

EXTENDING UNFAIR CONTRACT TERMS PROTECTION TO BANKING CONSUMERS IN MALAYSIA: THE CASE OF ISLAMIC BANKS

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Abstract: *Standard form consumer contracts are pre-prepared by Islamic banks, which has the most bargaining power in the transaction and makes the offer on a 'take it or leave it' basis to banking consumers. For banking consumers, there is no scope to negotiate changes but to accept terms that unfairly advantage Islamic banks at their expense. Also, many do not read the standard form contracts and for those who actually read them may not understand or value fully the risks of the terms. Based on this backdrop, this study examines the issue of fairness in the actual terms of Islamic banking standard form consumer contracts ('substantive unfairness') and the domestic laws relating to unfair contract terms (UCT) in standard form consumer contracts of Islamic banks. Using doctrinal and content analysis methodology, this study analyses the already in place legal protections of Consumer Protection Act (CPA) 1999 and Islamic Financial Services Act (IFSA) 2013 that protect banking consumers when they encounter such problems, and how effective these mechanisms are. The findings suggest that there is inadequate protection from unfair terms in Islamic banking consumer contracts in Malaysia especially to banking consumer, which not only led to significant imbalance in the contracting parties' rights and obligations but has also resulted in considerable detriment (whether financial or otherwise) to banking consumers. This study concludes with options for legislative amendment to address unfair contract terms problem, such as to extend the existing CPA 1999 provisions to capture contracts involving banking consumers or to broaden the provisions in IFSA 2013 on UCT. This study has important implications on Islamic bankers and the government in determining an effective protection policy to financial consumers and growth sustainability of Islamic banking institutions in Malaysia.*

Keywords: *UCT, Legislative Amendments, CPA 1999, IFSA 2013, Malaysia.*

Introduction

Financial services or products have major impact on all banking consumers whether choosing a personal financing, borrowing to fund current consumption, acquiring goods and services or protecting oneself from financial risks. The implication for banking consumers is that Islamic banks offering the contract, use standard form contracts that are pre-prepared by them and having the most bargaining power in the transaction, makes the offer on a ‘take it or leave it’ basis, while not giving the banking consumers any opportunity to bargain for more favourable terms. Information asymmetries and level of transparency are also inherent in this type of contract. On one hand, standard form contracts undeniably promote economic efficiency by reducing the transaction costs of negotiation every time a contract is made, however, there is disagreement regarding fairness of the contract terms with the potential for Islamic banks to incorporate unfair terms.

For banking consumers, there is minimal or no scope to negotiate changes but to accept terms that unfairly advantage Islamic banks at their expense. Also, many do not read the standard form contracts and for those who actually read them may not understand or value fully the risks of the terms. Not surprisingly, under these conditions banking consumers are poorly informed of the contract risk and susceptible to making poor decisions that are detrimental (whether financial or otherwise) to them. Islamic banks being the party offering the standard form contracts has better knowledge on the terms and conditions and may exploit the contract by including unfair contract terms. The limited opportunities for negotiating of terms due to infrequent interaction with Islamic banks, creates the potential of transferring all or some of the transaction risk to banking consumers. Banking consumers signing the contracts may also not have the legal or technical skills to critically analyse them and understand the risk implications of the terms presented by the Islamic banks, subsequently providing the opportunity for banks to manipulate. The concept of risk here refers to limitations of legal rights of contracting parties in legal proceedings and their rights to change unfavourable terms of the contract.

Standard form contracts are also criticised as adhesive whereby banking consumers have little choice but to sign the boilerplate contracts set by the Islamic banks and if they seek services elsewhere, the terms are actually standardised throughout the banking industry which makes it no point for them to ‘shop around’ for better terms.

For various reasons, banking consumers inadvertently accept unfair terms in boilerplate banking contracts because they are focused only on getting the goods and services for their consumption. Reviewing, reading and trying to understand the lengthy contracts in fine prints prior to signing them, are not high on their priority list. Banking consumers may not also read contract terms that often use legal terminology or any references made in the contract to particular legal statutes or rules that are difficult to comprehend. This leads to the broad acceptance of unfair contract terms in Islamic banking contracts.

Based on the above backdrop, some form of intervention may be warranted to encourage the adoption of ‘fair’ contract terms by the Islamic banks. The aims of this paper are to examine the scope of the unfair contract terms problem in standard form consumer contract, particularly in

Islamic banking consumer contracts and policy options to address such problem. The policy options of legislative amendment analysed in this study are:-

Option 1 - to extend the existing CPA (Amendment) 2010 provisions to capture contracts involving banking consumers.

Option 2 - to broaden the provisions in IFSA 2013 on UCT.

The detriment caused by unfair contract terms in standard form consumer contracts of Islamic banks arises in a number of ways such as: banking consumers unwittingly enter contracts they would have preferred not to enter, inefficient passing of all or most of the transaction risks to banking consumers whom are less able to manage them. The existence of unfair contract terms may well weaken the confidence of banking consumers in contracting with Islamic banks.

Research Methodology

The type of research employed in this paper is the doctrinal legal research and qualitative data research. This paper examines the application of standard form contracts by Islamic banks in transactions with banking consumers and the statutory legislative protection which protects banking consumers from unfair contract terms. It provides comments on the regulatory framework that regulate protection from unfair contract terms and whether such laws are adequate. For protection of banking consumers from unfair contract terms, this paper focuses on two options on legislative amendment to provide remedies to banking consumers from unfair contract terms. This study uses secondary data resources derived from the BNM Consumer and Market Conduct department main website, KPDNKK official website, books, newspaper articles, journals, and academic websites, including database sources like Lexis Legal research for Academics and HeinOnline.

Literature Review

Standard Form Contracts in Consumer Transactions

The process of mass production and distribution makes it more convenient for large-scale organisations to use ‘mass produced’ contracts involving standard-form contracts as a basis in their transactions, which is drawn up without negotiation process but nevertheless must be accepted by consumers (Poole, 2010). The classical doctrine of ‘freedom of contract’ and ‘rational consumer’ may not be capable of providing a just solution in standard-form contracts in which freedom of contract exists on one side only, and for which the party delivering the document may allocate the risks of non-performance or defective performance to the other party, whose contractual rights are diminished with no alternative benefit received (Sims, 2012).

The device of the standard-form contract has become prevalent and pervasive in the modern society and are sometimes called ‘contracts of adhesion’ which contains many conditions that are fixed by one party in advance and presented for en bloc acceptance and is not open to discussion (Furmston, 2012). The use of standard form contracts has many advantages to businesses negotiating numerous contracts, such as saving time and resources in negotiating contracts, but in practice it may present little choice and amplified serious unfairness to the adhering party who wants the product as he may have to accept the terms dictated by the other party (Macleod, 2007).

The court often suspect that superior bargaining power position is being exploited at the cost of consumers and such judicial attitude to standard-form contracts may be summarised by reference to the speech of Lord Diplock in the House of Lords in *Schroeder Music Publishing Co. Ltd v Macaulay* [1974] 1WLR 1308:

“Standard-form contracts in consumer transactions, and in other situations in which one party is said to have no alternative but to contract on the terms offered if that person is to contract at all, are not presumed to be fair and reasonable. Rather, they are viewed as the product of a superior bargaining position of one of the parties.”

In this era of globalisation, the characteristics of the standard form contracts such as: inequality of bargaining power, prepared in advance by one party on a ‘take it or leave it’ basis, no consensus ad idem, no freedom of contract and contract terms are printed in fine prints, reflects a new type of oppression to the consumers (Aziz et al, 2008). In summary, the dangers of standard-form contract are as follows (Wishart, 2005):

‘lack of comprehensibility or unfair surprise’ deterred reading and comprehension of contract which is due to the context in which contract is made such as: the small print, the unclear language, badly structured contract and confusing layout;
‘lack of negotiability’ due to the adhering party’s weak bargaining power;
‘substantive unfairness’ due to lack of transparency on risks inherent in the substantive terms but may result in serious imbalance in the parties’ rights and obligations which detriments the adhering party; and
‘lack of competitiveness amongst businesses’ due to restricted fairness in substance and level of choice on consumers may result in no incentive among businesses to compete with each other to improve choice and to produce terms that better reflect consumer interests.

Standardisation of standard form contracts should also be scrutinised on their contractual fairness or substantive unfairness such that regulating them necessitates an effective legislative consumer protection regime in place (Paterson, 2009). A substantial empirical literature proves that standard form consumer contracts contains unfair contract terms which significantly weighted against consumers due statements that disadvantaged consumers, complex grammatical structure, presented in fine print and cannot easily see it, lengthy, and written in unclear or ambiguous language (Whittaker 2011; Gerstenberg 2015; Lawson 2011, Paterson 2009). Furthermore, the behavioral science analysis seems to suggest that consumers are unaware of the quality of contractual terms dictated by businesses and they also routinely do not read standard form contracts, which resulted in them in accepting the terms blindly (European Commission, 2016).

However, specific literatures that deal with the protection of banking consumers from unfair terms in Islamic banking contracts are very limited. This study fills in such gap towards promoting a comprehensive legislature that protects banking consumers from unfair contract terms in Islamic banking consumer contracts.

Findings and Discussion

Statement of the Options

The options identified by this study to address the problem of unfair terms in standard form consumer contracts of Islamic banks is to help provide incentives for Islamic banks to offer fair contract terms as well as reducing the incidence of unfair terms being included in consumer transactions. It is hoped that the suggested options below will help in providing a level playing field for banking consumers when interacting with Islamic banks through standard form contracts.

Option 1 – Extending Consumer Protection Act (CPA) 1999

Generally under the Malaysian law, unfair contract terms such as limitation or exclusion of liability would be valid provided clear words are used in the contract. The Contracts Act 1950 (CA 1950) only has provisions and remedies for procedural unfairness but silent on unfair contract terms or substantive unfairness. Likewise, the CPA 1999 (Act 599) which came into force on the 15th of November 1999 provide legislative provisions for consumer protection, but it also contained many loopholes and did not provide assistance in relation to unfair terms (Amin, 2013). Since 1999, four amendments have been made to CPA 1999 in the year of 2002, 2003, 2007 and 2010. However, the more significant amendment was the Consumer Protection (Amendment) Act 2010 (The Amendment Act 2010) which has specifically provide redress with unfair contract terms problems. Prior to this, unfair contract terms problems were dealt with under the common law of doctrine of inequality of bargaining power (Trakic, 2015 & 2016).

The Amendment Act 2010 came into effect in 2011 and inserted Part IIIA into the CPA 1999 providing protection from unfair terms for consumers. The 2010 amendment aims to expand existing provisions to ensure the Act remains relevant to the current development on trade practices as well as providing more protection to the consumers. This amendment introduces Part IIIA: entitled ‘Unfair Contract Terms’ which defines the provisions in protecting consumers against unfair terms in a standard form contract. The Act also makes the Ministry of Domestic Trade, Co-operatives and Consumerism (abbreviated as MDTCC) responsible towards the consumer protection affairs through new laws, policies review or proposal to protect consumer, receive consumer complaint and act as a secretariat to the National Consumer Advisory Council (NCAC).

Part IIIA contains sections 24A to 24J intended to address the situation where businesses impose unfair terms in standard form contracts on consumers. According to section 1(3), the Act is only applicable to contracts entered into after the Act came into force. Figure 1 below shows the content of the CPA 1999. Section 24A states the general interpretation relating to Part IIIA. The definition of a contract as in section 2 CA 1950 is retained. ‘Standard form contract’ is a consumer contract being drawn up for particular industry’s general use irrespective whether it differs or not to other contracts commonly used in that industry, and an ‘unfair term’ is defined as ‘a term in a consumer contract and taking into consideration all circumstances, results in significant imbalance in the rights and obligations of contracting parties but detriments the consumers’.

Section 24B states that notwithstanding other acts such as CA 1950, Specific Relief Act 1950, Sale of Goods Act 1957 and other relevant provisions Part IIIA shall apply to ‘all contracts’. Sections 24C deals with procedurally unfair terms and 24C (1) prescribes such terms when: ‘it results in an

unjust advantage to the business or consumer due to the conduct of the business or the manner/ circumstances when the contract is entered into between the business and consumers.’ Section 24D deals with substantially unfair terms whereby 24D (1) lists such terms that ‘is harsh, oppressive, unconscionable, it excludes or restrict liability for negligence or for breach of express or implied terms of the contract without adequate justification.’

Section 24E states that the onus is on the business to prove that ‘contract term is with adequate justification’. Section 24F provides that a court or Tribunal on its own account may deal with unfair contract term problem even if none of the contracting parties has raised such issue. Section 24G gives power to a court or Tribunal to declare any unfair terms of sections 24C and D as void. 24H further provides that contract terms that are partially or wholly executed may still be void. Section 24I makes it an offence for ‘any person’ to contravene Part IIIA and punishable by fine of RM250,000 for the first offence, RM500,000 for a subsequent offence and RM2,000 a day if the offence continues. Finally, section 24J empowers the KPDNKK Minister to make regulations significant to Part IIIA.

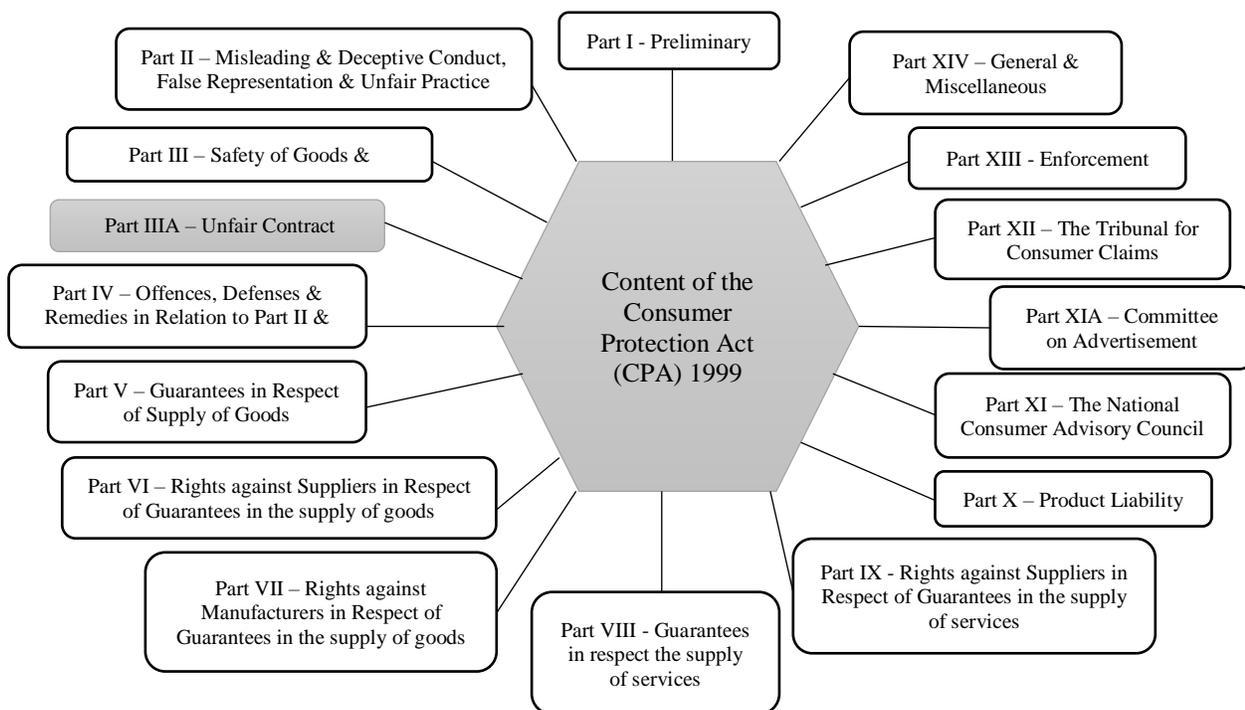


Figure 1 Content of the Consumer Protection Act (CPA) 1999

Primarily, the existing provisions of CPA 1999 for standard-form consumer contracts and the common law may provide protection to banking consumers through the application of fairness concept in contractual dealing. However, under this option, legislative amendment would be carried out to extend the existing unfair contract term provisions in the CPA 1999, so as to apply to financial products and services thereby providing that a term of a standard form contract offered by Islamic banks to banking consumers is void if it is unfair. There is no existing definition of ‘banking consumers’ in the Act, however the Act broadly defines ‘consumer’ as “...a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption”.

Part IX of IFSA 2013 defines ‘financial consumer’ which includes banking consumers as “any person who uses, has used or may be intending to use, any financial service or product inter alia (a) for personal, domestic or household purposes; or (b) in connection with a small business as may be specified by the Bank”. This option would require the amendment to the CPA 1999 to broaden the definition of ‘consumer’ to capture banking consumers and the phrase of ‘all contracts’ in Part IIIA should also include financial contracts. This would mean that provisions in the CPA 1999 remain consistent with the IFSA 2013 provisions. This option would seek to ensure that, when entering into a contract with Islamic banks, banking consumers would be certain as to whether or not the Act apply to the given Islamic banking contract. This option would also permit other unfair contract terms enforcers such as the Central Bank of Malaysia (abbreviated as BNM), consumer agencies and private parties to apply to court for a declaration that a term in standard form contract of Islamic banks is unfair. Such a declaration by a court would make it a contravention for any person to apply or rely on such term.

Additional actions could be taken to enhance existing legislative arrangements include:

The CPA 1999 should incorporate a ‘list of unfair terms’ or guidelines on the different examples of potential unfair terms in standard form contract and a ‘blacklisted list of unfair terms’ such as exemption or limitation of liability clauses, and such list would likely to be added over time;

What is an ‘unfair’ term is defined by section 24A(c) where three requirements must be satisfied that it is “a term in a consumer contract with regard to all circumstances”, “causes a significant imbalance in the rights and obligations of the parties arising under the contract” and “to the detriment of the consumer.” This study suggest that government action should also be incorporated in the CPA 1999 on any businesses should the term satisfies this three limbed test and is therefore ‘unfair’;

The CPA 1999 to provide definition on ‘significant imbalance’ as to whether to refer exclusively to the term in question itself or the whole contract;

To provide more detailed guidance on a test for determining the meaning of ‘adequate justification’ on the list of clauses which exclude or restrict liability for breach of express or implied terms;

To provide definition on the meaning of ‘unconscionable, oppressive and harsh terms’ in substantive unfairness and the circumstances for such terms to occur;

To address identified issues of the need have separate provisions dealing with procedural and substantive unfairness since in many instances it is possible that substantive unfairness may result in procedural unfairness or both may overlap in nature; and

To increase the threshold jurisdiction limit of RM25,000 of the Tribunal for Consumer Claims to adjudicate banking consumer complaints since most contracts of financial services and goods exceeds RM25,000 which otherwise cannot be brought before the Tribunal.

The option for extending unfair contract terms protection in CPA 1999 to banking consumers is intended to enhance, not impede or displace existing regulatory mechanisms like IFSA 2013 or Islamic banking specific measure for financial consumers in achieving similar policy outcomes of alleviating the detrimental effects of unfair contract terms.

Option 2 – Broadening the Provisions of Islamic Financial Services Act (IFSA) 2013

The IFSA came into force on 30 June 2013 as a culmination effort of the Government in modernising and harmonising various law that govern the financial services sector. It is known as an ‘omnibus act’ which repeals the Islamic Banking Act 1983 and the Takaful Act 1984 and combines the Islamic financial and takaful services under one act. The IFSA provides for the regulation and supervision of Islamic financial institutions, payment systems and oversight of the Islamic money market and Islamic foreign exchange market in promoting financial stability and compliance with Shariah. The principal regulatory objectives of the IFSA are promoting financial stability and protecting the rights and interests of financial consumers in line with Shariah.

The IFSA contains a significant number of provisions on consumer protection, particularly those which are contained in Part IX. Figure 2 below indicates the content of IFSA 2013. Primarily, the Act introduces a new definition of ‘financial consumer’, which refers to “any person who uses, has used or may be intending to use, any financial service or product inter alia (a) for personal, domestic or household purposes; or (b) in connection with a small business as may be specified by the Bank.” To ensure that Islamic banking institutions (IBIs) is fair and responsible when dealing with banking consumers, section 135 of IFSA emphasises on ethical business conduct and consumer protection by empowering BNM with a regulatory objective to ‘foster fair, responsible and professional business conduct of financial service providers (FSPs) when dealing with financial consumers, and to protect the rights of financial consumers.’ Furthermore, section 135(2) (a) (b) of IFSA specifies business conduct standards which includes: fair terms in a banking consumer contract for banking services or products, transparency and disclosure requirements, as well as providing accurate, clear, timely and not misleading information to banking consumers. Section 136 in Part IX of the IFSA prohibit a financial service provider from engaging in any business conduct set out in Schedule 7 of the IFSA such as ‘misleading and deceptive conduct, exerting undue pressure in any financial service, demanding payments from a financial consumer for unsolicited financial services or colluding with any other person to fix or control the features or terms of any financial service or product to the detriment of a financial consumer, other than any tariff or premium rates or policy terms which have been approved by BNM’.

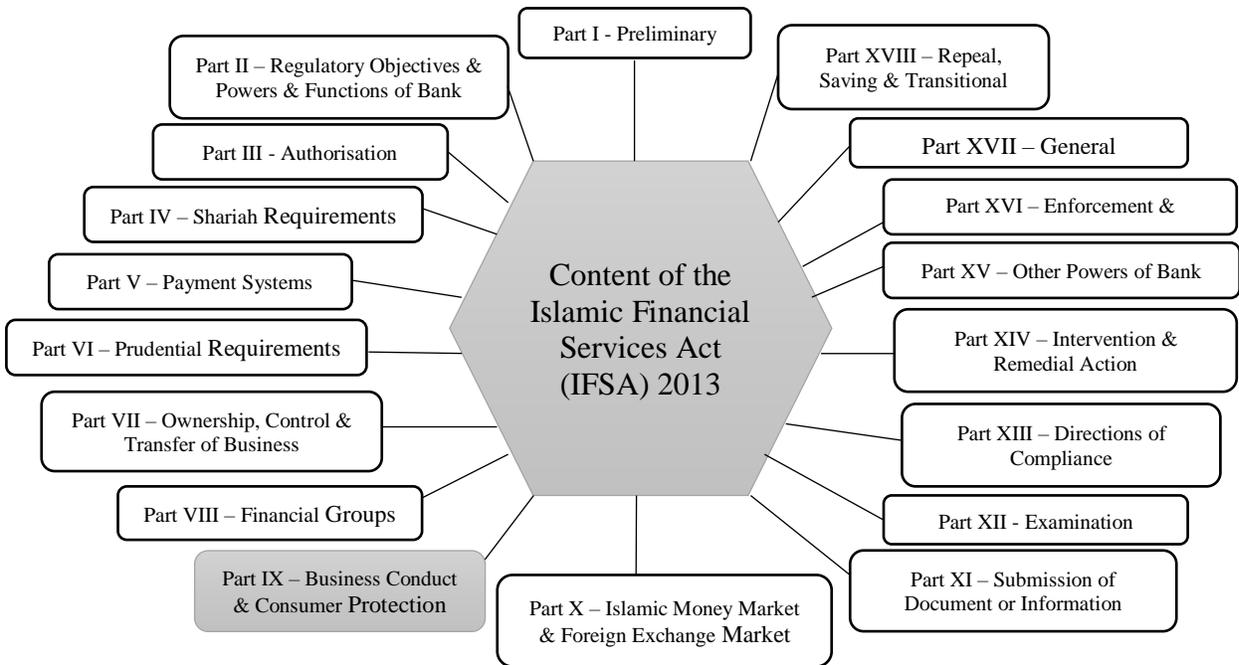


Figure 2 Content of the Islamic Financial Services Act (IFSA) 2013

Notwithstanding that IFSA gives emphasis on protecting banking consumers from any unfair trade or conduct of IBIs, nevertheless the Act is primarily more towards regulating IBIs on administration and governance structure. The IFSA do not specifically deal with the problem of unfair contract terms in IBIs' standard form consumer contracts. Therefore, this study suggests Option 2 in broadening consumer protection provisions of IFSA to counter unfair contract terms is Islamic banking standard form consumer contracts. In line with *Maqasid al-Shariah* of having a fair, transparent and consumer-friendly banking contracts, the policy objective here is to provide a level playing field for consumers transacting via standard form contracts with Islamic banks, which will enhance the welfare of banking consumers by increasing their confidence and certainty in contracting.

This option of broadening the scope of IFSA outlines a number of legislative actions to be pursued in achieving the previously stated objectives which include:

To provide a 'blacklisted terms' so that they are automatically unenforceable and never binding on banking consumers;

To provide a fairness test for relevant terms to be both 'transparent' such that terms must be in 'plain and intelligible language' and 'prominent' which means that the term is brought to the consumer's attention in such a way that an 'average consumer' (the objective test of an average consumer is 'a reasonably well-informed, observant and circumspect consumer') whom would be aware of the term, but which is subject to certain exemptions such as "terms that specify the main subject matter of the contract" or "set the price payable under such contract";

The Act should also cover 'consumer notice' which is defined as 'notice that relates to the rights or obligations between a banking consumer and an Islamic bank or a notice which exclude or

restrict an Islamic bank's liability to a banking consumer or any announcement/ other communication in writing or otherwise';

To provide a clear definition of 'unfair terms';

To provide a list of 'indicative but non-exhaustive list' of potential unfair terms or to be known as 'the grey list' which illustrates terms that 'may be regarded as unfair', for example terms that allow Islamic banks discretion to set the price after the banking consumer has signed the contract or any terms allowing the Islamic banks to decide the characteristics of the subject matter of the contract even if the banking consumer is bound by the contract;

To provide the requirement for 'transparency test' whereby Islamic banks are to ensure that a written term of consumer contract or consumer notice in plain and clear language and is also legible;

To impose duty of a court to consider the fairness of terms in consumer contracts even if the parties to the case do not raise it as an issue, provided that the court has sufficient legal and factual information to allow it to do so;

To give banking consumers choice either rely or not on unfair terms or notices;

To extend unfair contract terms provisions to secondary contracts that affects the rights and obligations of banking consumer and Islamic banks under the main contract even if such contracts are not consumer contracts; and

Enforcement of the unfair contract terms provisions to be shared between financial regulator, capital market regulator, public and private consumer agencies as well as individual banking consumers, while providing these enforcers power to apply for injunction or an interdict should the contract terms falls under 'blacklisted' provision, it breaches transparency requirement or other provisions as suggested above.

Any existence of unfair contract terms may reduce banking consumers' confidence in contracting with Islamic banks as well as violating the ethical norm of fairness as enshrined by the higher objectives of *Maqasid al-Shariah*. Broadening the provisions of IFSA to counter unfair contract terms problems is BNM's policy commitment towards better financial consumer protection and the preferred option at this time.

Conclusion

Standard form contracts involving banking consumers and Islamic banks should generally allocate risks to the able party that best to manage them so as to avoid significant imbalance in the rights of contracting parties and obligations arising under the contract. Banking consumers transacting with Islamic banks through standard form consumer contracts should have confidence that the terms of the contract they entered into are fair and reasonable such that they are protected from suffering detriment due to unfair terms.

However, to address the problem of unfair terms in standard form consumer contracts of Islamic banks, this study explores two main options: Option 1 is to have legislative amendment to extend the existing unfair contract terms provisions to standard form contracts involving banking consumers, and Option 2 is to broaden the provisions in IFSA 2013 on unfair contract terms. The policy objectives of both options are to provide certainty to Islamic banks as to what laws are available from the beginning of contract formation, to address asymmetrical information about

contract terms, to provide remedies for banking consumers against unfair contract terms, and to alleviate the detrimental effects due to unfair contract terms. Should the policy objectives of the above options not being met, it would result in diminished preparedness of banking consumers to invest and engage in enhancing the sustainability development goals of Islamic banking industry in Malaysia.

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