



A STUDY ON LAWS APPLICABLE TO *MUSHARAKAH*
MUTANAQISAH HOME FINANCING IN MALAYSIA

BY

SYUHAEDA AENI BINTI MAT ALI

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Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

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ABSTRACT

Musharakah Mutanaqisah Home Financing is a hybrid contract consisting of *Musharakah* (partnership), *Ijarah* (lease) and *Bai'*(sale). Despite its status as Islamic financing product, the present practise of *Musharakah Mutanaqisah* Home Financing in Malaysia is subject to conventional laws which are not intended to facilitate the application of Islamic law. Thus, this research aims to identify the applicable laws relating to *Musharakah Mutanaqisah* Home Financing in Malaysia for the purpose of determining the legal conflicts and legal problems as a result of the operation of the present legal framework. In pursuant thereto, this research employs a qualitative method in identifying and analysing the existing laws which consist of regulatory laws, substantive laws and procedural laws that include Islamic Financial Services Act 2013, Financial Services Act 2013, Central Bank of Malaysia Act 2009, National Land Code 1965, Rules of Court 2012 and Bankruptcy Act 1967. This research finds that whilst some of the existing laws do facilitate the operation of *Musharakah Mutanaqisah* Home Financing in Malaysia and have substantially improved the statutory position of *Musharakah Mutanaqisah* as one of the modes of Islamic financing recognised in Malaysia, the present legal provisions are still inadequate and incompatible with the implementation of *Musharakah Mutanaqisah* Home Financing. The research also finds significant number of legal issues derived from the implementation of the laws which require legal reform. Therefore, this research proposes legal solutions in term of amendments to the existing legal regime in order to facilitate the implementation and practises of *Musharakah Mutanaqisah* Home Financing. The proposed legal solutions should prove to be adequate and compatible to govern *Musharakah Mutanaqisah* Home Financing in Malaysia, thus resolving legal conflicts and problems in the current legal framework.

ملخص البحث

التمويل العقاري بالمشاركة المتناقصة هو عقد التمويل المهجين الإسلامي يتكون من المشاركة والإجارة والبيع. وعلى الرغم من مكانتها باعتبارها من منتجات التمويل الإسلامي، فإن الممارسة الحالية في هذا النوع من التمويل في ماليزيا تخضع للقوانين التقليدية التي لا تهدف إلى تسهيل تطبيق الشريعة الإسلامية. وبالتالي، يهدف هذا البحث إلى التعرف على القوانين المعمول بها فيما يتعلق بالتمويل العقاري بالمشاركة المتناقصة في ماليزيا لغرض تحديد النزاعات القانونية والمشاكل نتيجة لتشغيل الإطار القانوني الحالي. ولهذا الغرض، يستعمل هذا البحث طريقة النوعي في تحديد وتحليل القوانين القائمة التي تتكون من القوانين التنظيمية، والقوانين الموضوعية، والقوانين الإجرائية التي تشمل قانون الخدمات المالية الإسلامية عام ٢٠١٣م، وقانون الخدمات المالية عام ٢٠١٣م، وقانون البنك المركزي الماليزي عام ٢٠٠٩م، وقانون الأرض الوطني عام ١٩٦٥م، وقواعد المحكمة عام ٢٠١٢م، وقانون الإفلاس عام ١٩٦٧م. والحاصل من هذا البحث أنه بينما يوجد بعض القوانين الحالية يقوم بتسهيل عملية التمويل المشاركة المتناقصة في ماليزيا ويؤثر بشكل كبير في تحسين الوضع القانوني للمشاركة المتناقصة باعتبارها واحدة من وسائل التمويل الإسلامي المعترف بها، فإن الأحكام القانونية الحالية لا تزال غير كافية وتتعارض مع تنفيذ التمويل بالمشاركة المتناقصة. ووجد البحث أيضا أن هناك عددا كبيرا من القضايا القانونية المستمدة من تنفيذ القوانين التي تتطلب الإصلاح القانوني. لذا، يقترح هذا البحث الحلول القانونية في شكل تعديلات على النظام القانوني القائم من أجل تسهيل تنفيذ وممارسات التمويل العقاري بالمشاركة المتناقصة. وهذه الحلول القانونية المقترحة يجب أن تثبت لتكون كافية ومتوافقة لتنظيم التمويل العقاري بالمشاركة المتناقصة في ماليزيا، وبالتالي حل النزاعات والمشاكل القانونية في الإطار القانوني الحالي.

APPROVAL PAGE

The thesis of Syuhaeda Aeni binti Mat Ali has been approved by the following

Rusni Hassan

Supervisor

Ahmad Azam Othman

Co-supervisor

Uzaimah Ibrahim

Internal Examiner

Noor Inayah Yaacub

External Examiner

Ruzian Markom

External Examiner

SM Abdul Quddus

Chairman

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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TABLE OF CONTENTS

Abstract.....	ii
Abstract in Arabic.....	iii
Approval Page.....	iv
Declaration.....	vi
Copyright page.....	vii
Acknowledgements.....	viii
List of Tables.....	xv
List of Figures.....	xvii
List of Cases.....	xviii
List of Statutes.....	xx
List of Abbreviations.....	xxi
CHAPTER ONE: INTRODUCTION.....	1
1.1 Background of the Research.....	1
1.2 Statement of the Problem.....	4
1.3 Objectives of The Research.....	7
1.4 Research Questions.....	8
1.5 Hypothesis.....	9
1.6 Literature Review.....	9
1.7 Scope and Limitation of the Research.....	23
1.8 Research Methodology.....	25
1.9 Outline of chapters.....	27
CHAPTER TWO: MUSHARAKAH MUTANAQISAH HOME FINANCING IN MALAYSIA.....	30
2.1 Introduction.....	30
2.2 The Concept of <i>Musharakah Mutanaqisah</i>	30
2.3 The Structure of <i>Musharakah Mutanaqisah</i> Home Financing.....	36
2.3.1 Types of Property.....	37
2.3.1.1 Completed property.....	37
2.3.1.2 Property Under Construction.....	40
2.3.2 Procedures to terminate <i>Musharakah Mutanaqisah</i> Home Financing in the event of default by the customer.....	41
2.3.2.1 Termination with wa'ad.....	42
2.3.2.2 Termination without wa'ad.....	43
2.4 Practices and Operation of <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia.....	44
2.5 Legal Documentations of <i>Musharakah Mutanaqisah</i> Home Financing product in Malaysia.....	49
2.6 Conclusion.....	63
CHAPTER THREE: REGULATORY LAWS GOVERNING MUSHARAKAH MUTANAQISAH HOME FINANCING IN MALAYSIA.....	64
3.1 Introduction.....	64
3.2 Regulatory Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing.....	65
3.2.1 Islamic Financial Services Act 2013 (Act 759).....	66
3.2.2 Financial Services Act 2013 (Act 758).....	67
3.2.3 Central Bank of Malaysia Act 2009 (Act 701).....	68

3.2.4	Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 [P.U. (A) 210]	69
3.2.5	<i>Shariah</i> Standards and Guidelines	70
3.2.5.1	Shariah Resolution in Islamic Finance	73
3.2.5.2	Musharakah (BNM/RH/STD 028-7)	74
3.2.5.3	Introduction of New Products (BNM/RH/STD 028-5)	75
3.2.5.4	Shariah Governance Framework for Islamic Financial Institutions (BNM/RH/GL_012_3)	76
3.2.5.5	Fit and Proper Criteria (BNM/RH/GL 018-5)	76
3.2.5.6	Process Improvement to Expedite Issuance of Redemption Statement and Release of Original Title of Property (BNM/RH/CIR 007-10)	78
3.2.5.7	Prohibited Business Conduct (BNM/RH/GD 029-1)	79
3.2.5.8	Concept Paper of Ijarah (BNM/RH/CP 028-9)	79
3.3	Analysis of the Regulatory Laws	80
3.3.1	Definition of “Islamic banking business”	82
3.3.1.1	Islamic Financial Services Act 2013	82
3.3.1.2	Financial Services Act 2013	82
3.3.1.3	Central Bank of Malaysia Act 2009	83
3.3.1.4	Shariah Standards and Guidelines	85
3.3.2	<i>Shariah</i> Compliance	87
3.3.2.1	Islamic Financial Services Act 2013	87
3.3.2.2	Financial Services Act 2013	88
3.3.2.3	Central Bank of Malaysia Act 2009	88
3.3.2.4	Shariah Standards and Guidelines	88
3.3.3	<i>Shariah</i> Governance	92
3.3.3.1	Islamic Financial Services Act 2013	93
3.3.3.2	Financial Services Act 2013	95
3.3.3.3	Central Bank of Malaysia Act 2009	96
3.3.3.4	Shariah Standards and Guidelines	96
3.3.4	<i>Shariah</i> Advisory Council of Bank Negara Malaysia	101
3.3.4.1	Central Bank of Malaysia Act 2009	101
3.3.4.2	Islamic Financial Services Act 2013	102
3.3.4.3	Financial Services Act 2013	102
3.3.4.4	Shariah Standards and Guidelines	103
	(a) Supremacy of SAC of BNM	104
	(b) Separation of power	104
	(c) Expert evidence	106
	(d) Shariah matter	107
3.3.5	Consumer Protection	109
3.3.5.1	Islamic Financial Services Act 2013	109
3.3.5.2	Financial Services Act 2013	110
3.3.5.3	Shariah Standards and Guidelines	111
3.3.6	Financial Ombudsmen Scheme	113
3.3.6.1	Islamic Financial Services Act 2013	113
3.3.6.2	Financial Services Act 2013	114
3.3.6.3	Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015	115
3.4	Conclusion	116

CHAPTER FOUR: SUBSTANTIVE LAWS GOVERNING <i>MUSHARAKAH MUTANAQISAH</i> HOME FINANCING IN MALAYSIA	118
4.1 Introduction	118
4.2 Substantive Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing	119
4.3 Analysis of the Substantive Laws	120
4.3.1 Contracts Act 1950 (Act 136)	123
4.3.1.1 Wa'ad (promise)	124
4.3.1.2 Conditions precedent	127
4.3.1.3 Free consent	129
4.3.1.4 Unlawful Consideration	131
4.3.2 Housing Development (Control and Licensing) Act 1966 (Act 118).....	132
4.3.2.1 Applicability of HDA 1966	133
4.3.3 Housing Developers (Control and Licensing) Regulations 1989 [P.U.(A) 58/1989].....	134
4.3.3.1 Terms and conditions of sale and purchase agreement.....	137
a) Claim For Liquidated Damages	137
a) The terms used: interest and loan.....	138
4.3.4 Law of Tort: Occupiers' liability	139
4.3.5 Real Property Gain Tax Act 1976 (Act 169)	142
4.3.6 Stamp Act 1949 (Act 378)	144
4.3.7 Personal Data Protection Act 2010 (Act 709).....	146
4.3.8 National Land Code 1965 (Act 56).....	148
4.3.8.1 Non- recognition of Indefeasibility of title	149
4.3.8.2 Non recognition of beneficial ownership.....	152
4.3.8.3 Security provision	153
4.3.8.4 Non registration of lease	154
4.3.8.5 Overlapping positions	155
4.3.8.6 Approval of state authority	156
4.3.8.7 Terms used.....	157
a) "Security for loan"	157
b) The term "interest" in the Statutory Form 16A	157
4.3.9 Malay Reserve Land Enactments.....	158
4.3.9.1 Restriction of MREs relating reserve lands	160
4.3.10 Trustees Act 1949 (Act 208).....	166
4.4 Conclusion	168
CHAPTER FIVE: PROCEDURAL LAWS ON <i>MUSHARAKAH MUTANAQISAH</i> HOME FINANCING IN MALAYSIA	169
5.1 Introduction	169
5.2 Procedural Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing.....	170
5.3 Analysis of Procedural Laws	177
5.3.1 Right <i>In Personam</i> : Civil Action In Court.....	177
5.3.1.1 Rules of Court 2012 (PU (A) 205/2012)	177
5.3.1.2 Limitation Act 1953 (Act 254)	181
5.3.1.3 Subordinate Courts Act 1948 (Act 92) and Subordinate Courts (Amendment) Act 2010 (Act 1382).....	183
5.3.1.4 Court of Judicature Act 1964 (Act 91)	185
5.3.1.5 Evidence Act 1950 (Act 56)	186

a) Expert opinion.....	187
5.3.2 Enforcement Of Judgment	189
5.3.2.1 Rules of Court 2012 (PU (A) 205/2012)	190
i) Judgment Debtor Summons.....	190
ii) Writ of Seizure and Sale	191
iii) Garnishee Proceeding	193
5.3.2.2 Companies Act 2016 (Act 777) and Companies Winding Up Rules 1972 [P.U.(A) 289/1972]	194
i) Winding Up Proceeding	194
5.3.2.3 Bankruptcy Act 1967 (Act 360) and Bankruptcy Rules 1969[P.U.(A) 199/1969].....	197
i) Bankruptcy Proceeding.....	197
5.4 Action <i>In Rem</i> : Foreclosure Proceeding	202
5.4.1 Rules of Court 2012 (PU (A) 205/2012) and the National Land Code 1965 (Act 56).....	203
5.4.1.1 Foreclosure (High Court) for Registry Title	205
5.4.1.2 Foreclosure (Land Office)for Office Title	208
a) “Cause to the contrary” under NLC 1965	209
5.4.1.3 Deed of Assignment (No individual document of title cases)	213
5.4 Conclusion	214
CHAPTER SIX: ANALYSIS AND FINDINGS OF LAWS APPLICABLE TO MUSHARAKAH MUTANAQISAH HOME FINANCING IN MALAYSIA.....	
6.0 Introduction.....	216
6.1 The Regulatory Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing.....	217
6.1.1 The Adequacy of the Regulatory Laws	220
6.1.1.1 Islamic Financial Services Act 2013 And Financial Services Act 2013 ..	223
(i) Statutory definition of <i>Musharakah Mutanaqisah</i>	223
(ii) Consumer protection: Unfair Terms of Contract	228
6.1.1.2 Central Bank of Malaysia Act 2009	229
(i) Distinction between legal and Shariah issues.....	229
(ii) Shariah Advisory Council	233
(a) Supremacy of SAC.....	233
(b) Judicial review	235
(c) Separation of power	236
(d) Expert evidence.....	237
6.1.1.3 Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015	238
6.1.1.4 Shariah Standards and Guidelines	239
(i) Effects of non-compliance of Shariah Standards and Guidelines on the contract entered.	239
(ii) Consumer protection: Unfair Terms of Contract	240
6.2 The Substantive Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	244
6.2.1 The Adequacy of the Substantive Laws	245
6.2.1.1 National Land Code 1965.....	247
(i) Non recognition of indefeasibility of title	247
(ii) Beneficial ownership.....	249
(iii) Charge	251

(iv) Lease.....	252
(v) Overlapping position	254
(vi) Approval of state authority for foreign ownership	255
(vii) Improper terms used.....	256
(vii) Term ‘interest’ in the Statutory Form 16A.....	256
6.2.1.2 Malay Reserve Enactments.....	257
6.2.1.3 Contract Act 1950.....	260
(i) Unlawful Consideration.....	260
(ii) Wa’ad	262
(iii) Unfair terms of contract	264
6.2.1.4 Housing Developer (Control And Licensing) Regulation 1989.....	269
6.3 Procedural Laws Governing Musharakah Mutanaqisah Home Financing in Malaysia	274
6.3.1 The Adequacy of the Procedural Law.....	275
6.3.1.1 Bankruptcy Act 1967.....	275
(i) Claim for interest under Section 3(1) (i) of Bankruptcy Act 1967.....	275
(ii) Non recognition of social guarantor	277
(iii) Lacuna in Section 8(2A) of the BA 1967.....	277
6.3.1.2 Court Of Judicature Act 1964.....	278
6.3.1.3 National Land Code 1965	279
6.3.1.4 Evidence Act 1950.....	282
6.3.1.5 Rules Of Court 2012	284
6.3.1.6 Limitation Act 1953.....	285
6.4 Conclusion	286
CHAPTER SEVEN: RECOMMENDATIONS AND CONCLUSIONS	288
7.0 Introduction.....	288
7.1 Recommendations.....	288
7.1.1 Regulatory Laws	289
7.1.1.1 Islamic Financial Services Act 2013 And Financial Services Act 2013.....	289
(i) Statutory definition of Musharakah Mutanaqisah	289
(ii) Inadequacy of consumer protection : Unfair Terms of Contract.....	291
7.1.1.2 Central Bank of Malaysia Act 2009	292
(i) Distinction between Legal and Shariah issues	292
(ii) Capacity of SAC in giving ruling relating to Shariah matters.	293
7.1.1.3 Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015	294
7.1.1.4 Shariah Standards, Guidelines and Policy Documents of BNM	295
(i) Specific guideline/policy document on <i>Musharakah Mutanaqisah</i> Home Financing	295
(ii) Standardization of legal documentation	296
(iii) Consumer protection: Unfair Terms of Contract	297
7.1.2 Substantive Laws	297
7.1.2.1 National Land Code 1965	297
(i) Non recognition of indefeasibility of title	297
(ii) Non recognition of beneficial ownership	298
(iii) Charge	299
(iv) Lease.....	300
(iv) Overlapping positions in different types of contracts.....	300

(v) Improper Terms used.....	301
(vi) Term ‘interest’ in the Statutory Form 16A.....	302
(vii) Approval of state authority for foreign ownership.....	302
7.1.2.2 Malay Reserve Enactments.....	304
7.1.2.3 Contracts Act 1950	304
(i) Unlawful Consideration.....	304
(ii) Wa’ad	305
(iii) Unfair terms of contract	306
7.1.2.4 Housing Developer (Control And Licensing) Regulation 1989	307
7.1.3 Procedural Law	307
7.1.3.1 Bankruptcy Act 1967	307
(i) Gap in Section 3 (1)(i) of BA 1967 on late payment charge.....	307
(ii) Non recognition of social guarantor	308
(iii) Lacuna in Section 8(2A) of the BA 1967	309
7.1.3.2 The Court of Judicature Act 1964.....	309
7.1.3.3 Evidence Act 1950.....	310
7.1.3.4 National Land Code 1965	311
7.1.3.5 Rules Of Court 2012	311
7.1.3.6 Limitation Act 1953.....	312
7.2 Conclusion	312
REFERENCES.....	314

LIST OF TABLES

<u>Table No</u>		<u>Page No</u>
2.4.1	List of Islamic Banks which offers <i>Musharakah Mutanaqisah</i> Home Financing products in Malaysia	44
2.4.2	List of Commercial Bank which offers <i>Musharakah Mutanaqisah</i> Home Financing products in Malaysia	45
2.5	Legal Documentation of <i>Musharakah Mutanaqisah</i> Home Financing use by Local Islamic banks, Foreign Islamic bank and Commercial banks in Malaysia	50
3.2.5	Regulatory Laws: <i>Shariah</i> Standard and Guidelines	72
3.3	Salient features of Regulatory Laws governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	80
3.4	Summary of the identified legal issues on the implementation of regulatory laws to <i>Musharakah Mutanaqisah</i> Home Financing	116
4.2	Lists of Substantive Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	119
4.3	Summary of the Provisions of the Substantive Laws Governing <i>Musharakah Mutanaqisah</i> Home Financing	121
4.3.3	Statutory Housing Agreements	135
5.1	Procedural Laws on <i>Musharakah Mutanaqisah</i> Home Financing	171
5.2	Summary of the provisions of the procedural laws governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	172
5.4	Summary of the identified legal issues from the implementation of the procedural laws	214
6.1A	Regulatory Laws: Statutes	217
6.1B	Regulatory Laws: <i>Shariah</i> Standards and Guidelines	218
6.1.2	Summary of the findings of the adequacy of the regulatory laws governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	242
6.2	Substantive laws: Statutes	244

6.2.1.4	Summary of the findings of the adequacy of the substantive laws governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	269
6.3	Procedural laws: Statutes	274
6.3.1.6	Summary of the findings of the adequacy of the procedural laws governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	285

LIST OF FIGURES

<u>Figure No</u>		<u>Page No</u>
2.3	Operation of <i>Musharakah Mutanaqisah</i> home financing contract	36
3.2	Regulatory Laws governing <i>Musharakah Mutanaqisah</i> Home Financing in Malaysia	66
5.4	Foreclosure Proceeding	204
5.4.1.1	Foreclosure (High Court) For Registry Title	205
5.4.1.2	Foreclosure (Land Office) For Land Office Title	208
5.4.1.3	Deed Of Assignment (No individual document of title cases)	213

LIST OF CASES

- Affin Bank Berhad v Zulkifli bin Abdullah* (2006) 1 CLJ 438
Arab Malaysian Finance v Taman Ihsan Jaya and Ors (Koperasi Seri Kota Bukit Cherakah Sdn Bhd)[2008] 5 MLJ 681
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Bandar Builders Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7
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Bank Kerjasama Rakyat (M) Bhd v Flavour Right Sdn Bhd & Ors [2012] MLJU 1003
Bank Kerjasama Rakyat Malaysia Bhd v. Brampton Holdings Sdn Bhd [2015] 4 CLJ 635
Bank Muamalat Malaysia Bhd v Kong Sun Enterprise Sdn Bhd and Others [2012] 10 MLJ 665
Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Others, COA Civil Appeal No: W-02-1731-2009 W-02-1732-2009, W-02-1733-2009
Chye Fook & Anor v Teh Teng Seng Realty Sdn. Bhd. [1989] 1 MLJ 308
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The Real Property Gain Tax Act 1976 (Act 169)
Trustees Act 1949 (Act 208)

LIST OF ABBREVIATIONS

AIBIM	Association of Islamic Banking Institutions Malaysia
All ER	All England Law Reports
AMR	All Malaysian Report
Anor	Another
BA 1967	Bankruptcy Act 1967
BAFIA 1989	Banking and Financial Institutions Act 1989
BNM	Bank Negara Malaysia
BR 1969	Bankruptcy Rules 1969
CA 1950	Contract Act 1950
CBMA 2009	Central Bank of Malaysia Act 2009
CJ	Chief Judge
CJA 1964	Court of Judicature Act
CLJ	Current Law Journal
CLJ (Sya)	Current Law Journal (Syariah)
EA 1950	Evidence Act 1950
ECA	Exchange Control Act 1953
ed./eds.	Editor / Editors
Etc.	(<i>et cetera</i>) and so forth
FMS	Federated Malay States
FMSLR	Federated Malay States Law Report
FOS	Financial Ombudsman Scheme
FSA 2013	Financial Services Act 2013
FSPs	financial services providers
HDA 1966	Housing Development (Control and Licensing) Act 1966
HDR 1989	Housing Development (Control and Licensing) (Amendment) Regulations 1989
IA	Insurance Act 1996
IBA 1983	Islamic Bank Act 1983
IDT	Issue Document of Title
IFI	Islamic Financial Institution
IFIs	Islamic Financial Institutions
IFSA 2013	Islamic Financial Services Act 2013
INSAF	The Journal of the Malaysian Bar
IslamicFOSR 2015	Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015
JDS	Judgment Debtor Summons
JKPTG	Department of Director General of Lands and Mines
KFHMB	Kuwait Finance House Malaysia Berhad
LA 1953	Limitation Act 1953
LNS	Legal Network Service
LR	The Law Review
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
MOD	Murabahah Overdraft Facility
MREs	The Malay Reservation Enactments

NLC 1965	National Land Code 1965
Ors.	Others
P./PP.	Page / Pages
PDPA 2010	Personal Data Protection Act 2010
PSA 2003	Payment Systems Act 2003
Pt.	Part
QB	Queen's Bench
ROC 2012	Rules of Court 2012
RPGT 1979	Real Property Gain Tax Act 1979
SA 1949	Stamp Act 1949
SAC	<i>Shariah</i> Advisory Council
SCA 1948	Subordinate Courts Act 1948
SCA 2010	Subordinate Courts (Amendment) Act 2010
SGF 2010	<i>Shariah</i> Governance Framework for Islamic Financial Institutions 2010
ShLR	<i>Shariah</i> Law Report
TA	Takaful Act 1984
TA 1949	Trustees Act 1949
TLR	Times Law Report
UFMS	Unfederated Malay States
V	Versus
Vol.	Volume
WLR	Weekly Law Review
WSS	Writ of Seizure and Sale

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE RESEARCH

Musharakah Mutanaqisah Home Financing is a hybrid contract consisting of *Musharakah* (partnership), *Ijarah* (lease) and *Bai*(sale).¹ Firstly, the customer and the Islamic Financial Institution (hereinafter referred to as “IFI”) will enter into a partnership (*Musharakah*) by jointly purchasing an asset based on a determined share depending on the amount of financing requested². The deposit paid by the customer is deemed as his initial share of ownership. For instance, the customer pays 10% deposit of the house whilst the IFI provides the remaining balance of 90%. Therefore, both the customer and the IFI will co-own the house and their shares would be ratio 10:90 percentages. Secondly, under the concept of *Ijarah* (lease), the IFI will lease its share in the property to the customer. The customer is to pay the lease accordingly. Finally, the customer will gradually purchase the share of the IFI until the entire share will be fully purchased by the customer.³

¹ Bank Negara Malaysia, “*Shariah* Resolution in Islamic Finance”, accessed July 8, 2015. http://www.bnm.gov.my/microsites/financial/pdf/resolutions/Shariah_resolutions_2nd_edition_EN.pdf. See also Siti Fariha Muhamad and Azira Hanani Abd Rahman, “An Evaluation On *Musharakah Mutanaqisah* Based House Financing by Islamic Banks in Malaysia”, (paper presented at the International Conference on Social Science Research organised by World Conferences.net, Penang, 4-5 June 2013).

² Ibid.

³ The periodic rental amount will be jointly shared between the customer and the IFI according to the percentage share holding at the particular times which keeps changing as the customer purchases the IFI’s share. The customer’s share ratio would increase after each rental payment due to the periodic redemption until eventually fully owned by the customer. See Noreeta Mohd Nor, “*Musharakah Mutanaqisah* as an Islamic Financing Alternative to BBA”, MIF Monthly (September 2008): 22 See also Nurdianawati Irwani Abdullah “Status and Implications of promise (*wa’ad*) in Contemporary Islamic Banking,” (*Emerald*) *Humanomics*, Vol. 26, No. 2 (2010) : 92, accessed November 1, 2014, www.emeraldinsight.com/0828-8666.htm.

Musharakah Mutanaqisah or co-ownership financing technique was first approved for house financing in 1991 during a workshop jointly organised by the Islamic Research and Training Institute, Jeddah, and the Sudanese Estates Bank, Sudan, held in Khartoum.⁴ Nonetheless, the earliest application of *Musharakah Mutanaqisah* home financing in Malaysia was highlighted by Mohd Ali Hj Baharum since 1990.⁵ Kuwait Finance House (Malaysia) Berhad⁶ had firstly offered *Musharakah Mutanaqisah* Home Financing in Malaysia in 2006⁷, and its operation was then extended to other local and foreign banks in Malaysia such as RHB Islamic Bank Berhad,⁸ Citibank Malaysia,⁹ Maybank Islamic,¹⁰ OCBC Al Amin Bank,¹¹ Standard Chartered *Saadiq* Islamic Bank,¹² Affin Islamic Bank Berhad,¹³ HSBC Amanah Malaysia Berhad,¹⁴ and Public Islamic Bank Berhad.¹⁵

⁴ Mahdi, M. A.(Ed.) “Islamic Banking Modes for House Building Financing”, Seminar Proceedings Series No. 28 organised by Islamic Research and Training Institute (IRTI), Jeddah, 1995.

⁵ Mohd Ali Hj Baharum, “Masalah Perumahan Penyelesaian menurut Perspektif Islam” Dewan Pustaka Islam, 1990:91-97

⁶ Kuwait Finance House Malaysia Berhad, accessed November 1, 2014. <http://www.kfh.com.my/kfhmb>

⁷ Osmani and Abdullah, “*Musharakah Mutanaqisah* Home Financing: A Review of Literature and Practices of Islamic Banks in Malaysia,” International Review of Business Research Papers, Vol 6. No 2. (July 2010): 273, accessed November 1, 2014.

<http://www.irbrp.com/static/documents/July/2010/21.%20Osmani.pdf>

⁸RHB Islamic Bank, accessed November 1, 2014. http://www.rhb.com.my/islamic_Banking/az_zahra/home_financing.html, See also Mohd Sollehudin bin Shuib, Joni Tamkin Borhan and Muhammad Nasri Md Hussain, “Pembiayaan Perumahan secara *Musharakah Mutanaqisah* di RHB Islamic Berhad (RHBIB): Analisis Kelebihan, Isu dan Cabaran dalam Penawaran Produk,” Vol.1, No.1, (2011): 135-148, accessed November 1, 2014, http://umexpert.um.edu.my/file/publication/00002713_79308.pdf

⁹ Mohd Sollehudin bin Shuib, Joni Tamkin Borhan & Azizi Abu Bakar, “*Musharakah Mutanaqisah* Home Financing Products: An Implementation Analysis, Product Advantages and Issues at Citibank (Malaysia) Berhad,” Journal of Techno-Social Vol. 3 No.2 (October 2011): 43-53

¹⁰ Maybank Islamic Bank, accessed April 17, 2016. http://www.Maybank2u.com.my/mbb_info/m2u,

¹¹OCBC Al Amin, accessed November 1, 2014. [http://www.ocbc.com.my/OCBCAl_Amin/bb_financing_term_financing_i.shtml#](http://www.ocbc.com.my/OCBCAl_Amin/bb_financing_term_financing_i.shtml#Diminishing_Musharakah_Asset_Financing-i)

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¹²Standard Chartered *Saddiq* Bank, accessed November 1, 2014. <https://www.sc.com/my/saadiq/myhomeone-i.html>.