

Good Faith, Fair-Dealing and Disclosure Requirements in Hire-Purchase
Contracts in Malaysia:
Islamic and conventional Perspectives

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Abstract

This paper aims to analyze the importance of the element of good faith, fair-dealing and disclosure requirements in a hire-purchase contract from both Islamic and conventional financing perspectives. The application of good faith is determined at a particular time by those standards of honesty, fairness and reasonableness prevailing in a given community that are considered appropriate for formulation in new, revised rules. In the eighteenth century, the concept of fair-dealing was viewed as an essential concept and emerged as a governing principle applicable to all common-law contracts. Under Islamic Law, the elements of good faith (*ihsān*) and fair-dealing (*'adl*) are important and highly emphasized. One of the conclusions made in this research is that good faith and fair-dealing are two crucial elements in hire-purchase contracts, both in the Islamic and conventional systems.

Introduction

In Malaysia, there are two types of hire-purchase financing offered by banks, namely conventional hire-purchase and Islamic hire-purchase. The banking system in Malaysia is regulated by the central bank, Bank Negara Malaysia,¹ a regulatory and supervisory body. The statutes applicable to both Islamic and conventional banks and financial institutions are the Banking and Financial Institutions Act 1989 (Act 372)/(BAFIA) and the Islamic Banking Act 1983 (Act 276)/(IBA).

The law on hire-purchase in Malaysia is regulated by the Hire-Purchase Act 1967 (HPA) (Act 212)², as amended by the Hire-Purchase (Amendment) Act 1976, and more recently by the Hire-Purchase (Amendment) Act 1992 (Act A813). The Malaysian hire-purchase transaction actually originated from the early development of the banking system, where goods were exchanged in return for a promise of future payment by installment.

Before the enactment of the Hire-Purchase Act in 1967, all hire-

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¹ Sect. 3 (1) of BAFIA; The Bank shall have all the functions and powers conferred, and the duties imposed, on it by this Act, and the same shall be in addition to those conferred and imposed under the Central Bank of Malaysia Act 1958.

² Wu Min Aun & Beatrix Vohrah, *The Commercial Law of Malaysia*, 2nd ed. (London: Longman: 2003), p. 257.

purchase transactions in Malaysia were governed by common law and the Contract Act 1950.³ Later on, as the authorities recognized the hire-purchase transaction as an efficient method for consumers to acquire assets, 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 consumers' goods and specified items. This has been accomplished by 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-Purchase⁵.

Definition

Under common law, a hire-purchase transaction is a contract whereby one party (called "the owner") leases goods on "hire" to "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 lease, or elect to purchase the goods on completion of the necessary payments agreed in the contract.⁶ 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 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.

In the context of Islamic Law, the term used for a hire or lease contract is *al-ijārah*. It is an exchange of usufruct for a consideration of price against certain goods and services. In other words, the lessor is still the owner of the goods while the lessee uses the goods with a consideration of price.

In *fiqh*, *al-ijārah* means "to give something on rent."⁷ Literally *al-ijārah* or *al-ajr* means substitute, compensation, recompense, indemnity,

³ Ibid., p. 8.

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

⁵ Aun & Vohrah, *The Commercial Law of Malaysia*, 2nd ed, p. 258.

⁶ Buang, *Malaysian Law On Hire-Purchase*, 2nd ed, p. 5-6.

⁷ Abdur Rahman I. Doi, *Shari'ah: the Islamic Law* (London: Ta Ha Publisher, 1984), p. 369.

consideration of return or counter-value.⁸ For *al-ijārah* to be valid, the essential constituents of the transaction are the lesser and the lessee, the item which is to be hired, the price or remuneration for the hire, and consent to the hire transaction.⁹ The contracting parties must also be legally capable to enter into the *ijārah* contract, and there must be proper stipulation of the remuneration. Furthermore, the period of the contract is dependent upon the mutual agreement of the parties; it can be short or long.

Today, the high cost of living and the increasing prices of assets make it impossible to purchase on a cash basis. This situation evokes a need for the creation of a new product that is consistent with *Shari'ah* principles. A response to this need has been the introduction of *al-ijārah thumma al-bay'* (AITAB), which is a hire-purchase contract comprised of two separate contracts; the first is *al-ijārah* (a lease contract), and the second is the addition of an option to purchase (*al-bay'*). Under the first contract, the hirer hires the goods from the owner at an agreed rental over a specified period.¹⁰ Then, upon expiry of the hiring period, the hirer is given an option to enter into a second contract to purchase the goods from the owner at an agreed price.¹¹

Generally, the contract term is relatively long and almost equal to the service life of the leased equipment, at least 2 to 5 years.¹² During this period the lessee is required to pay at fixed intervals, as rent, an amount equivalent to the purchase price of the item, interest accrued on it and commission.¹³ In most cases, the items leased are plants, equipment and machinery, and the entities to whom they are leased are business firms and enterprises.¹⁴ This type of Islamic banking facility is very useful in helping buyers with insufficient funds to lease goods from the bank with an option to purchase them at the end of the contract. It is also designed to assist lessees in raising funds and improving their financial situations.

In addition, the general requirement of the lease must be satisfied, and

⁸ Ibid.

⁹ Doi, *Shari'ah: the Islamic law*, p. 370.

¹⁰ Sudin Haron, *Islamic banking rules and regulations* (Kuala Lumpur: Pelanduk Publications, n.d.), p. 78.

¹¹ Ibid.

¹² Muhammad Muzaffar, "Ijara: Financing on the basis of hire-purchase and leasing," *Encyclopedia of Islamic Banking and Insurance* (London: Institute of Islamic Banking), pp. 137-144.

¹³ Ibid.

¹⁴ Ibid.

the object leased must not be perishable or consumable. The basic concept of *al-ijārah* is payment for usufruct; as such, the item being leased must be maintained, as much as possible, as it was when the lease was initiated, and upon the expiry of the contract it is to be returned. The contract is invalid if the item contracted in the *ijārah* is used for a purpose prohibited by *Sharī'ah*, for example renting premises for prostitution, for use as a nightclub or other immoral activities. It is also invalid if the activity is mandatory in nature, e.g. hiring a mother to breastfeed her own baby.¹⁵

In Malaysia, *al-ijārah thumma al-bay'* (AITAB) has been accepted as an Islamic mode of financing.¹⁶

Scope

The scope of the implementation of hire-purchase is embodied in the local statute. Apart from the Hire-Purchase Act 1967, reference is 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 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) motorcycles;
 - (c) motor cars, including taxi cabs and hire cars;
 - (d) goods-transport 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

¹⁵ Haron, *Islamic banking rules and regulations*, p. 77.

- and any combination thereof;
2. refrigerators, deep-freeze food preservers and any combination thereof;
 3. sewing machines 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 cassette recorders;
 9. typewriters;
 10. organs and pianos;
 11. photostat machines
 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 hiring or purchasing the goods 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 section of the definition reflects the position under common law, but the second section of the statutory definition goes further.¹⁷ A hirer of goods under the Act only has possession of the goods and no more. The hirer does not have ownership of the goods, as would be the case where goods are sold on credit, unless he exercises the option to purchase the goods.

¹⁷ Buang, *Malaysian Law On Hire-Purchase*, 2nd ed., p. 7.

Under common law, when a hirer has 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's recovery of possession of goods. These provisions are to protect 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. The procedure is frequently practiced by most banks and financial institutions in Malaysia, both Islamic and conventional. Although procedures differ between Islamic and conventional institutions, they maintain the same aim: to execute repossession in an ethical manner in case of default of payment.

The Procedures of Repossession

Under the HPA 1967, there are only three situations in which an owner can repossess the goods. First, if there have been "two successive defaults of payment". Second, if there has been "default in respect of the last payment", upon which the hirer has been served with a notice in the form set out in the Fourth Schedule, and the period fixed by the notice has expired (which shall not be less than 21 days after the service of the notice).¹⁸ Third, if a hirer dies; however, in that case the owner cannot repossess the goods unless there have been "four successive defaults of payment".¹⁹

The owner is exempted from complying with section 16 (1) when there are reasonable grounds to believe that the goods will be removed or concealed by the hirer contrary to the provisions of the agreement.²⁰ 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 remove or conceal the goods 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 on the form set out in the Fifth Schedule.²¹ The owner is also required to deliver to

¹⁸ Hire-Purchase Act (HPA), Sect. 16 (1).

¹⁹ HPA, Sect. 16 (1A).

²⁰ HPA, Sect. 16 (2).

²¹ HPA, Sect. 16 (3).

the hirer a document acknowledging receipt of the goods.²² The document must contain a short description of the goods as well as the date, time and place the goods were repossessed. 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.”²³ However, if the hirer then recovers the goods so repossessed, the hire-purchase agreement is deemed to continue in force between the parties.

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.²⁴

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.²⁵ 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 of them 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.²⁶ 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.²⁷

Rights of the 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

²² HPA, Sect. 16 (4).

²³ HPA, Sect. 16 (6).

²⁴ HPA, Sect. 16 (A).

²⁵ HPA, Sect. 16 (7).

²⁶ HPA Sect. 17 (1).

²⁷ HPA, Sect. 17 (2).

writing to the owner requiring him:²⁸

- 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.
- c) Alternatively, the hirer may claim from the owner such reasonable costs incurred by the owner in taking possession of the goods, in the event that the value of the goods exceeds the net amount payable.
- d) For the purpose of this section, the expression "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 bought the goods for cash, the amount paid by that person.
- e) In this case, the hirer may also claim from the owner costs of storage, repair or maintenance; and
- f) reasonable expenses incurred in selling the goods.²⁹

The expression "net amount payable" means "total amount payable less the statutory rebate for the term charges and insurance".³⁰ It is also provided under the HPA 1967 that when the owner intends to sell the goods by public auction, he must serve the hirer with a copy of the notice of such public auction not less than 14 days from the date the said auction is to be held.³¹ If the owner intends to sell the goods by means other than public auction, he must give the hirer an option to purchase the goods for the price at 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 the owner a notice in writing, setting the amount which he claimed under this section.³² 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

²⁸ HPA, Sect. 18 (1).

²⁹ HPA, Sect. 18 (1)(b).

³⁰ HPA, Sect. 18 (3).

³¹ HPA, Sect. 18 (4).

³² HPA, Sect. 18 (5).

three months after the notice was 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 of any amount in satisfaction of the hirer's claim. If this offer is accepted by the hirer, the dispute ends; but if the offer is rejected by the hirer, the owner is entitled to pay the amount to the court against the hirer's claim.

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 with respect to 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.³³ If the hirer is able to do all that, the law then requires the owner to "forthwith 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 alter existing judgments or orders when goods are repossessed.³⁴ 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,"³⁵ which is applicable

³³ HPA, Sect. 19.

³⁴ HPA, Sect. 20.

³⁵ A. Elizabeth Martini (ed.), *Oxford Dictionary Of Law* (Oxford University Press., 5th ed., 2003), p. 70. "Caveat Emptor" means 'let the buyer beware', a common law maxim warning a purchaser that he cannot claim that his purchases were defective unless he protected himself by obtaining express guarantees from the vendor. The maxim was 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, to be of satisfactory quality and fit for any purpose, and this is to be made

to buyers, imposes a duty on the buyer to exercise due care and diligence in order to be alert to any defects in the goods or contract before entering into the contract.

As time passed by, mainly due to a cultural trend of people always seeking their rights, the maxim of “*uberrimae fidei*”³⁶ (utmost good faith) was introduced to make a contract more accessible and reliable. Under this maxim, the nature of the contract and all the existing contractual relations therein are taken into consideration. A good example of an *uberimae fidei* type of contract is an insurance contract, whereby full disclosure by the party concerned plays an important role in the enforcement of the claim.

Historically, English law did not recognize the elements of good faith and fair-dealing as prerequisites for making a contract.³⁷ Nonetheless, these elements were enforced by the Court of Chancery on the grounds of conscience³⁸ through the system of writ and the forms of action. In the fifteenth 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 litigants a remedy due to the non-performance of a promise.

In the seventeen and eighteen centuries, good faith and fair-dealing were regarded as only piecemeal solutions. The relevant legal principle encompasses the basic rule “*pacta sunt servanda*,”³⁹ 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 breach of contract in common law today. As a result, the following provisional or working definition has been adopted:

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.

³⁶ Ibid., p. 513.

³⁷ John H. Baker Hence, *Introduction to English Legal History* (London: Butterworths, 4th ed., 2002), makes no reference to good faith and fair-dealing in his *History of Common law*.

³⁸ J.F.O. Connor, *Good Faith in English Law* (1990), p. 18.

³⁹ Martini (ed.), *Oxford Dictionary Of Law*, p. 351. *Pacta sunt servanda* means ‘agreements are to be kept; treaties should be observed’.

Elements of Good Faith and Fair-Dealing in Contracts: English Law

Under English law, the principle of good faith is derived from the rule *pacta sunt servanda*⁴⁰ and other legal rules distinctly and directly related to honesty, fairness and reasonableness. These supplement or supersede normally applicable rules when it is necessary to ensure that the standards of honesty, fairness and reasonableness which prevail in the community also prevail in English law.

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 when the most important task before us is to identify what might be labeled as ‘Good Faith Rules’. The provisional or working definition has now crept slowly into legislation as an important element to be considered.

Nevertheless, good faith and fair-dealing may not be relevant in all contracts; the matter depends on each individual contract. For instance, in the hire-purchase contract of a second-hand car, the element of disclosure is very important to the purchaser in order for the transaction to be considered fair. 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 Malaysian law, the application of good faith and fair-dealing developed similarly to English common law. It is treated as an implied principle to which the law gives equal concentration in enforcing a valid contract. Thus, the court will look into the unfairness of a case to determine the inviolability of the contract.

In the case of *PN Pillay & Co v Kah Motor Co Ltd*,⁴¹ the plaintiff entered into a hire-purchase agreement with the defendant on August 6, 1963. It was provided in Clause 4 of the agreement that in the event of default by the hirer in paying the monthly installments, the owners may “immediately terminate the hiring and they shall thereupon without

⁴⁰ Ibid.

⁴¹ [1965] MLJ 47.

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 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, [for] example, 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*,⁴² the appeal raises the question of the proper construction of paragraph 4 of the appellants’ letter to the respondents dated April 17, 1946, which read as follows:

In the event of Bangkok not being interested we will sell locally or elsewhere, 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, the further saturation of the market by the cement of the next shipment would considerably reduce their chances of doing so afterwards. 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.

⁴² [1949] MLJ 212.

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

The Elements of Good Faith and Fair-Dealing in Contracts: Islamic Law

According to Faruqi's Law Dictionary, good faith⁴³ is best defined as *husn al-niyyah* or an act done in good faith if done honestly, even though negligently.⁴⁴ A transaction is not conducted with fair-dealing when the contracting parties do not practice full and honest disclosure in concluding the contract. For example, if a known defect was not disclosed the buyer was deprived of information that is supposed to be well known before the contract was concluded.

The Arabic word for a contract is “*‘aqd*”, which literally means “a knot”; the derived meaning is, thus, “an obligation”.⁴⁵ When two parties enter into a contract, it is called *al-in‘iqād*, i.e., binding together the offer and acceptance. The Qur’ān states: “O you who believe, fulfill (all) obligations.” [Q. 5:1]

Thus the obligations arising out of a contract are called *‘uqūd*. Obligations in Islam are not only confined to contractual obligations but also covers political, economic and social obligations. In short, the term *‘uqūd* has wider connotations as compared to the term “contract” in common law.⁴⁶ The term *‘uqūd* reflects the obligation associated with the contract to deal with good faith and fairness.

⁴³ This term is properly used by some Arab legal writers as mentioned in, Harith Sulayman Faruqi, *Faruqi's Law Dictionary English-Arabic* (Beirut: Librairie du Liban, 1988), p. 318; See also Muhamad Wahidul Islam, *The Doctrine of Good Faith in Commercial Transactions : A Comparative Study under English Common Law and Islamic Law*, MCL Dissertation (Kuala Lumpur: International Islamic University Malaysia), 1998, p. 12.

⁴⁴ M. David Walker, *The Oxford companion to law* (Oxford: Clarendon Press, 1980), p. 530.

⁴⁵ Doi, *Shari‘ah: The Islamic Law*, p. 356.

⁴⁶ *Ibid.*, p. 356.

The element of good faith and fair-dealing can be observed in most Islamic contracts; for instance, *musāwamah*,⁴⁷ *murābahah*,⁴⁸ *tawliyah*,⁴⁹ *wadī'ah*,⁵⁰ and *ishrāk*,⁵¹ all except *musāwamah* require the original price to be mentioned. They are regarded as “*uqūd al-amānah*” which is equivalent to the Latin term *uberrimae fidei*.⁵²

Under Islamic law, the maxim of caveat emptor cannot be accepted because it is contrary to the principle of *uqūd al-amānah*.⁵³ This is because caveat emptor places the burden of proof regarding any deceitful element upon the buyer. On the other hand, in *uqūd al-amānah*, both the buyer and seller have the responsibility to honestly declare all information relevant to the contract before its conclusion. In short, the term *uqūd al-amānah* reflects the obligation upon the contracting parties to enact contracts on the basis of good faith and fair-dealing, which is similar to the maxim of *uberrimae fidei*.

These contracts require the disclosure of the original price because it might influence the buyer's decision to enter into a contract with the seller. This means the buyer has put some degree of trust in the seller regarding the information he/she provides about the goods. To make this trust meaningful, the law imposes upon the seller a duty to disclose the true facts, for such a disclosure is regarded as indicating his sincerity.

Finally, Prophet Muhammad (ﷺ) warned that selfish and dishonest traders would face punishment in the hereafter for undermining the fundamental basis of contracts. Wāthilah bin Asqa' related that once the

⁴⁷ A sale by mutual consent concluded through negotiations between the seller and buyer in which no reference is made to the original cost price. It is also a profit sale but the actual cost price and the amount of profit is unknown because the seller is not bound to disclose the cost price.

⁴⁸ A cost-plus profit sale in which the profit is expressly disclosed by the seller.

⁴⁹ A sale at cost price without any profit for the seller, as per mutual agreement.

⁵⁰ A contract of resale at less than the original price. The contracts of *tawliyah* and *wadī'ah* usually occur when sellers dispose their old stock, especially at the end of the year.

⁵¹ A contract by which the seller sells a share in his firm at the price he originally paid; the buyer becomes a partner in the subject matter to the extent of the proportion he pays of the original total price. It is necessary that his shared ratio be fixed and known to each party. It covers all contracts under the generic title of contracts of partnership and companies.

⁵² Mohd. Ali Baharum, *Misrepresentation: A Study of English and Islamic Contracts* (Kuala Lumpur: Al-Rahmaniah, 1988), p. 122.

⁵³ The word “*uqūd*” as used in the Qur'ān has a comprehensive meaning that includes the rights of Allah. In this context it refers to rights implicit in contracts in which trust is a significant element.

Messenger of Allah came to them and said: “*O you traders, beware of telling lies in (your business) transactions.*”⁵⁴

Prophet Muhammad (ﷺ) always encouraged the Muslims to do business, as it is considered an aspect of *‘ibādah*. This can be seen from a verse of the Qur’ān: “*And when the prayer ends, disperse in the land and seek of Allah’s bounty, and remember Allah much, that you may be successful.*” [Q: 62:10]

Of course, no action is left without regulation under Islamic law. Thus, a Muslim is obliged to be honest and fair in his business. He must shun fraud, deceit and perfidy so that his wealth is gained from healthy sources. For example, the Qur’ān orders businessmen: “*Give full measure and be not of those who cause loss to others*” [Q: 26:181]; “*And weigh with an equal balance*” [Q: 18:35].

Prophet Muhammad (ﷺ) approved of and confirmed transactions which do not conflict with the principles of the *Shari‘ah* and disapproved of and prohibited those business practices which contradict the *Shari‘ah*’s objectives and aims. The prohibitions include transactions that involve the element of fraud or deceit, exorbitant profit or injustice to one of the contracting parties, all of which are contrary to the overriding principle of good faith and fair-dealing mentioned in the Qur’ān: “*Do not defraud people of their things, and do not commit corruption in the earth*” [Q: 26: 183].

The elements of good faith and fair-dealing are not new in Islamic terminology because they are an 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 business contract is regarded as lacking perfection in accordance with Islamic good manners, decency and ethical standards.⁵⁵ The Qur’ān announces a general rule that mutual consent is a condition for the validity of every kind of contract. There is no basis for excluding the hire-purchase contract from that general rule. “*O you who believe, do not consume your property among yourselves unjustly; rather, [it should be] trade by mutual consent amongst you. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you*” [Q: 4:29]. The element

⁵⁴ Sulayman bin Aḥmad al-Ṭabarānī, *al-Mu‘jam al-Kabīr* (Mosul, Iraq: Maktabat al-‘Ulūm wa al-Ḥikam, 1983), vol. 22, p. 56, *ḥadīth* no.132.

⁵⁵ Abdullah Alwi Haji Hassan, *Sales And Contracts In Early Islamic Commercial Law* (New Delhi: Kitab Bharan, 1997), p. 15.

of mutual consent was emphasized in the *ḥadīth*: “It is unlawful to possess the property of a Muslim without his express consent.”⁵⁶

As evident from the Qur’ān and *ḥadīth*, Islam has laid down an ethical discipline in commercial transactions for the believers to follow. Dishonest traders who contravene those rules are blameworthy and liable to punishment on the Day of Judgment. The Prophet (ﷺ) strongly promoted generosity to purify one’s account of malpractices and unsuitable acts while conducting business. He 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.

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

The Disclosure Requirement and Good Faith: Islamic Law

Generally, the requirement of disclosure is an important aspect of good faith and fair-dealing where it serves to satisfy the essence of the contract. Malaysian and Islamic law recognize it as a paramount consideration for upholding the inviolability of the contract. Under Malaysian Law, there are some contracts which emphasize a duty on the parties to exercise good faith and fair-dealing by disclosure of all material facts to the contract; for example, in contracts of insurance, sales, loans and scholarships.

The main purpose of disclosure of a material fact is to protect the buyer from being misled by the seller in entering into a contract. 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 honest disclosure may deter the other party from entering into the contract or cause the lowering of the price.⁵⁷ Even if disclosure is not requested by the buyer, it is still obligatory as a general moral duty. The legal implication of non-disclosure will affect the contract as a whole; failure to disclose is treated as grounds to void the contract, which gives the defrauded party the right to either rescind or affirm it.

Nevertheless, non-disclosure is permitted with regard to unimportant facts and where such facts are for one party’s knowledge only. Further,

⁵⁶ Al-Bayhaqī, *al-Sunan al-Kubra’*, *ḥadīth* no. 11325, vol. 6, p. 100.

⁵⁷ Doi, *Shari’ah: the Islamic Law*, p. 119.

having knowledge of a defect in the subject matter and failing to disclose it is not treated as a prerequisite 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 the contract was concluded. 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 knowledge of it before contract and concealed it or had no knowledge at all.

Under Islamic law, several conditions need to be fulfilled before exercising an option of defect known as *khiyār al-'ayb*. First, the defect must have existed at the time of the sale, or subsequent to it but before delivery. Second, it must continue to exist when the purchaser 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, the purchaser has to have been ignorant, at and prior to the sale, of the existence of the defect; if he knew of it at either time he has no option. Fourthly, there must be no stipulation in the contract waiving or releasing the seller from liability for defects in the thing sold; if such a condition exists, the purchaser has no option.⁵⁸

All schools of *fiqh* agreed that concealment of a defect is a prohibited act (*ḥarām*) and will cause the contract to be voidable.⁵⁹ Malikīs, however, added the qualification that the defect must be serious, but according to the other schools, it is enough to prove the existence of any defect, regardless of whether it is severe or not.⁶⁰ This is based upon the apparent meaning of a *ḥadīth* reported by Wāthilah ibn al-Asqa' (may Allah be pleased with him) that he heard the Messenger of Allah (ﷺ) say, "Anyone who sells a defective item without informing (the purchaser) about its defect will remain forever under the anger of Allah." The reporter was unsure of the exact wording; the Prophet (ﷺ) may have said, "...the angels curse him incessantly."⁶¹

In short, there are two types of disclosure that are important to the party; first, disclosure of all defects affecting the subject matter of the contract which are known by the other party at the time of concluding the contract. Second is the disclosure of the facts in certain contracts which are regarded in Islam as *uberrimae fidei*. The reason behind that is

⁵⁸ Baharum, *Misrepresentation: A Study of English and Islamic Contracts*, p. 118.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p. 121.

⁶¹ Muḥammad ibn Yazīd Ibn Mājāh, *Sunan Ibn Mājāh* (Beirūt: Dār al-Fiqh, n.d.), vol. 2, p. 755, *ḥadīth* no. 2247.

to preserve the inviolability of the contract, for Islam has given great weight to transactions achieving the objectives for which they were legislated.

Practical Perspective of Good Faith & Fair-Dealing in Hire-Purchase: The Conventional Hire-Purchase Contract

Practically speaking, it is observed that the elements of good faith and fair-dealing are given consideration in both Islamic hire-purchase contracts and conventional hire-purchase contracts. That is done in order 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, financing of stolen goods, forged common seals and fictitious transfers.

In conventional hire-purchase contracts, HPA 1967 is thoroughly applied with regard to two types of goods: consumer goods and motor vehicles.⁶² In practice, most hire-purchase financing is on motor vehicles as compared to consumer goods.⁶³ This is mainly because the facilities provided to buy consumer goods are a kind of benefit only offered to the staff of the bank or financial institution and to large companies which have a 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*'.⁶⁴ This type of facility is given mainly to large and trusted companies when the amount of goods is huge in number, for example, computers when the order reaches thousands of units. 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.

The Islamic Hire-Purchase Contract

At present, the Islamic hire-purchase financing offered by local Islamic banks is AITAB. AITAB is applied as a modification of HPA

⁶² HPA, Sect. 2.

⁶³ Mohd. Nor Syafii b. Sabtu, interviewed by the writer (Kuala Lumpur: 2005).

⁶⁴ Badron Hisham b. Dol Kamis, interviewed by the writer (Kuala Lumpur: 2005).

with added emphasis upon two elements, namely the “letter of ‘*aqd*’ and without “overdue interest”. In the case of defaulted payments, a repossession order is executed without charge for overdue interest.

Fair-Dealing in Repossession: Conventional and Islamic Banks and Financial Institutions

Conventional and Islamic banks and financial institutions all appoint an 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 members of AHPCM.⁶⁵ Apart from the procedures and process, there is also a Code of Ethics on Repossession⁶⁶ that the authorized repossessors need to comply with.⁶⁷

- As far as possible, the number of authorized repossessors must be minimized unless circumstances warrant additional assistance.
- The reposessor should only gain entry into premises with the knowledge and consent of the occupant.
- The reposessor 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 tactics’ of any kind is strictly prohibited in the performance of their work.
- At the time of repossession, the reposessor should give a standard notice to the hirer informing him of the address and telephone number of the finance company and the authorized officers he can contact immediately to resolve any problems.
- The reposessor 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

⁶⁵ Azman Ahmad, *Hire-Purchase Training Manual on Credit Control* (Kuala Lumpur: Arab-Malaysian Finance Berhad, n.d.).

⁶⁶ Bank Bumiputra Commerce Finance Berhad, *Handout on the Law and Practice of Hire-purchase in Malaysia*, (2004), p. 10.

⁶⁷ Code of Ethics on Repossession, introduced by the AHPCM (the Association of Finance Companies of Malaysia and the Ministry of Domestic Trade and Consumer Affairs, n.d.).

presence of the hirer or any person authorized to use that vehicle.

- The reposessor should at all times act in accordance with the laws and regulations in the performance of their work.

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

Good Faith and Fair-Dealing Elements in Hire-Purchase Contracts (Motor Vehicles)

In order to discuss the implementation of the good faith and fair-dealing elements in hire-purchase contracts, the writer looked into contracts for motor vehicles, as that is the most common type of financing involving hire-purchase contracts.⁶⁸

The Hire-Purchase Contract for a Motor Vehicle

For a new 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 breaks down, the vehicle is still guaranteed by the warranty valid for 2 years as provided by the vehicle manufacturer.⁶⁹ The implication here is that the vehicle manufacturer must exercise good faith and fair-dealing in its business transaction to ensure that the product is guaranteed and that quality is maintained.

For a second-hand or used vehicle, the said vehicle needs to be inspected by PUSPAKOM⁷⁰ to ensure that it is in good condition and to reduce risks such as a jointed car. PUSPAKOM will confirm whether or not the registration card and the vehicle are genuine, 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 is supported by legal recognition of the elements of good faith and fair-dealing in conducting a transaction with the bank or financial institution.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ PUSPAKOM's core services: Initial Inspection: Inspection to determine vehicle status before registration with the Road Transport Department or before transfer of ownership for commercial vehicles; Routine inspections: routine half-yearly checks to gauge roadworthiness of commercial vehicles and ensure compliance with the 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; Accident Inspection: in aid of police investigation of fatal accidents involving vehicles.

Standard Form

Both the Islamic and conventional hire-purchase contracts adopt the standard Hire-Purchase Offer Form issued by Bank Negara Malaysia. Islamic hire-purchase is exemplified in the form used by Bank Muamalat Malaysia Berhad. It clearly states that the agreement will be dealt with under the *Shari'ah* principle of AITAB and expressly requires numerous particulars to be filled in containing particulars such as description of goods, effective date of agreement, the address where the goods under hire-purchase will be kept, cash price of the goods, deposit (not less than 10% of the cash price), freight charges (if any), vehicle registration fees, 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 amount of each installment, the time, place and the person to whom the installment is to be paid, name and address of hirer and owner; and signatures of hirer and owner. It also provides that all the terms and conditions must be fulfilled.

The conventional hire-purchase form adopts the standard hire-purchase offer form. At the end of the form is an important notice which states that by virtue of the HPA, it is an offence to remove a vehicle under hire-purchase from the address stated in the agreement without informing the bank or financial institution of the new address within fourteen (14) days from such removal.⁷¹ The penalty for this offence is a fine not exceeding RM 3,000.00 or imprisonment not exceeding six months or both.

It is also an offence under the HPA to defraud or attempt to defraud the bank or the financial institution by selling or disposing of the vehicle or by any other means.⁷² The penalty for this offence is a fine not exceeding RM 10,000.00 or imprisonment not exceeding three years or both. These provisions are implicitly to safeguard the interest of the financial institution as the owner of the said vehicle.

It is advisable to the customer, upon default of payment, to surrender the vehicle with good faith. The bank or financial institution will sell the vehicle by auction according to the market value plus the balance of the payment. The shortfall still has to be borne by the customer. In a situation where the buyer changes his home address, it is the customer's obligation to inform the bank or financial institution of the latest home

⁷¹ Sect. 37 (2).

⁷² Sect. 38.

address. This is to ensure that the statement of claim reaches the address on time so that the customer can make the payment on time to avoid any overdue interest in the case of conventional banks and financial institutions.

The Role of “Good Faith and Fair-Dealing” upon Given Information.

From the above discussions, it is apparent that banks and financial institutions rely mainly on the information given by the customer at the interview. The bank or financial institution ought to act in good faith and deal fairly with the customer. However, if the information is suspected to be false or the documents are suspected to have been forged, the bank or financial institutions have the right to verify the information given. In order to avoid mistakes or misrepresentation or forgery of the particulars given, the bank or the financial institution reviews the data via a connected web system. For instance, in a conventional bank’s practice⁷³ all the particulars will be submitted to a web channel known as Biz-Channel, and the headquarters will re-check again via an overall system, including CTOS, FIS, CCRIS and CDIS.

Observations on Practical Issues

It is important that preventive measures be taken to curb fraud. It is suggested that more stringent practices be carried out in processing and loan disbursement. One of the strategies would be the verification of information in the application form through indirect questions. Original documents must be verified, and sufficient documents to support the application must be submitted. The bank officer concerned should always be alert throughout the interview with the customer and make CTOS, FIS, CCRIS and CDIS checking mandatory⁷⁴.

It is advisable that a subdivision of duties be implemented among the officers so that no one person handles a transaction from beginning to end. That will prevent abuse of power or position. As physical inspection of vehicles is mandatory to ensure the vehicle is in good condition, it is submitted that a regular assessment and review of the Jabatan Pengangkutan Jalan (JPJ) runner be conducted. Any exceptional findings provided by the FIS unit on JPJ random checks must be investigated thoroughly. It is also

⁷³ Khairuddin b. Saad, interviewed by the author (Kuala Lumpur: 2005).

⁷⁴ Ibid.

important that brokers' performances be constantly monitored.⁷⁵

Another factor that is equally important is recruitment and training. Key control features at the recruitment level should include screening character references and past employment records. It is worthwhile to have regular training sessions of the staff to equip them with up-to-date knowledge and skills to make them 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.⁷⁶

Internal control should be constantly reviewed to ensure its effectiveness. No internal control will work without effective enforcement by the supervisory staff. Hence, firm and punitive actions, including police reports, should be taken against those staff who compromise their positions.

Disclosure is an important element in ensuring that the hire-purchase contract is concluded with good faith and fair-dealing. A transaction is less likely to be concluded with good faith and fair-dealing in a system of weak controls and inadequate and ineffective supervision. Nevertheless, a strong system of internal control may not by itself eliminate the commission of *mala fide*. There must be constant self-appraisal along the way to minimize the incidences of malpractice: from the application stage through the process of obtaining and rechecking the information given by the customers until determining that the final settlement of the payment appears to be well prepared. Even in the case of repossession certain criteria must be complied with to ensure that the noble attributes of honesty, fairness and reasonableness are upheld.

Suggestions and Proposals

Some of the provisions of the Hire-Purchase Act 1967 (Act 212) and some of the Regulations' Guideline clauses are considered rigid by the banks and financial institutions. It has also been suggested that Bank Negara Malaysia should give more emphasis to the Islamic products because their advantages make them more acceptable, as mentioned earlier.

On the whole, as Malaysia pursues the status of a fair and reliable country, Islamic products should be actively incorporated into the

⁷⁵ Ibid.

⁷⁶ Bank Bumiputra Commerce Finance Berhad, Handout on the Law and Practice of Hire-purchase in Malaysia, (2004).

banking system to steadily and surely replace conventional banking products which cause injustice and oppression in the society at large. It is hereby recommended that only one Hire-Purchase Act based on *Shari'ah* should govern the market, one that comprehensively covers both conventional and Islamic hire-purchase transactions.

It is proposed that prospective buyers and customers in hire-purchase transactions should consider the following aspects before entering a hire-purchase contract. First, 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 in order to avoid repossession of his assets by the owner. Second, before signing the agreement, the hirer must read all the terms and conditions contained therein. The relevant legal maxim is *ignorantia juris non excusat* (ignorance of the law is no excuse), implying that there is no defense against criminal or other proceedings arising from its breach.⁷⁷

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 have any difficulty understanding the legal jargon or the language used, he should ask for help from qualified persons.

Conclusion

The terminology and legal structure that apply to the two types of hire-purchase differ because each is based on a different foundation. Islamic hire-purchase is based on the *Shari'ah* while conventional hire-purchase is based on human rationality (common law). However, it is submitted that good faith and fair-dealing are two important elements of hire-purchase contracts in both the conventional and Islamic systems. This is because the attributes of honesty, reasonableness and fairness, the underlying principles in every distinct hire-purchase contract both in Islamic and conventional systems, connote the notion of fair-dealing transaction whereby the contract's inviolability is performed to satisfy the demand of the parties in the contract.

Nonetheless, the recognition of these two elements differs from one jurisdiction to another due to 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 for entering a hire-purchase contract.

One main observation when comparing conventional and Islamic practices of hire-purchase in Malaysia is that the elements of good faith and fair-dealing are enforced through the duty of disclosure. It is obligatory for contractual parties to disclose all relevant facts of which they have knowledge.

In the documentation process, the disclosure requirement is applied in the standard form whereby a few sections have 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 non-cash considerations provided; the annual percentage rate for term charges; balance originally payable; total amount payable; the number of installments and the amount of each installment; the time, place and person to whom the installments are 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 cannot 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 verification 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).

In case of 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).

In conclusion, it is observed that both Islamic and conventional hire-purchase transactions clearly emphasize the elements of good faith, fair-dealing and disclosure requirements.