

UNFAIR TERMS IN ISLAMIC BANKING CONTRACTS: REALIZING MAQASID AL-SHARI'AH TOWARDS BANKING CONSUMER PROTECTION IN MALAYSIA#

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The use of unfair contract terms in Islamic banking contracts remains a serious problem in Malaysia. Most Islamic banking contracts are in standard form contracts, also known as 'adhesion contracts', which are pre-drafted by the party with strong bargaining power in the contract and contain terms that are potentially unfair. These contracts are presented on a 'take it or leave it' basis and non-negotiable, leaving banking consumers no realistic opportunity to bargain for more favourable terms, subsequently resulting in an unfair transaction. This paper analyzes various legal documentations of Islamic banks in Malaysia in the light of Maqasid al-Shari'ah in order to propose fair, transparent and consumer-friendly banking contracts. This paper adopts a combination of theoretical and content analysis methodology. The findings suggest that unfair contract terms existed in legal documentation of various Islamic banks whereby the inequality of bargaining power (ghubn) in banking industry resulted in the rights of banking consumers being infringed. Further, the unfair contract terms have greater implications to the realization of Maqasid al-Shari'ah, as it does not comply with the principles of protecting public interests (maslahah), honesty, trustworthy, financial transparency, prevent harm/hardship and al-'adl wal-ihsan (justice with benevolence) in the circulation of wealth in banking transactions. This paper is important as it justifies the need to protect banking consumers from unfair contract terms as well as sending a strong message to the bankers to do fair trading and transparency in dealings, such that unfair terms will not be tolerated.

Key words: Banking consumers, protection, unfair terms, Maqasid-Shari'ah

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1. Introduction

The expansion of Islamic banking industry is a global phenomenon, exhibiting an annual growth of assets at the rate of 16% in 2014 and 2015, and estimated to grow by an average of 19.7% a year up to 2018¹. The Malaysian Islamic banking industry has expanded from 6% to 22% of the overall banking industry whereby the liberalisation of Malaysian Islamic banking industry has subsequently led to Malaysia becoming the leading international hub for Islamic finance². Consumers of Islamic banking products have also increased tremendously worldwide and by December 2013 was estimated at 30 million³.

Malaysian banks (conventional, Islamic, and foreign) have a network of over 2,200 branches in the country. Malaysia has dual nature, the conventional and full-fledged Islamic banks, which operate in parallel. Currently, there are 16 licensed Islamic banks registered with Central Bank of Malaysia (BNM), 10 full-fledged local Islamic banks and 6 foreign Islamic banks⁴. The Central Bank of Malaysia (BNM) defined Islamic banking as “a system of banking that uses financial services and products that conform with the *Shariah* law (*Shariah* compliant) and governed by the underlying principles to conduct business in accordance to mutual risk and profit sharing between contracting parties, the assurance of fairness to all as well as transactions must be supported by genuine business activity/asset”.⁵ This definition indicates that *Shari'ah*, which consists of Islamic ethical precepts and values, is the foundation of Islamic banks that guides the banking operations and outlook of Islamic banks, and that failure to follow *Shari'ah* will render banks not to be considered as Islamic banks. The *Shariah* principles also provide a strong foundation for banking consumer protection via mutual consent of parties, transparency in dealings, and fulfillment of promises in the contracts. Since the ultimate goal of Islamic banks is to achieve the *Shari'ah* objectives (*maqasid*), therefore *Maqasid al-Shari'ah* becomes an important discipline in Islamic banking to streamline the Islamic banking activities and strengthen the Islamic bank because attainment of *Maqasid al-Shariah* indicates the *Shariah* compliant status of Islamic banks.

The development of larger-scale organizations with its mass production and distribution, made a new type of contract appeared, the standardized mass contract. Islamic banks use the standardized contract for their dominant and recurring banking transactions, which significantly reduce legal, *Shari'ah*, operational and other related costs by minimizing documentation and procedures variation, as well as minimizing negotiations between parties and *Shari'ah* scholar involvement⁶. Standard form contract are also referred to as 'contract of adhesion', 'boilerplate contracts', or 'take it or leave it contracts' since consumers have little or no opportunity to negotiate from unfair terms in the standard form contracts. The terms and conditions (T&C) are often written in fine prints and drafted on behalf of the party with superior bargaining power, and the weaker party who are in need of goods and services, has no ability to shop around for more favourable terms either because of the monopolistic power of the drafter or that other competitors use the same provisions.

This paper attempts to evaluate the implementation of *Maqasid al-Shari'ah* in the wordings of Islamic banking contracts and determine whether the unfair contract terms violates the *Shari'ah*. Ensuring fair and transparent contract terms in Islamic banking legal documentation is pertinent in sustaining public confidence and trust in the banking industry because without the support and goodwill of the banking consumers, in the long run the banking institutions will not survive. The aftermath of the global financial crisis of 2007-8 has proven that moral and ethical failures of the financial industry in protecting the interest of the consumers and investors, can result in instability of banking industry should the consumers lose confidence on the sector.

2. Literature review

The term *Shariah* originates from the Arabic root word *shara'a* which linguistically means "the clear, well-trodden path to water" or "the straight path to be followed."⁷ Technically, a more comprehensive definition of *Shari'ah* is "the total sum of Islamic teaching and system revealed to Prophet Muhammad (pbuh), recorded in the Quran and deducible from the Prophet's divinely-guided lifestyle, *Sunnah*."⁸ In

addition, the contemporary definition of *Shari'ah* could be observed in two views⁹:

- (1) *Shari'ah* is viewed as the wide-ranging body of 'Islamic law', meaning the canon law of Islam, which includes the injunctions revealed by Prophet Muhammad (saw) relating to law and belief. Here, Shariah is deduced within the domain of law which regulates their human rights and daily activities such as prayer, provision of charity, financial, business transaction, inheritance etc; or
- (2) *Shari'ah* is defined within the context of a wider meaning as a system of life, which comprises of the belief system (*aqidah*), the law/rulings in Man-God and man-man relationship (*ahkam*) and a code of moralities/ethics (*akhlak*). This is more encompassing as it covers the entire way of life for humanity such moralities, economic, political, etc.

The *Shari'ah* is best understood through its objectives, also known as *Maqasid al-Shari'ah*. Literally, *Maqasid al-Shari'ah* means goals or rationale intended by Allah in the Islamic law, which reflects the holistic view of Islam as a complete and integrated code of life, comprises those benefits and guidance behind the revelation of Islamic law to be applied in daily life of individual and public, for this world and hereafter¹⁰. According to Imam Abu Hassan Al-Ghazali (d.505 AH), "the objectives of the *Shari'ah* is to promote the welfare of all mankind, namely: the protection of their faith (*din*), life (*nafs*), their intellect (*'aql*), dignity or lineage (*'ird*) and their wealth (*mal*). Everything that ensures the safeguard of these five, is considered desirable and whatever which fails to protect these five is considered corruption."¹¹ Generally, the objectives of *Shari'ah* law can be defined as "the end sought behind the enactment of each of the ruling of *Shari'ah* and the secret involved"¹², which explains the wisdom behind the rulings which encompasses both the public *Maqasid (ama)* and private *Maqasid (khasa)*. It is predicated on protecting interest and prevent harm on individual and that of the public. This concludes that *Shariah* aims at maximizing benefit of the people (*maslahah*) and minimizing harm whereby their fulfillment will create a balanced satisfaction in human wellbeing in the world and hereafter.

Simply put, *Maqasid al-Shari'ah* is a comprehensive concept founded on two aspects¹³:

- (1) Macro *Maqasid*: This is based on the broader purpose and wisdom behind enacting the *Shariah* rulings (*ahkam*) which relates towards the general objective of *Shariah* as to achieve social justice and equity in the economic system via wealth circulation, fulfilling society's basic needs etc ; and
- (2) Micro *Maqasid*: The specific purposes which are created to gain specific benefits for the public in performing their daily activities such as dealings with Islamic banking.

Hence, the *maqasid* discussion should embrace both classes of *Maqasid* which are equally important, but it also depends on which priority one prefers.

Islamic banks are Islamic when they conform to *Shari'ah* as the main guiding principles in all operations of Islamic banks¹⁴. It has been stated that Islamic banks describe themselves as providers of ethical banking services, better than their conventional counterparts, but that in reality their practices seldom comply with Islamic ethics and some practices are even inconsistent with ethics¹⁵. Having said the above, Islamic banks are seen as development institutions with important role to in the economic and moral uplift for the Islamic community/public within the *Shari'ah* framework¹⁶.

Standard form contracts are a common feature in banker-customer relationship in Islamic banking which contain standardized and non-negotiable provisions usually in pre-printed forms in fine prints, and drafted by or on behalf of bank¹⁷. However, these contracts have the ability to abuse banking consumers into accepting unfair/unconscionable terms because of unequal bargaining power between the contracting parties¹⁸. As such, the rationale of banking consumer protection against unfair contract terms is to protect banking consumers from inequality of bargaining power in contract¹⁹, failure of Islamic banks to assess *Maqasid al-Shari'ah* and Islamic business ethics²⁰, as well as inadequate legal protection in Malaysia²¹

3. *Maqasid al-Shariah* in Islamic banking industry

It is pertinent to apply *Shariah* in Islamic banking because it was revealed with the primary objective of providing public benefit (*maslahah*) and preventing harm (*mafsadah*) to the people with regards to their worldly affairs and the hereafter. The Quran describes the main objectives of *Shariah* in *Al-Anbiya' 21:107* "And We have sent you (O Muhammad (saw)) except as a mercy to the world (mankind, jinns and all that exists.)". This verse explains that mercy or '*rahmatan*' encompasses compassion, kindness, goodwill, beneficence and include whatever benefit that are harmonious to mankind which establishes justice and protect public against evil.

This paper will observe the ends and means from the micro maqasid of *Maqasid al-Shari'ah* in Islamic banking. *Maqasid al-Shariah* ensures that Islamic banks could contribute towards socio economic justice by ensuring that all banking activities and transactions comply with *Shari'ah*. The discussion of *Maqasid al-Shariah* in Islamic banking dealings, therefore is considered in a more specific manner by applying the standards and guidance of divine revelation in providing protection to banking consumers from unfair contract terms in banking documentation. Such specific purposes of *Maqasid al-Shari'ah* has provided a meaningful theoretical framework for *Shariah* to address current and real challenges in banking transactions.

3.1. *The Goals (Maqasid) and Means (Wasa'il) of Shari'ah in Islamic banking*

In Islamic banking, *Maqasid al-Shariah* refers to the overall goal that *Shari'ah* aims to achieve which are quite specific objectives related to banking transactions and activities that brings, happiness, prosperity and wealth to the banking consumers. The objectives of the *Shari'ah* in Islamic banking includes²²:

a) *Equitable Wealth Circulation*

This objective preserves the nature of dealings in Islamic banking so as to allow equitable distribution of wealth via mobilization and investment of savings as well as effective rendering of banking services.

The Quran highlights such warning that wealth is to be shared amongst the populace: “*That it (nation’s wealth) does not become a commodity between the rich among you.*” (*Al-Hashr: 7*). This verse stresses that circulation of wealth in society is vital in bringing justice to the nation but wealth should not be concentrated on the rich few alone, which requires mankind to do business that achieve fair distribution of wealth and avoid unjust concentration.

Islamic banks play an important role in circulating resources in the economy by refraining from hoarding and monopolizing of wealth as well as ensuring that large section of the society become part of the monetary cycle of wealth. In the pursuit of wealth, bankers are prevented from controlling the majority of wealth in the society through profit maximization and exploiting banking dealings by depriving the banking consumers of satisfying their rights. More importantly, wealth should not be amassed through usurping the rights of banking consumers as stated in the Quran *An-Nisa 4:29* that: “*O you who have believed, do not consume one another’s wealth unjustly but only [in lawful] business by mutual consent.*” Here, Islam makes it clear that while the broad based circulation of wealth is an important economic principle which bring prosperity and happiness to the whole society, however monopolizing of wealth, transgression of weaker party to contract and greediness of opportunist would cause harm to others and will receive the wrath of Allah in the hereafter. Legitimate circulation of wealth amongst the largest section of the populace would definitely afford protection against the crimes and greediness of unscrupulous bankers. Islamic banks in describing themselves as being providers of *Shari’ah*-compliant (*riba* free) banking and ethical banking services, should reconsider their present behaviour as mere profit-oriented organizations. Conformity with *Maqasid al-Shari’ah* means that maximization of profit must be accompanied with responsible behaviour that ensure a level playing field in banking transactions, as well as realizing brotherhood and enhancing social cooperation, rather than being part of social destruction²³.

To institute equitable circulation of wealth, *Shari’ah* guaranteed freedom of contracts with equal bargaining status in banking

transactions. Contract should be respected and fulfilled to protect interest of contracting parties and avoid hardship in performing the contract. As a matter of justice and equity, while *Shari'ah* emphasizes on the fulfillment of contractual obligations, it also provides ways to remove contractual obligations by allowing cessation and cancellation of contract should the contract terms is *gharar* (uncertainty in banking transaction/injustice) or unfair treatment happened to contracting parties. *Riba* which transfers risk to one party to contract while guaranteeing fixed return to another is also banned since it results in unjustified increase in wealth in banking transactions. In the *maqasid* approach, *Shariah* injunctions are integrated in the banking operations with the main concern for fair and transparent banking practices.

b) Educating the individual (tahdhib al-fard)

This is yet another important objective of the *Shariah* for individuals to acquire knowledge and inspire them to be righteous, trustworthy, and honest so as to become useful members of society and to prevent them from causing harm to others. All matters related to injunctions of the *Shariah* such as in *Muamalat* seek to educate people to adhere to principle of justice, honesty, mutual consent and social responsibilities. The Quran in *Az-Zumar 39:9* asserts that “*Are those who know equal to those who do not know? Only they will remember [who are] people of understanding.*” This verse indicates that people will be judged by their knowledge and understanding. Knowledge is indeed important to fulfill religious responsibilities, as it is also needed to achieve social and economic wellbeing of the society in ensuring social harmony and human rights. Islamic banking literacy can help empower banking consumers to enable them to make informed decisions, being aware of their consumer rights/responsibilities, increase awareness of redress mechanisms and to give them confidence to take legal action against Islamic banks that violate the *Shariah*.

To achieve this objective, *Shari'ah* emphasized the role of government in implementing banking consumer awareness and education programme to achieve effective consumer protection

infrastructure. BNM as the regulatory and supervisory authority of financial institutions, used a risk-based approach to consumer protection by focusing on market conduct and financial education to ensure a stable banking system and fair treatment of banking consumers. The Consumer and Market Conduct Department (CMCD) was also established to increase attention to fair and equitable banking practices and financial literacy of banking consumers. The Malaysian market conduct framework highlights some positive practices for consumer protection²⁴:

- Financial literacy and awareness. BNM facilitates financial education via outreach programs, including exhibitions, seminars, bulletins, brochures and periodicals to inform consumers about their rights and responsibilities on specific banking products or give wide publicity of unfair contract terms.
- Implement new market conduct guidelines as risks emerge, mainly on products commonly used by banking consumers. BNM also collaborates with banks and maintain two Web sites which provide useful information in choosing the right product, financial calculators, and tables to compare rates, fees, and features of banking products of different banks.
- Availability of multiple and systematic avenues to lodge complaints and seek recourse: BNM, industry and consumer associations, and Financial Ombudsman Scheme (FOS). Consumer groups, including National Consumer Complaints Centre (NCCC)²⁵ and Consumer Association Penang (CAP) act as a connecting link between consumers wanting to file complaints and defaulting bankers to ensure justice is served to consumers.

c) Promote fair and transparent banking practices

This is one of the main objectives of *Shari'ah* to protect banking consumers from imbalance of their rights due to unfair contract terms. In upholding justice ('*adl*), the Islamic banks must be efficient, ethical and fair to all participants. '*Adl* is a manifestation of Allah's mercy to

mankind as stated in *Al-Hadid 57:25* which says, “*We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice.*” *‘Adl* in Islam literally means to place matters in their right/ proper place. It is fundamental in *Shariah* to establish equilibrium between rights and obligations of the banker-customer in order to eliminate all disputes in banking dealings. Fairness relevant to Islamic banks are right to equal information, right to efficient prices, right to fair and transparent contractual wording, and right to equal bargaining power in banking transactions.

The tools instigated by *Shari‘ah* of promoting fair and transparent banking practices is by imposing Islamic contract law in all banking transactions such as: contractual wordings must be defined clearly, jargon-free and easy to understand, no material information is hidden as well as all information is reliable and accessible to contracting parties. BNM has issued Guidelines on Product Transparency and Disclosure to enhance disclosure quality, timely, clear and concise, accurate, relevant, consistent, and comparable. Clearer understanding of banking documentation and transparency would also enhance banking consumer protection. Islam disapproves any banking transactions which involve injustice or detrimental to the rights of the contracting parties. To ensure that banking consumers are treated fairly, BNM monitors marketing material for unfair contract terms and responds to customer complaints arising from certain banking products/services.

d) Establishing Islamic business ethics and standards

Islamic banking may be viewed as a form of ethical investing or ethical borrowing/lending. In Islam, ethics governs all aspects of life while emphasizing the relationship of the individual to Allah whereby such moral conduct is seen as part of their devotion and faith. Islamic business ethics as enshrined by the *Shariah* are based on compassion, tolerance, benevolence, free will, hospitality, justice and responsibility, whereby *al-‘adl wal-ihsan* being the most important. In the Quran, Allah describes individuals that attain everlasting success or *falah* as those who “*inviting to all that is good (khayr), enjoining what is right*

(maruf), forbidding what is wrong (*mungkar*), and believing in Allah” (*Ali Imran 3: 110*). This clearly means that individuals must place social interest over and above their personal interest at all times and must not forget their role as vicegerent of Allah on earth (*Al-Baqarah 2: 30*). This verse established the Islamic ethics related to rights and obligations of banker and customer in Islamic banking industry that bankers must behave in an ethical manner in performing their jobs to the best of their ability and therefore are accountable to Allah in the Hereafter.

Shari'ah instituted ethical values in Islamic banking including freedom of contract, freedom from excessive uncertainty (*al-Gharar*), and entitlement to fair contract. These ethical practices play a prominent role in Islamic banking industry because absence of ethical values would result in criminal activities. To avoid unfair dealings and exploitation of others, the Association of Banks in Malaysia (ABM) helps set policies and guidelines for member banks on code of conduct/ethics and encourage honest bankers, bankers that aim for consumer satisfaction will be credited by publishing favourable report about them.

e) Realizing social justice to prevent harm (mafsadah)

The *Shari'ah* aims to practice the concept of mutual consent in contracts and equitable right to achieve comprehensive communal prosperity to the public. To achieve the economic prosperity of the public, the basic needs of banking consumers must be satisfied which as a result, would remove or minimized any harm and hardship in banking transactions. Achievement of this objective will create moral consciousness to acknowledge the rights and obligations in banker-customer relationship towards wellbeing of the weaker party to contract, the banking consumers. This makes the social responsibility of Islamic banks towards the banking consumers an obligation (*fard*) and not an option, with the banks having the upper hand in contractual negotiation, they must give room to banking consumers to negotiate T&Cs that are also favourable to them.

The achieving of this objective is by involvement of the state/government to set up regulations, laws and policies towards banking

consumer protection against unfair contract terms. This calls for the urgent need of having Malaysian own Unfair Contract Terms Act and Standard Form Contract which are long overdue.

4. Unfair Contract Terms in Islamic banking documentation

In commercial practice, a standardized contract is primarily used by organizations with strong bargaining power/position. The standardization of contracts become popular and it is common for banks to offer consumers with standard forms contract which must be accepted and complied to improve efficiency in business dealings. The banking contracts states the terms and conditions that set out the rights and obligations of bankers and customers who are bound by them. The terms are fixed, non-negotiable and not transparent to the extent of being dictated by legislative or economic pressure.

A term in Islamic banking standard form consumer contracts would be considered as unfair if²⁶;

- Clauses give banks sole and absolute discretion from time to time to vary, limit, restrict, refuse or withhold some conditions of the financing under the banking contract;
- The terms give advantage to Islamic banks and causes significant imbalance on parties' rights and obligations;
- The terms are contrary to good faith and detrimental financially or otherwise to the banking consumers when applied or relied on;
- Terms unreasonably limiting/ avoiding the liability of the Islamic banks to the banking consumer;
- Terms unreasonably allowing the Islamic banks to terminate or alter the contract or product/ services provided under the contract without recourse to the banking consumers;
- Terms which are not expressed in plain, intelligible language and are difficult to understand by average/ typical banking consumers.

The following instances, though not exhaustive/definitive, may provide insight on the types of wordings that could be potentially unfair contract terms:-

a) Exemption/Exclusion Clauses

Unfairness is likely to happen when a bank uses wordings that excludes or restricts the Islamic bankers from liability for breach of contract and protect them from being sued by the banking consumers for damages, loss, negligence etc. For example:

“In consideration of the Bank acting as the Customer’s agent, the Customer shall indemnify the Bank against all actions, claims, demands, liabilities, losses, damages, costs and expenses of whatever nature which the Bank may sustain or incur as result of acting as his/her agent.” (Islamic Bank A Personal Financing-i Facility for Pensioners)

Such clauses may be unfair since it disadvantaged the banking consumers due to unequal bargaining power and lack of sufficient information to determine whether terms are fair. This clause violates the spirit of *Maqasid al-Shari’ah* on realization of *maslahah* (public interest) in all aspects/life because it failed to establish justice, promotes mutual support and alleviates hardship on banking consumers. It is unethical and selfish for the bankers to abuse the freedom of contract concept by discharging their liability through manipulative method of drafting the contract. Such wordings should not be used in Islamic bank legal documentation.

b) Limitation of Liability Clauses

Any terms in a contract that purports to limit or exclude the bankers’ liability to the banking consumer are very likely to be considered unfair. This is a sensible way for bankers to apportion risk in a contract by capping the amount of damages payable on a breach of contract, impose time limit for claims, restrict the types of loss recoverable or the remedies available and some clauses go to the extreme of excluding bankers’ liability altogether. For example:

“The Principal Cardholder and/or the Supplementary Cardholder hereby agrees to waive and/or to release Islamic Bank B from any claims or demands arising directly or indirectly from the withdrawal, cancellation or suspension of the Card including without limitation to any purported claim for defamation or losses whatsoever.” (Islamic Bank B Credit Card-i)

This clause goes against the spirit of cooperation and fair treatment among contractual parties expounded in *Maqasid al-Shariah* because in the credit card contract, the Islamic bank actually transfers all the risk and liabilities to the banking customer, leaving the bank no risk to bear while securing profit. Shariah emphasized on mutual agreement which brings about mutual consent and satisfaction on parties to a contract. Broad clauses such as this should be avoided when drafting a contract.

c) Force majeure Clauses

This clause is potentially unfair because it aims to excuse one party for the non-performance of contractual obligations triggered by some unforeseeable specified events which otherwise could be breach of contract. Islamic banks, for example, use force majeure clauses in Islamic credit card agreement whereby bankers accept no liability for breach of contract:

“Islamic Bank A shall not be liable for failure to carry out its obligations due directly or indirectly to any Acts of God, or force majeure, war (whether declared or undeclared), strike, riot, civil commotions, acts of terrorists, labour unrest, lock-out, fire, accident, breakdown of machinery or any matter beyond the control of Islamic Bank A.” (Islamic Bank C Credit Card-i)

Even if such clause is lawful stipulation in Islamic contract law for facilitating discharge of contract, however, from *Maqasid al-Shari'ah* point of view it is unfair to the banking consumers since such clause override legal rights of banking consumers to seek redress when banks are in default or even hindering legitimate efforts to seek redress.

d) Abusive Clauses

The abusive characters of a clause: consumer receive inadequate information on potentially unfair clause, departure from reasonable expectation of adhering party, obscure or confusing clause, lack of negotiation and unilateral drafting. The following example gives the Islamic banker the right to transfer of bank debt.

“The Owner shall be entitled to, at any time and without prior notice to the Hirer, set-off or transfer any sum or sums standing to the credit of one

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or more accounts of the Hirer held with the Owner, including any savings account, fixed account or current accounts in towards satisfaction of any liabilities of the Hirer to the Owner, including any compensation fees under the hire purchase and any amount in arrears of the hire purchase accounts of the Hirer.”

(Islamic Bank D Hire-Purchase Agreement-i)

This clause violate the *Maqasid al-Shari'ah* on the spirit of social responsibility because it breach the good faith since it is so weighted in favour of the banker, increase the benefit bankers enjoyed and excessively detrimental to the rights of banking consumers. Over severe sanctions of this kind are likely to be considered unfair when bankers are allowed to use enforcement methods which could violate banking consumers' proprietary rights. Banks using contracts of adhesion has a duty to inform unfair clauses that are particularly detrimental to the consumer.

e) Right to final decision

Banking consumer could be at a disadvantage when a term gives the bank the right to decide how contract is interpreted or whether a breach has occurred, for example:

“The Islamic Bank has the absolute discretion to review and/or amend the terms and conditions of the Facility offered and/or cancel the same.” (Islamic Bank E Personal Financing-i Facility Agreement)

This clause may be unfair and violates the *Maqasid al-Shari'ah* when banks is able to decide whether it has met its own contractual obligation or reserves the right to decide the meaning of contractual terms. This indicates that banks are given too much freedom in deciding how to perform a contract to the extent of altering the way contract works to suit themselves, this would cause harm to banking consumers by denying their redress that they are entitled to.

f) Terms are not transparent

Contractual wordings of the terms in banking contract are transparent if they are legible, expressed in clear, plain intelligible language, and jargon-free language that banking consumers can understand which

enable them to make informed choices, before signing a contract, as to which contract terms are detrimental to their consumer interests and whether to proceed with the contract or not. For example:

“Use of credit card: The Islamic Bank C is entitled at its sole and absolute discretion without any liability whatsoever to suspend, cancel or recall the Card by giving notice to the Cardholder and without the need to assign any reason whatsoever thereto.” (Islamic Bank C Credit Card-I)

Contractual terms such as the above is contrary to the *Maqasid al-Shari'ah* of promoting fair and transparent banking practice because the contract terms are not reader-friendly since the sentence is not expressed in plain and intelligible language, and not jargon-free. Contractual documentation should be drafted in a way that give banking consumers a chance, before entering a contract, to see and understand any terms that could operate to their disadvantage and whether or not to make a contract.

g) Unilateral Variation of actions, fees and charges

Such terms give the banks the right vary any of the terms already agreed upon and allow them to modify the written contract terms on a unilateral basis regardless of the consent of banking consumers:

“It is hereby declared that any amendment and/or variation of any fees, charges, terms and conditions herein contained, shall be made or caused by way of Bank giving written notice in advance to the Customer in accordance with any published rulings of Shariah Advisory Council Bank Negara Malaysia, in silent of which in accordance to the Bank’s internal policy and/or procedure.” (Islamic Bank E-Personal Financing-i Facility Agreement)

Variation clauses are likely to be unfair if they are used to force the banking consumers to accept increased costs, new requirements or reduced benefits. Terms that give banks the sole right to determine and change important elements like fees, charges, T&Cs that have been agreed at its discretion, are likely to be unfair. *Maqasid al-Shari'ah* insist that contract is legitimate if there exist mutual consent of both parties. For variation clause to be fair, banking consumers should be given enough information when entering into the contract

to foresee their position by use of such clauses, to understand the implications, and given the right to cancel the contract.

h) Unilateral Termination for convenience Clauses

Termination of contract by the banks at their convenience can leave banking consumers seriously inconvenienced, and potentially facing costs.

“The Bank reserves the right to terminate or withdraw the Facility at any time irrespective of whether or not you have breached any terms and conditions contained herein or in any other documents in relation to the Facility and without any obligation (be it at law or in equity) to assign any reason for such termination or withdrawal.” (Islamic Bank B Equity Home Financing-i)

The above term stating that banks can terminate at its option, irrespective whether banking consumers is at fault, is likely to be considered unfair. There is also potential unfairness is the bank can terminate without notice or reasons behind. *Shari'ah* disapproves commercial transactions that cause harm and injustice to any one of contracting parties which restricts freedom to contract as well as allowing one party gain at the expense of another party. Banking consumers should always have a real opportunity to understand contract terms provided by a provision of a cooling-off period before they are bound by them or even cancel without financial sanction.

In conclusion, there is an obvious scope of abusing *Maqasid al-Shari'ah* when Islamic banks apply unequal bargaining power in banking contracts. Fair and transparent contractual terms are the hallmark of Islamic banks. However, Islamic bank's standard form contracts become a tool that exploits the banking consumers since they are not negotiable but provide freedom and absolute discretion for the Islamic banks to include potential unfair terms in their legal documentation. The Islamic banks should not take advantage of banking consumers' vulnerability due to their weaker bargaining power in contract negotiation, particularly when the banking consumers are left worse off than before they enter into the contract. Most of the time, banking consumers signed the standard form contracts in good faith but sadly these unfair contract terms are legal

in nature. Islamic banks need to implement fairness by recognizing the banking consumers' rights to equal bargaining power in negotiation leading to a transaction.

3. Conclusion

Attainment of the *Maqasid al-Shari'ah*, to maximize benefit and minimize harm to banking consumers and other stakeholders, is an indispensable function of Islamic banks. *Shariah* law highlighted respective elements that are vital for banking consumer protection such as transparency in dealings, trade through mutual consent, honesty and truthfulness in banking transaction, to earn legitimate (*halal*) business and just price, fair and transparent legal documentation to name a few. The legal documentation of the various Islamic banks under the present study in Malaysia seems to be devoid of the spirit of *Maqasid al-Shari'ah*. It is expected that these discrepancies can be lifted if only Islamic banks observe the universal and dynamic conception of *Maqasid al-Shari'ah* in their corporate objectives and policies in order to achieve justice and equity in banking transactions and activities. This indicates that Islamic banks must develop its vision and mission not only limited to individual objective by providing *Shari'ah* compliant products/services, but rather more encompassing so as to include the concept of social welfare of the society.

The Islamic banks could play an important role in achieving the realization of *Shari'ah* compliant status through its affirmative emphasis on the ethical and moral considerations in dealings with banking consumers. By having fair and transparent legal documentation for the benefits of banking consumers at large, the Islamic banks could seek to establish a banking business based upon fairness and justice. However, findings on potential unfair terms in Islamic banks contracts in this study, justify the dire need for protection of banking consumers against unfair contract terms via improved legal documentation which can play promising role in Islamic banking industry in Malaysia. Islamic banks need to deal fairly with banking consumers, in ensuring that contractual wordings be drafted with respect to banking consumer legitimate interests.

Finally, if Islamic banks can fully realize the noble objectives of *Shari'ah* in Islamic banking legal documentation, hopefully such implementation will help enhance the performance of their business and services, establish justice and satisfaction on the banking consumers, as well as fulfilling the economic and social justice in the banking sector.

Notes

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