

***Commodity Murabahah* Home Financing in Malaysia
in the Case of Abandoned Housing Projects:
A *Shariah* Analysis on Its Operation**

Amnisuhailah binti Abarahan*
Muhammad Yusuf Saleem*
Azman Mohd. Noor*

Abstract

Commodity murabahah has received extensive exposure since the Islamic financial industry shifted from *bay' bithaman ajil* for its banking and financial products. The *muamalat* based contract which is innovated from the classical *tawarruq* with certain modifications has proliferated in many of the retail products in Malaysia including home financing. This paper analyses the financing facility offered to Malaysian homebuyers to investigate the extent of safeguards present in the facility when there are project abandonments. The operation of *commodity murabahah* as practiced in Malaysia for houses under construction are discussed and analysed with respect to their operations to know whether they conform both in form and

* Lecturer, Faculty of Islamic Economics and Finance, Universiti Islam Sultan Sharif Ali Brunei Darussalam.

Email: amni.abarahan@unissa.edu.bn.

* Associate Professor, Graduate Studies in Islamic Finance, International Centre for Education in Islamic Finance Malaysia.

Email: yusuf@inceif.org.

* Associate Professor, Institute of Islamic Banking and Finance, International Islamic University Malaysia.

Email: azmann@iiium.edu.my.

substance. The analysis is done via library research while semi-structured interviews on operation of the facilities are done with experts in the field. The study finds that the *commodity murabahah* facility catered lacks the necessary safeguards for customers of Islamic banks. This can further aggravate the situation of homebuyers who have no proper recourse when their under constructed houses are left abandoned by developers. The paper calls for a more *Shariah* based oriented facility for houses under construction which is close to its *muamalat* nature in order for the rights and obligations of parties involved in home financing be inherent.

Keywords: *commodity murabahah*, home financing, *Shariah*, abandoned housing projects, homebuyers

Introduction

Since the inception of Islamic banking and finance in Malaysia, the country has been in the forefront leading the industry towards becoming a global Islamic financial hub. From *sukuk* in the Islamic capital market arena to retail banking products in Islamic financial institutions, various *muamalat* based contracts are used prevalently suited to cater the needs of modern times. The shift of the banking industry which was once concentrated with the use of *bay' bithaman ajil* in the beginning of its years, has now shifted to different *Shariah* contracts to answer the call for more *Shariah* compliancy. *Commodity murabahah* has become a popular recourse to the alternative *bay' bithaman ajil*. It has been widely applied and well received by the industry

including for home financing facilities. The use of *Shariah* compliant contracts however should not only be assessed on the surface as their operations remain a constant discussion for many including homebuyers getting *commodity murabahah* financing for under construction houses. This proves very important when the houses financed by IFIs are later abandoned by project developers due to the nature of sell then built housing delivery system used in Malaysia. It is vital that the operation of the facility be investigated from the *Shariah* purview to look at the materialization of the inherent rights and obligations that *commodity murabahah* comes to offer. The use of library research and semi-structured interviews of industry players are very important in bringing the discussion into motion. The paper discusses the scenario of abandoned housing projects and the role of the Housing Development (Control and Licensing) Act 1966 (Act 118) for housings in Malaysia and later defines and explains *commodity murabahah* and its operation in home financing for houses under construction. The analysis of the operation from the *Shariah* perspective later follows with issues like the underlying asset and ownership, the legal title and ownership, the resemblance between *tawarruq* and *inah* and the asset being pledged. The paper later draws out its findings and conclusion from the analysis.

Background of the Study

Islamic banking and finance offer various products to cater the need of financial clients who opt for *riba*-free transactions. It has always and continue to be the main

objectives of *Shariah* to protect the contracting parties where the rights and obligations arise from the consent of both counterparties. Financial engineering has taken place in the development of *Shariah* compliant contracts, though some strong proponents of Islamic finance have strongly argued that these contracts are seen to be mimicking conventional ones and have urged the development of *Shariah*-based contracts rather than *Shariah* compliant ones.

Rising cases of abandoned housing projects in Malaysia affecting homebuyers strengthens the need to address the situation. Disheartened homebuyers have called Islamic products far worse than conventional ones. This study relates *commodity murabahah* home financing facility to the situation of abandoned housing projects in Malaysia. This is due to the fact that the housing delivery system used in the country is based on the sell then built delivery system, where houses are usually bought by homebuyers first, obtain financing from IFIs later and only afterwards in due course developers start the build-up of the houses being financed. This is called end financing. According to Dahlan (2014) abandoned housing projects have plagued the housing industry in Malaysia as early as the 1970s. The first half of 2017 statistic of MUHLG itself records that there are 67 AHPs across the states in Malaysia as of June 2017. This AHPs affect 14,973 housing units and 10,602 homebuyers (MUHLG, 2017). This poses a great concern to the housing industry and to the banks themselves when buyers are not protected. Even though there are no recent information on how many abandoned housing projects are financed under *commodity murabahah*, allegations of Islamic banks

pressuring their clients in the mass media are enough to cause concern (Rosly, 2010). The issue of claiming the full financing amount by banks in the event of customer default in situations of abandoned projects is seen as unfair and unjust as the repayment of financing is higher when default happens (Lukonga, 2015). Cases like these have given rise to sceptics who question the realities of Islamic finance as consumers do not understand mechanisms of financial products and are not well-informed, thus unable to choose the best products for financing their homes (Lukonga, 2015). Therefore, the nature of using Islamic home financing products should initially reflect the necessary protection that embodies the full right and obligations of the parties on the basis of which contract the products are based upon.

Home financing products offered by Islamic banks should more importantly be assessed to ensure that the main objectives of *Shariah* are fully reflected, guaranteeing the well-being and protection necessary, not just for the bank but also its customers. With the basis of upholding benefit and repelling harm (*raf' al-haraj wa daf' al-darar*) and the concept of just and benevolence (*al-'adl wa al-ihsan*), it is imperative to ensure that *maqasid al-Shariah* is embodied in *commodity murabahah* and thus no harm will befall customers.

Scope of the Research

The research is focused on the operation of *commodity murabahah* home financing offered in Malaysia. The study's

main objective is to study the extent of protection mechanism that *commodity murabahah* is able to offer in cases of housing projects abandonment by developers.

Literature Review

Home Financing Facilities

As housing projects are capital intensive, the cooperation of banks and financial institutions in terms of funding are expected. Most importantly, this is to assist developers in financing the housing projects either by giving them bridging loans or by providing end-financing to homebuyers (Yusof et.al, 2016).

Tawarruq, better known as *commodity murabahah* is one of the well-supported contract in Malaysia for home financing. Regardless of OIC *Fiqh* Academy's resolution on the impermissibility of organised *tawarruq* in its 19th meeting in 2009, Islamic home financing facilities based on the contract has gained much popularity (ISRA, 2013). Though it is claimed to be an alternative to *bay' bithaman ajil*, Razak et.al (2015) state that *tawarruq*, just like *bay' bithaman ajil* has features that insulate Islamic banks as well as transfer risks and liabilities to homebuyers. Thus, this questions how far an alternative is *commodity murabahah* in home financing if it also inherits the same features as *bay' bithaman ajil*.

Form vs Substance

Yusof (2013) states that because of the replication of conventional products, there are issues of form over

substance affecting Islamic banks. Though the Islamic financial products have all the *Shariah* features in form, they do not reflect the *Shariah* objectives of the contract. He also argues that when the legal specificities of the contract is strictly complied, this will preserve the sanctity and validity of Islamic financial transactions but it is the ethical and social implications of the contract that should be prioritized. He further adds that Islamic contracts and instruments must reflect the true nature of their contracts both in form and substance in order to distinguish themselves from conventional ones. Soualhi (2015) states that the ill use of some *Shariah* contracts has raised concerns to their *maqasid*-compliance. He also recommends simplification of Islamic financial engineering in order to minimize possible convergence of Islamic with conventional finance. By investigating the operation of *commodity murabahah* financing for houses under construction, this paper will be able to highlight the level of conformity of form and substance for the facility as well as the element of safeguards provided by *commodity murabahah* for customers.

Abandoned Housing Projects

As home buyers intend to own houses, they often approach Islamic banks due to their faith premium. With the various financing options offered, home buyers can avoid interest bearing loans. However, this can turn into a nightmare when homes under construction are left abandoned by developers due to various reasons such as an economic downturn, lack of feasibility studies, inadequate experience and expertise, lack of coordination or even fraudulent practices by

developers (Mydin et.al, 2014). Haron et.al (2016) also claim that one of the main contributing factors of abandoned housing projects is the lack of enforcement of housing law and policy in the country and homebuyers are not sufficiently protected under the existing law. They also state that the developer and banks have taken advantage of Malaysia's housing delivery system of sell then built (STB). According to them by using the system, the risks are all transferred to house buyers through their progressive payments.

Dahlan (2014) states that homebuyers are not able to revoke the agreements and claim for the return of all the money paid, as the developers may have absconded or may have no financial means to meet the claims. There are even some cases that are dragged for many years, home buyers may have even passed away before plans to revive the project are put into place. There are papers on abandoned housing projects from the legal perspective but only some discuss the issue from the *Shariah* perspective. Dahlan & Al Junid (2011) examine the extent the Sale & Purchase agreement and the loan agreement in *bay' bitahaman ajil* have complied with the requirements of Islamic law in protecting the customers in the case of abandoned housing projects. The study strongly asserts that the *bay' bithaman ajil* contract used was contradictory to Islamic teachings and suggested for necessary modifications to protect borrowers. Yusof et.al (2016) also discuss abandoned housing projects but in relation to Islamic finance legal documentation from the legal perspective. This study will be able to relate the investigation of abandoned housing projects with the

financing facility of *commodity murabahah*, where the financing is focused on facilities extended to customers on houses under construction or yet to be constructed from the *Shariah* purview.

Based on the literature reviewed, the *Shariah* analysis of the operation of *commodity murabahah* for financing of abandoned housing projects have not been addressed. Furthermore, the scenario present in Malaysia as the focus study has also not been discussed. The findings of this study highlight and safeguard the inherent rights and obligations of counterparties in *commodity murabahah* especially for homebuyers in light of the *Shariah* objectives, ensuring the presence of equity and fairness to achieve a more stable financial economy based on true *Shariah* principles.

Research Methodology

The study is best to conduct qualitatively to find the extent of measures offered by *commodity murabahah* home financing for houses under construction. Main references include related literature which are primary ones for *commodity murabahah* such as the *Qur'an* and *ahadith* and secondary ones for abandoned housing projects which includes *Shariah* resolutions and standards, as well as related acts and regulations on the research area. By focusing the study on the Malaysian experience, interviews on the structural operation of the facilities and the scenario of abandoned housing projects are conducted to gain better inputs and insights. The interviewees comprise of

experienced Islamic bank personnels and practitioners. Documentation analysis is done to substantiate the arguments.

Abandoned Housing Projects in Malaysia

The protection of consumers' interest and welfare in Malaysia is under the Ministry of Domestic Trade Cooperatives and Consumerism (MDTCC), but matters pertaining specifically to housing and related issues are vested by the federal government to Ministry of Urban Well-being Housing and Local Government (MUHLG). This includes the issues of abandoned housing projects which is specifically under the task of the National Housing Department (NHD), together with the enforcement of the Housing Development (Control and Licensing) Act 1966 (Act 118) for housing matters. An abandoned housing project is when a housing developer had refused to carry out or delayed or suspended or completely stopped works on the project for the period of six months or more from the promised completion period in the S&P agreement (Hussin & Omran, 2011).

Housing Development (Control and Licensing) Act 1966 (Act 118)

The Housing Development (Control & Licensing) Act 1966 (Act 118), known as the HDA is important to highlight in this study. The Act has been in force since 29 August 1969 and has gone through numerous amendments (Tan, 2016). The main purpose of the Act's enactment is to provide for

control and licensing of the business of housing developments in Peninsular Malaysia and for the protection of the interest of purchasers against unscrupulous developers (Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335; Gan Hoe @ Gan Nuan & Anor v. Golden Century Development Sdn Bhd & Anor [1981] CLJ 89; SEA Housing Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31). The Housing Development (Control and Licensing) (Amendment) Act 2012 Act 1415) on the other hand was gazetted on 9 February 2012 and came into operation on 1 June 2015. The delay in enforcement was because the Act was to be enforced together with the Strata Management Act (2013) and Strata Titles Act (Amendments) 2013 (Tan, 2016). This act is also within the ambit of Ministry of Urban Well-being Housing and Local Government (MUHLG) in issues related to housing.

The amendment of the HDA 1966 Act (118) was to improve the legal aspects in relation to home properties in order to enable the National Housing Department (NHD) and MUHLG to take far more aggressive actions against developers and protect homebuyers from falling into victims of abandoned housing projects. Among the amendments of HDA 1966 (Act 118) include the following (Tan, 2016:n.p):

- 1) Section 3: the interpretation of ‘housing developer’ is extended to include a person or body appointed by a court of competent jurisdiction to be the provisional liquidator for the housing developer in a case where the housing developer is under liquidation.

- 2) Section 6: The developer's required deposit is increased from RM200,000 to 3 percent of the estimated construction costs (excluding land cost but including financial costs, overhead costs and all expenses needed for the completion of the housing development).
- 3) Section 7B: legal action taken against housing developer who commits an offence under section 7, the case where the license of the developer has expired but the project has not been completed at the time of the expiry.
- 4) Section 8A; the entitlement for housebuyer to terminate the S&P Agreement at any time if the developer refuses to carry out or delays or suspends or ceases work for 6 months continuously or more after SPA execution.
- 5) Section 16N: The jurisdiction of the Tribunal for Homebuyers Claims is expanded to include claim of damages for Sale and Purchase Agreement cases entered with housing developers.
- 6) Section 16Q: The phrase "the cause of action not to be split" has been substituted with "claims not to be split".
- 7) Section 16AD (1): The increase of fine rate from not less than RM5,000 but not exceeding RM10,000 to not less than RM10,000 but not exceeding RM50,000.
- 8) Introduction of new section 18A: To enable home buyers to initiate legal proceedings against any licensed developers who abandons or caused the housing projects to be abandoned. They are to be

- fined between RM250,000 and RM500,000 or imprisonment not exceeding three years or both.
- 9) Section 24(2)(g): The fine has been increased from RM20,000 to RM50,000 for housing developers without valid license or for those who do not comply to the Tribunal award.
 - 10) Abolition of subsection 16N(iii): Tribunal now has jurisdiction to hear cases relating to claims for late delivery of vacant possession.

The standard Sale and Purchase Agreements (schedules G, H, I & J) are also amended by the Housing Development (Control and Licensing) Amendment 2015 on 1st July 2015, in order to improve and protect the rights of homebuyers. The amendments are as the following (Tan, 2016:n.p):

- a) Regulation 8: On advertisement and sale permit. The licensed housing developers are not allowed to include the following:
 - (i) Offer of free legal fees
 - (ii) Projected monetary gains and rental income
 - (iii) Claim of panoramic view
 - (iv) Travelling time from housing projects to popular destinations or
 - (v) Any particular to which the housing developer cannot genuinely have proper claim.
- b) The time of the Sale and Purchase Agreement has been standardised to 30 days. It is no longer 21 days for payment term of progressive billings or payment term for refund by the developer.

- c) The manner of delivery of vacant possession: must be furnished with Certificate of Completion and Compliance (CCC), separate strata title (for properties with stratas) with completion of any alteration or additional work.

Both the recent amendments of the acts are promulgated to provide better protection for homebuyers. The amendments and the tightening of the HDA 1966 (Act 118) previously in the year 2002 and 2007 have failed to address the problem of abandoned housing projects. The recent amendments are important and can help buyers in upholding their rights particularly in situation of abandoned housing projects left by developers and also to avoid potential homebuyers from falling prey to fraud advertisements by developers in selling properties which are yet to be built.

A homebuyer is a very important proponent in this study. He is basically a purchaser who has bought a property or has a confirmed dealing with a licensed developer. This also includes second hand purchasers, buyers who buy the property under sub-sale from the first purchaser and does not include purchasers subsequent to this (Sabri, 2014). Although the HDA1966 (Act 118) is available to address the concerns of homebuyers in cases of abandonment, the Act only handle matters between the developer and owner. However, it does not bring in banks or financial institutions which are most often than not giving financing to homebuyers. The addressing of this relationship is absent and not covered by the HDA 1966 (Act 118). Due to the fact that it involves the roles of financial institutions, it is without

choice that it should fall under the ambit of Islamic Financial Services Act 2013 or BNM's *Shariah* Standards (stated under different *Shariah* contracts in the standards). Islamic Financial Services Act 2013, although do not precisely define anything on the protection of customers, the standards seek to protect them from any financial biases. The *Shariah* Standards for each contracts used are lengthy enough in explaining the operation of each financing structures, thus addressing the rights and obligations of all parties involved. However, are the realities of financing under construction houses according to the standards? Will homebuyers have the necessary exit mechanisms when housing projects are abandoned?

***Commodity Murabahah* Home Financing**

The situation of buying a house that ends up being abandoned by developers, starts with a housing project which has not been built or is under construction. The relationship initially begins with the arrangement and agreement between the homebuyer and the developer. The financial institution only comes into the picture when homebuyers approach banks to get financing for the remaining price of the property to be constructed. The bank acts as the end-financier.

***Commodity Murabahah* Modus Operandi for House Under Construction**

Tawarruq, both organized and reversed are used in Malaysia.

However, the International Council of Islamic *Fiqh* Academy, in its 19th session, after taking into considerations the classifications of classical and contemporary jurists on *tawarruq*, classifies *tawarruq* into the following (OIC *Fiqh* Academy, 2009) resolution 179 (19/5):

- 1) According to jurists, *tawarruq* is technically defined, “as a person (*mustawriq*) who buys merchandise at a deferred price, in order to sell it in cash at a lower price”. Usually, he sells the merchandise to a third party, with the aim to obtain cash. This classical *tawarruq* is permissible, provided that it adheres with the *Shariah* requirements of *bay’*.
- 2) Organised *tawarruq* in its contemporary definition is when a person (*mustawriq*) buys a merchandise from a local or international market on deferred price basis. The financier arranges the sale agreement with either himself or through his agent. The *mustawriq* and the financier execute the transactions simultaneously afterwards, often at a lower price.
- 3) Reverse *tawarruq*: It is the same as organised *tawarruq*, but the *mustawriq* is the financial institution and it acts as a client.

The council has ruled that the second and third type of *tawarruq* (organized and reversed *tawarruq*) are not permissible. The reason is because of the simultaneous transactions done between the financier and the *mustawriq*, whether done explicitly, implicitly or according to common practice. It is considered as a deception in order to get

additional quick cash and this results to *riba*.

The legality of *tawarruq* is based on the Quranic verse, “Allah has permitted trading and forbidden usury” (Surah al-Baqarah, 2:275). The legality for *tawarruq* aside from this, is based on a *hadith* reported by Abu Sai’d al-Khudri and Abu Hurayrah (r.a.) that the Prophet (PBUH) appointed a man as his agent in Khaybar. He brought some good quality dates to the Prophet (PBUH). The Prophet later asked him, “Are all the dates of Khaybar like this?” The man later replied, “No, I swear by *Allah* (SWT), O Messenger of *Allah*, we exchange a *saa*’ of this kind of date for two *sa*’as of another (lower in quality) and the two *sa*’as of this for three *sa*’as.” The Prophet said, “Do not do that. Sell your batch of dates for dirhams and then pay for the good quality dates with the dirhams.” (*Sahih Bukhari, Hadith* No.2080). It is also claimed that the permissibility of *tawarruq* is because of public interest (*maslahah*), necessary to alleviate and ease the life of the people. It is also permissible based on the *fiqh* legal maxim of: الأصل في المعاملات الإباحة According to the original method of ruling, *mu’amalat* is permissible, except when there is a provision prohibiting it.

The permissibility of *commodity murabahah* is mentioned in Bank Negara Malaysia’s *Shariah* resolution (2010:13):

The council in its 51st meeting held on 28th July 2005/21st Jamadil Akhir 1426 resolved that deposit product and financing based on the concept of *tawarruq* known as *commodity murabahah* is

permissible.

An organized *tawarruq* structure (*commodity murabahah*) for most IFIs in Malaysia happens in the following sequence. The customer will first sign the Sale & Purchase agreement with the developer for the intended house to be purchased. A sum is deposited with the vendor/developer which is usually 10% of the house price, for example RM10, 000. The customer will then approach the bank for financing the remaining value of the property price, example RM90, 000. Once the financing facility is approved by the bank, the customer will then request the Bank to purchase a commodity with the undertaking to purchase it back from the bank. It is through the Master *Murabahah* facility agreement that the bank agrees to purchase the commodity under certain terms and conditions stated in the agreement. The commodity will then be purchased at the specified cost price, RM90, 000 from a commodity broker. The bank then sells the commodity to the customer at a cost-plus profit price (*murabahah*), example RM 170, 000. This cost-plus profit price is to be paid by the customer to the bank on deferred payment basis (based on agreement of the terms and conditions). The Bank is then appointed as an agent by the customer to sell the commodity on a spot basis to another commodity broker for RM 90,000 (initial financing price applied). The spot payment price will be made to the developer for the sum of RM 90,000.

The diagram below illustrates the modus operandi of *commodity murabahah* home financing applicable for both completed and those under construction:

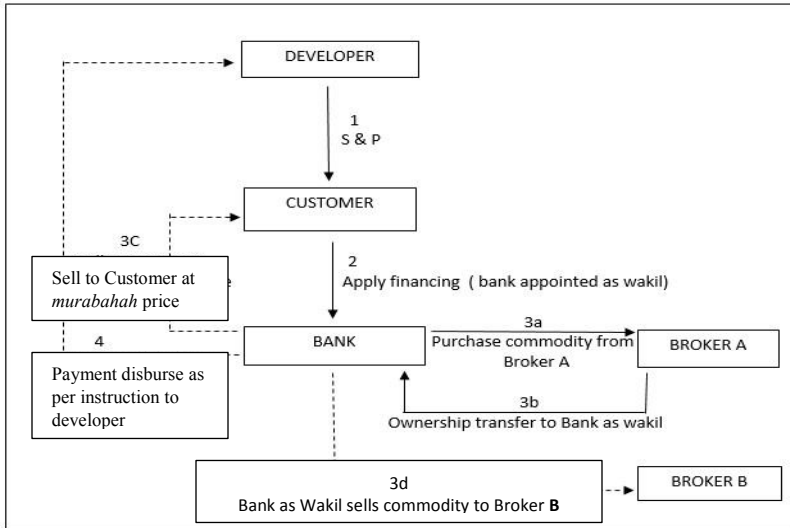


Fig.1 *Commodity Murabahah* Financing for Completed and Under Construction Houses. (Source: Writer’s Own Illustration.)

The use of *commodity murabahah* for financing, irrespective for completed or houses under construction, the underlying asset or subject matter used in the facility has got nothing to do with the house being purchased by the customer. The underlying asset is a commodity allowed to be transacted upon according to criteria mentioned by the SAC’s resolution on *tawarruq* (BNM, 2018). The bank directly takes the role of a financier to the customer, by disbursing the financing amount to the customer through a *murabahah* transaction after the commodity having been purchased from

another broker. *Tawarruq* is thus seen in this sense as a source of liquidity for customers to get housing financing. Initially, the sell and buy back, considered as legal trick of *inah* occurs when it involves only two parties but in the case of *commodity murabahah*, three or even four parties are involved in the transaction. It is worth looking at the discussion on *tawarruq* or organized *tawarruq* termed by scholars and why its use is frowned upon outside Malaysia.

The *Shariah* discussion on the compliance of *commodity murabahah* is only focused on the operation involving the brokers, the arrangements of the selling and buying in the structure, i.e. bank to broker A, from bank to customer, bank to broker B. If they are not done in order, it could trigger *Shariah* non-compliance risk. The *Shariah* Advisory Council of Bank Negara Malaysia has come up with resolutions, parameters and *Shariah* standards to ensure the validity and *Shariah* compliance in *commodity murabahah*. This study only focuses on the relevant and related matters necessary regarding the issue mentioned, which is *commodity murabahah* financing houses under construction later turn abandoned.

The Underlying Asset and Ownership

When the underlying contract structure for a house under construction or yet to be constructed financing is discussed from the *Shariah* perspective, banks are seen to be trying to convey the message that they have no relation whatsoever with the house the customer is going to purchase. The bank as a financial intermediary insists on getting back their

payments when they are due while the issue of abandonment or non-completed house is a problem that should be dealt with by the developer and the customer only. Customers are therefore obliged to make repayments of the amount disbursed to the developer via the *tawarruq* contract in the event of non-completion of the asset. In the case that the property is completed only up to a certain stage, it is not a matter of concern for the bank also. The customer bears the risk fully in a *tawarruq* based home financing looking from the *Shariah* view. Therefore, ownership issues between the bank and the customer do not arise, as ownership concerns the developer-customer only.

Legal Title and Ownership

Under *commodity murabahah*, the legal title and beneficial ownership of the house under construction or yet to be constructed rest with the developer and the customer. By paying the deposit e.g. 10% the customer gets beneficial ownership of the property from the developer. While legal title still rests with the developer or owner of the land until further process at the Land Office is completed. However, the asset under construction is still charged to the bank, in the form of a legal charge for landed property whilst Deed of Assignment for non-landed property. The ownership discussion is relevant only to the developer and customer and has nothing to do with the bank. Therefore, if anything happens to the house, such that it is not completed by the developer, the bank has no obligation to address the problem. The customer must bear this at his own risk.

Resemblance between *Tawarruq* and '*Inah*

As *commodity murabahah* is seen as a financing arrangement where a *murabahah* sale transaction is done on behalf of the customer in need of liquidity, there is a close resemblance that can make it similar to the operation of giving out of a conventional loan. If the structure of *commodity murabahah* used for houses under construction is not reviewed, it can raise a non-*Shariah* compliant issue as the roles and responsibilities are not adhered to. However, the hybrid structure should be complimented. Though there are more parties involved in the *commodity murabahah* structure, neither the customer nor the bank has any intention to own the commodity. This is clear on the intention of how a *tawarruq* functions, strictly for liquidity purposes. Thus, are the selling and buying of the commodities regarded as efforts that shall render the financing amount disbursed as legitimate? It must always be kept in mind that the profit of any business dealing will only be legitimate if it is accompanied by *ikhtiyar/kasb* (effort), *al-ghurm* (risk) and *daman* (liability). If this is the case, in terms of risk of giving out the financing, the bank only assumes the customer default risk in cases of abandonment.

By far, it is observed that the most significant feature of the *commodity murabahah* structure is that the buying and selling of the commodity is done between the bank with the commodity supplier Broker A and Broker B. In *bay' bithaman ajil*, the selling and buying is conducted through the Property Purchase Agreement and Property Sale Agreement, involving the customer as well as the bank.

Thus, the segregation of these contracts in the structure of *commodity murabahah*, separates the responsibility of non-completion of houses under construction from the bank. In this regard, the bank is still an agent acting on behalf of the customer for the buying and selling of the commodities from Broker A and Broker B.

This study views that *commodity murabahah* is a hybrid functional structure with many benefits for the Islamic financial market. The use of commodity *murabahah* for home financing of houses under construction is evidently suitable from the bank's perspective. A bank personnel interviewed claims the following, "we have actually shifted from *musharakah mutanaqisah* to *commodity murabahah* for financing house under construction because using *musharakah mutanaqisah* for that purpose proved very risky to the bank." The only *Shariah* issue with *commodity murabahah* is that it is organized, with respect to the Malaysian practice, it is allowed and heavily practiced. It is viewed that using *commodity murabahah* for financing of houses not yet constructed or under construction will not provide the necessary protection or viable exit mechanism for proper claims for homebuyers. It merely allows customers to borrow money for certain amount of time, payable by instalments.

The Asset Pledged

If the house is abandoned by the developer, customers using *commodity murabahah* do not have any option but to

continue paying. Stopping their payments will trigger an event of default, resulting in them being sued in the courts. The bank will enforce its right to claim the financing amount and any additional security pledged/ collateralized (not the house under construction) to the bank as security. The bank can enforce its right to sell or auction off the asset to recover the amount owed by the customer. Having the pledged asset, is one way to guarantee the repayment of bank's facilities. Although the concept of *rahn* is allowed in *Shariah*, the customer is stripped of his well-being, money, shelter, ownership and even his dignity (if his financial position becomes so severe he is blacklisted and declared bankrupt). The concept of *masalih* which is highly claimed with the offering of *commodity murabahah* in retail and financing products can lead instead to *mafasid*, in the event of abandoned housing projects. Although banks may claim that the *mafasid* is not caused by *commodity murabahah* itself but is caused by non-reputable or malicious developers as well as the poor choice of the customers, the structure of *commodity murabahah* gives no option for customers.

Commodity murabahah is certainly the financing instrument or product of choice for Islamic banks, where *Shariah* issues are minimized, if the proper arrangements, order and *Shariah* standards as suggested by SAC of Bank Negara Malaysia are observed accordingly. However, this is a financing product that customers need to avoid if they are seeking financing for houses under construction because they themselves need to bear the risk of non-completion. Unless they are willing to accept the burden of doing so, and have confidence on their selected developers, customers

might as well seek an alternative product for houses under construction. Another interviewee mentions that although the bank has shifted to financing houses under construction from *musharakah mutanaqisah* to *commodity murabahah*, financing facilities will still be extended to customers under *commodity murabahah* only if the developers are those in the bank's list of panel developers. These are developers trusted by the bank, reducing the risk of non-completion. The interviewee adds, "We have a panel. We only give *commodity murabahah* product financing if the developer comes from our panel". This means that *commodity murabahah* is still deemed a suitable facility by the bank for financing the house under construction even though the developer is reputable.

If an event of abandonment occurs, a customer is still entitled to rebate (*ibra'*) under *commodity murabahah* home financing. Therefore, stopping to make instalment payments to banks is not a wise action if it is under *commodity murabahah*, as there is actually a loophole that exist that may lessen the amount to be paid to banks. Indeed, there should not be a total disregard on the amount of financing already disbursed under the *commodity murabahah* facility, if the relevant steps and procedures as have been set up for it to adhere to *Shariah* requirements are made. However, with the rebate mechanism enforced in sale-based transactions sanctioned by the *Shariah* Advisory Council of Bank Negara Malaysia, it proves that the profit element of the unexpired duration of the facility should not be claimed as such. Thus, only the amount to be paid already disbursed to the

developer as well as the accrued profit during the tenure before termination of the facility should be claimed from customer, not the whole amount. However, this also depends on the operation of each bank. If the payment of the disbursed amount is fully released to the developers, customers will be responsible for the amount already disbursed, compared to partial release of the amount to developers.

Overall Structural and Operational Analysis of Commodity Murabahah Home Financing Facility

1. *Commodity murabahah* is a more straight forward contract compared to other home financing contracts, although considered as a new hybrid of product structure.
2. *Tawarruq* based facility directly gives out financing amount to the customer for liquidity to finance the customers' home purchases.
3. The underlying asset in a *tawarruq* based home financing has nothing to do with the house to be financed, as another underlying asset where the 'real' sale and purchase of the asset takes place is a commodity approved by the regulators. Thus, issue of the non-existent subject matter as in the case of *bay' bithaman ajil* is no longer present.
4. The mechanism of organized *tawarruq* for home financing, releases the banks from any responsibility (with regards to contract structure responsibilities) in relation to houses still under construction.
5. The fact that the house is still under construction or yet

to be constructed, will not cause any problem to banks. It is the sole choice made by the customer to decide on the developer of his choice, thus all risk and liabilities of the asset are borne by the developer and customer to bear the risk of non-completion and defects that come therewith.

Conclusion

Although the causes of abandoned housing projects are not the fault of financial institutions, this does not mean that it is only left for homebuyers to shoulder the blame. End financing the under constructed properties using Islamic based financial structures should eminently reflect the *muamalat* operations of the structures used. It is true that financial engineering can and may take place, but it should never be practised in the expense of the weaker party. In this study, it is found that *commodity murabahah* home financing of under construction houses can further aggravate the situation of homebuyers if the housing projects are abandoned. Aside from the fact that the financing facility raises several *Shariah* red flags, majority of the risks and responsibilities are transferred to homebuyers throughout the structural operations. Customers have no choice or option but to pay the bank the amount owed. They do not have the ability to have any recourse, lodge claims against the bank, as the bank is not a party to the purchase of the house under construction or yet to be constructed. *Shariah* has always made it clear on the wholesome protection of parties in business dealings to be one of truth, equity and

fairness for which through the analyses on the facility, the risk is transferred only to the customers or homebuyers. Therefore for *commodity murabahah*, it is suggested for homebuyers to be aware on their 'willingness' once the facility is agreed upon, as the facility is structured and operated in the sense that all the risks and liabilities are shifted to the customers only. The only recourse that homebuyers have in situations of abandonment in *commodity murabahah* facility is the *ibra'* mechanism.

The findings of this paper is part of the findings of the PhD Dissertation entitled Consumer Protection in Malaysian Islamic Home Financing Facilities from the Shariah Perspective: With Special Reference to Abandoned Housing Projects.

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