are in charge of enforcing Islamic hire-purchase law. These law-enforcement officers should possess a minimum knowledge of Islamic law and jurisprudence besides necessary expertise in the area of banking and finance. Lack of such experts will certainly impede the efficiency of Islamic hire-purchase law.

Realising the above impeding factors, it is necessary that the law-maker take them into consideration when deciding the ways to regulate Islamic hire-purchase transactions. Instead of having an

independent regulation (*Mu'āmalah* Hire-Purchase Bill), *Sharī'ah* principles could also be incorporated within the existing regulations (Hire-Purchase Act 1967). Factors like substantial contents of the law and its strong enforcement are paramount considerations to determine the effectiveness of its implementation as a governing law.

Part 3

RECOMMENDATIONS FOR *SHARĪ'AH* FRAMEWORK OF AITAB TRANSACTIONS

An independent *Mu'āmalah* Hire-Purchase law governing Islamic hire-purchase transactions, will probably result in a dual system of laws which may give more legal certainty and variety. The *Mu'āmalah* Bill if implemented, may give more choices to the public to submit themselves to either civil or *Sharī'ah* laws, whichever suits their affairs. The issue is, to enforce the *Mu'āmalah* Bill, it certainly requires a structured legal institution (*Syariah* Court) which has an appropriate hierarchy with sufficient authority to decide and make a final decision in a dispute. For this purpose, necessary amendments must be made to the Civil Law Act 1956 and Federal Constitution²³ to give effect to the proposed framework. However, such endeavour is nearly impossible as it involves huge costs and problems of red-tape. The enactment of a new law is not as easy as one might perceive since it has to go through many stages, either in the pre-parliamentary or the parliamentary stage. A proposed law, before being passed and gazetted as a law must have a strong administration and enforcement body. This poses some serious impediments since the current status of the *Syariah* Courts is far below the civil courts in terms of its limited jurisdiction to hear and have a final decision in most cases. This is due to the prevalence of conventional law

²³

The Civil Law Act 1956, by virtue of section 5 permits the application of English Law to banking and mercantile matters in the absence of any specific regulations. Federal Constitution is the supreme law of the land which provides that matters relating to Islamic law are under the State List (not Federal List) and limited to personal matters such as betrothals, marriage, custody etc. Thus, as Islamic law is a state matter, the law and its administration vary from state to state.

in Malaysia. Moreover, the proposed amendments to both 'supreme' laws (Civil Law Act 1956 and Federal Constitution) are believed to be almost impossible because such amendments would need full support from the government, comprising executive, legislative and judiciary.

In view of such major obstacles in the way of establishing an independent *Shari'ah* law for Islamic hire-purchase, this paper views that another possible and viable way of establishing the *Shari'ah* principles of hire-purchase is by incorporating them into the existing law. This approach is presently undertaken by the Government. This necessitates a few modifications and adjustments to the Hire-Purchase Act 1967²⁴ to make it compatible with all *Shari'ah* requirements. In the case of minor incompatibilities, certain modifications to the law can be made by inserting supplementary provisions to give effect to the *Shari'ah* principles. Detailed examination of the HPA has shown that not all provisions in the HPA 1967 contradict the *Shari'ah*. In fact, most of the HPA's provisions are acceptable and within the spirit of the *Shari'ah*. It is more feasible to work on the existing law, instead of introducing a new hire-purchase law which will certainly encounter many bureaucratic problems in the course of implementing it.

Alternatively, the *Shari'ah* rules can be incorporated into a Schedule²⁵ in the HPA. The Schedule will become an independent set of rules, and the parties to the AITAB agreement must submit to the rules under this Schedule. This option of implementing *Shari'ah* principles to the AITAB operation is believed to be more feasible, realistic and less complicated as compared to establishing an independent *Shari'ah* law. Furthermore, cases involving AITAB transactions can benefit from the

²⁴ Although it is understandable that the HPA suffers a deficiency of rigidity as mentioned earlier, it still has a possibility of permitting the incorporation of the *Shari'ah* principles into it. As a result, the operation of AITAB will be securely protected by the HPA and at the same time, it adheres to the *Shari'ah* requirements of AITAB.

²⁵ A schedule is an important component in a legislation which provides supplementary matters that are not covered by the main provisions. There are currently seven Schedules in the HPA containing list of goods, documents and notices and manners of calculating the term charges and annual percentage rate. These schedules are effective and enforceable under the HPA.

existing administrative and legal institutions of HPA which have been established for a long period of time.

However, the proposed framework could not be a success unless it is enforced by well structured legal institutions and procedural rules based on the spirit of *Sharî'ah*. To support the above proposal, efforts to improve the jurisdiction of *Sharî'ah* courts in handling Islamic banking and commercial matters (in this case, AITAB) must also be given serious consideration. The jurisdiction of the court to try Islamic banking cases is still an unresolved issue. Civil courts are currently given power to try Islamic banking disputes, which include AITAB cases. In this respect, three matters relating to the procedure of handling Islamic banking cases which invoke *Sharî'ah* issues are proposed:

First, since banking matters fall within the jurisdiction of the civil court, the court must introduce a specific procedure for Islamic transactions (*Mu'āmalah*). With the procedural rules, the court will be more cautious when making decisions in Islamic banking matters. They may also begin to understand and appreciate Islamic banking concept.

Secondly, the judge who hears an Islamic banking case must have some basic knowledge of Islamic contracts and Islamic transactions (*Mu'āmalah*).

Thirdly, a qualified *Sharî'ah* judge can be placed in the sitting of the civil court whenever there is a case involving *Sharî'ah* issues.

CONCLUSION

The paper has examined the Hire-Purchase Act 1967 examining its content, rules prescribing rights and responsibilities of parties involved in the transaction, enforcement and other general matters. However, the HPA appears to be insufficient in providing substantive rules prescribing the basic concept of the Islamic hire-purchase contract. This loophole may open the application of English law to Islamic hire-purchase transactions. *Mu'āmalah* Hire-Purchase Bill was initiated to remedy the inadequacy of the Hire-Purchase Act 1967. The Bill was modelled after the HPA with some modifications to make it consistent with the *Sharî'ah* requirements. A thorough review of the HPA and the *Mu'āmalah* Bill reveals trivial differences in terms of overall contents and procedural rules. Potential discrepancies between the two regulations

are found only in their respective concepts and interpretations, agreements and arrangement of provisions.

There were generally two opposite considerations on whether AITAB transactions should be governed by a specific *Shari'ah* law, (i.e. *Mu'āmalah* Hire-Purchase Bill) or to incorporate *Shari'ah* principles into the HPA. This paper strongly supports a self-governing Islamic hire-purchase law so that AITAB can be properly implemented in the light of the *Shari'ah*. This is in line with the recent decision by the Attorney General to amend the HPA to give effect to an Islamic hire-purchase transaction. However, the paper anticipates that for the long run, it is not a good idea to amend the Hire-Purchase Act 1967 for the purpose of harmonising laws because the amendment will not bring a big impact to the development of AITAB. Thus, it will not lead to full implementation of Islamic hire-purchase law except probably a part of it

However, the current factual scenario does not support the implementation of the *Mu'āmalah* Bill in view of some inherent limitations, such as the bureaucratic process of passing new law and having a weak enforcement body. On the other hand, there have been strong legal and enforcement institutions in support of the HPA which can be jointly utilised by *Shari'ah* regulations like the *Mu'āmalah* Bill. At the present stage, efforts are needed to remedy those inconsistencies in the HPA by incorporating *Shari'ah* principles contained in the *Mu'āmalah* Bill. With this choice in hand, this paper is optimistic that the harmonisation of the *Shari'ah* and conventional law in the Hire-Purchase Act 1967 will bring a positive impact to the operation of AITAB in particular; and to the development of Islamic law from within the conventional practice in general.