ARE THE STATUTORY STANDARD SALE AND PURCHASE OF HOUSE CONTRACTS IN PENINSULAR MALAYSIA COMPATIBLE WITH ISLAMIC LAW?

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**INTRODUCTION**

Pursuant to reg 11(1) and (1A) of the Housing Development (Control and Licensing) Regulations 1989 and the principles decided in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd*,¹ *SEA Housing Corporation Sdn Bhd v Lee Poh Choo*,² *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors*³ and *MK Retnam Holdings Sdn Bhd v Bhagat Singh*,⁴ it is mandatory that the statutory standard formatted sale and purchase agreement (Schedules G, H, I and J), as provided in the Housing Development (Control and Licensing) Regulations 1989 will govern all agreements relating to the purchase of houses in Peninsular Malaysia.

**OBJECTIVES OF THE PAPER**

This paper seeks to examine the provisions in the statutory standard formatted sale and purchase agreement (Schedules G,⁵ H,⁶ I⁷ and J⁸) of the Housing Development (Control and Licensing) Regulations 1989 ('the said agreement') and considers the issue as to whether the said agreement is compatible with the requirements of the Shariah (Islamic law), insofar as the latter relates to abandoned housing projects.

The determination of this issue becomes of paramount importance when the parties to the said agreement later apply for loans to purchase the housing units from Islamic banks in Malaysia. As the main requirement for an Islamic bank is the upholding of the principles of Islamic law in its operation, it prompts the question as to whether the said agreement complies with the requirements set out by Islamic law. For otherwise, the subsequent loan agreement that the parties may enter into with an Islamic bank would also contagiously be null and void.

**AUTHORITY FROM THE PRIMARY TEXTS**

There are many verses from the Quran, calling for the doing of justice and abstaining from committing any cruelties, frauds and injustices especially in business transactions. The following are examples of the relevant verses:
(1) Do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people"s property (Surah al-Baqarah (2): 188).

(2) O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful! (Surah al-Nisa’ (4): 29).

(3) Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition (Surah al-Nahl (16):90).

(4) O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do (Surah al-Nisa’ (4):135).

(5) ... To the Madyan people We sent Shu’ab, one of their own brethren: he said: “O my people! worship Allah: Ye have no other god but Him. Now hath come unto you a clear (Sign) from your Lord! Give just measure and weight, nor withhold from the people the things that are their due; and do no mischief on the earth after it has been set in order: that will be best for you, if ye have Faith (Surah Al-A’raf (7):85).

(6) And withhold not things justly due to men, nor do evil in the land, working mischief9 (Surah al-Syu’araa’ (26):183).

(7) O ye who believe! fulfil (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for Allah doth command according to His will and plan (Surah al-Maidah (5):1).

The practice of *riba’* (interest/usury) in lending transactions and ‘gharar’10 in sale and purchase transactions are just some examples of practices that are considered fraudulent or unjust. The practice may be necessary and appropriate for investors and businessmen as being creative and devious capitalist business devices to maximise profits with no or less risk but they are unlawful according to Islamic law. Thus, Islam prohibits the practice of *riba’* (interest/usury) and ‘gharar’ transactions. This is explained in the following Quranic verses:

(a) Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: ‘Trade is like usury,’ but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (for ever) (Surah al-Baqarah (2):275).

(b) This because they love the life of this world better than the Hereafter: and Allah will not guide those who reject Faith. Those are they whose hearts, ears, and eyes Allah has sealed up, and they take no heed. Without doubt, in the Hereafter they will perish (Surah al-Nahl (16):107-109).

(c) If any do wish for the transitory things (of this life), We readily grant them -- such things as We will, to such person as We will: in the end have We provided Hell for them: they will burn therein, disgraced and rejected (Surah al-Isra’ (17):18).

Similarly, the hadiths of the Prophet Muhammad (Peace Be Upon Him -- ‘PBUH’) also call for a similar practice when carrying out any transactions:

(i) Muslims are brothers. It is not permissible for a Muslim to sell a thing which contains faulty
elements/flaws/defects (aib) to his fellow brother (Muslim) except if he discloses it.¹¹

(ii) Those who cheats us. is not from us.¹²

(iii) It was reported that the Prophet (PBUH) while he was passing a vendor selling foods, and became attracted to the bunch of foods before him. He put his hand into the bunch and found the below part of it, the foods were wet. He asked the seller: What is this? The seller replied: the foods were wet because they were poured with rain water and to prevent public from knowing this fact, he put the wet foods at the below part of the bunch. On hearing of this, the Prophet (PBUH) said: ‘He who cheats us, is not from us’.¹³

(iv) It is not permissible for someone to sell a thing except after he has explained about it, nor is it permissible for a person who knows such a state of condition of a thing, except he explains about it.¹⁴

(v) Yahya related to me from Malik from Abu’r-Rijal Muhammad ibn Abd ar-Rahman ibn Haritha from his mother, Amra bint Abd ar-Rahman that the Messenger of Allah, may Allah bless him and grant him peace, forbade selling fruit until it was clear of blight. Malik said, ‘Selling fruit before it has begun to ripen is an uncertain transaction (gharar)’ (muwatta’ Imam Malik).¹⁵

CONTRACT OF SALE INVOLVING NON-EXISTENCE OF SUBJECT MATTER

The position of Islamic law is clear on the contract of non-existence. Islamic law lays down a condition that the subject matter must actually exist at the conclusion of the contract. Hence, if the subject matter does not exist, generally, the contract is void even though it could probably exist thereafter, or even if it is established then that it would exist in the future but the existence is still to the detriment of any of the parties to the contract. Contracts which involve non-existent subject matters are prohibited pursuant to a hadith, wherein the Prophet (PBUH) prohibited a person from selling animal foetus yet to be born while it was still in the mother’s womb, when the mother was not part of the sale.¹⁶ Similarly, the selling of milk whilst it is still within the udder of the animal is void as there is a possibility of the udder being perhaps void of milk, and instead, only containing air.¹⁷ In one hadith, the Prophet (PBUH) prohibited the act of stopping the flow of milk from the udder of a female goat for a certain period of time for the purpose of enticing the public to purchase the female goat on the pretext that it contained a lot of milk.¹⁸ The Prophet (PBUH) also prohibited the sale of things which one did not own.¹⁹

However, Muslim jurists allow contracts of non-existent of subject matters, as being an exception to the above. Such a contract would include the sale of agricultural products before they are harvested. However, this is subject to the knowledge that the products have already appeared or shown signs of growth even though they are not in a ripe state. Further, this type of contract is allowed if the purchaser immediately harvests the product. Muslim jurists in general, have decided that the sale of fruits which had yet to be harvested but which showed signs of growth would be allowed but that the sale of the fruits which had not shown any signs of growth would be disallowed.²⁰ This type of contract falls under the category -- ‘the subject matter exists in essence, before it comes into existence later’.²¹

If the subject matter of the contract did not exist at the time of the contract and it is established that it could not exist in the future, then the contract is said to contain gharar elements and such, a contract is not accepted by the Muslim jurists.²² Transactions containing gharar elements are prohibited based on the verses of the Quran above and the Hadith of the Prophet (PBUH).²³ A majority of the jurists are also unanimously of the opinion that if the subject matter of the contract could not be surrendered to the parties at the conclusion of the contract or at the promised date, it is a gharar contract and thus void, not binding and of no legal effect.²⁴

Gharar is forbidden in Islam as its existence would harm the well-being, rights and interests of contractual parties and cannot ensure a satisfactory outcome, justice and fairness in the outcome of contractual dealings.²⁵ It is also forbidden by the Syariah because this element typically causes enmity, dispute,
hardship, injustice and losses to the parties.

ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

Abandoned housing projects in Peninsular Malaysia are one of the spillover problems of the housing industry. This problem is the nightmare for the purchasers involved and becomes a burdensome social obligation for the Government to tackle. From the year 1990 until June 2005, a total of 141 projects have been considered abandoned. This figure does not include abandoned housing projects which have been categorised as abandoned in toto since the 1970s, ie abandoned housing projects which have no possibility for rehabilitation at all, housing projects (which are abandoned) carried out by parties not being the subjects of purview of the Ministry of Housing and Local Government (‘MHLG’) and the abandoned housing projects in Sabah and Sarawak. This figure is a cause of concern to the general public and purchasers may lose confidence in housing developers and the housing industry in Peninsular Malaysia and especially the Government (MHLG) being the regulatory body in the housing industry.

There is too, the formidable problem of what needs to be done with the abandoned housing projects. Can these abandoned projects be expeditiously rehabilitated? If so, how much will the additional cost be?

CAUSES OF ABANDONMENT OF HOUSING DEVELOPMENT PROJECTS IN PENINSULAR MALAYSIA

The following are some of the reasons why housing projects in Peninsular Malaysia are abandoned:

1. financial problems faced by the housing developers (the cause of this problem is owing to the problems with the developers’ financial and construction management (severe liquidity problems and high gearing) to meet the construction costs and to repay the creditors);
2. loose approval of the applications for housing developer licenses by MHLG (MHLG fails to obtain the requisite advice and opinion of economists, legal experts, property experts and other experts in approving the applications);
3. problems with illegal squatters (sometimes developers face formidable problems in getting rid of squatters from the project sites);
4. ongoing conflicts, feuds and squabbles between and among the developers, land proprietors, purchasers, contractors, consultants and financiers causing further difficulties in coordinating and streamlining development and construction activities;
5. insufficient coordination between the land authority, planning authority, building authority, housing authority and other technical agencies in respect of the approval for the alienation of land, land uses, subdivision of lands, planning permission, building/infrastructure plans’ approval, housing developers’ licenses and issuance of the Certificate of Fitness for Occupation (‘CF’) and Certificate of Completion and Compliance (‘CCC’);
6. fraudulent practices of the housing developers, for example in instructing the architects or engineers to issue false claims for the release of the purchasers housing loans’ funds from the end-financiers dishonestly;
7. lack of, or insufficient experience and skills of developers in handling housing development projects (in some cases, the developers show their irresponsibility by absconding, after realising that they are unable to complete the projects);
8. blatant disregard for the laws by developers, throughout the course of development of the housing projects (these laws are the Housing Development (Control and Licensing) Act 1966 (‘Act 118’) and its regulations made thereunder, the Street, Drainage and Building Act 1974 (‘SDBA 1974’), the Uniform Building By-Laws 1984 (‘UBBL 1984’) and the planning and building guidelines issued by the planning authority and the building authority);
9. enforcement weaknesses on the part of the land authority, planning authority, building authority and the housing authority over the development of the housing projects;
GRIEVANCES AND TROUBLES FACED BY PURCHASERS IN ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

The following are some of the grievances and problems faced by purchasers when housing development projects are abandoned:

1. they are unable to get vacant possession of the units on time as promised by the vendor developers;
2. the construction of the houses is terminated or partly completed resulting in the same being unsuitable for occupation, mostly for a long time, unless the units can be expeditiously revived;
3. in the course of the abandonment of the project, purchasers still have to bear all and keep up the monthly instalments of the housing loans repayable to their respective end-financiers failing which, the purchased lots being the security for the housing loan would be sold off and with the possibility of the borrower purchasers being made bankrupts by their lender bank;
4. further, as the purported purchased unit has been abandoned and cannot be occupied, purchasers have to rent other premises, thus adding to their monthly expenses;
5. inability of the purchasers to revoke the sale and purchase agreements and claim for the return of all the purchase moneys paid to the developers as the developer might have absconded or that there were no monetary provisions to meet the claims;
6. many problems and difficulties occur when attempts are made to rehabilitate the abandoned housing units (the problems are because the projects may have been long overdue without any...
prospect of a revival, and require additional costs and expenditure on the part of the purchasers before they can be rehabilitated;

(7) possible difficulties for reaching consensus and for getting cooperation from purchasers, defaulting abandoned developers, end-financers, bridging loan financiers, contractors, consultants, technical agencies, local authorities, land authorities, state authorities and planning authorities for rehabilitating the projects (the troubles may be due to the technical and legal problems faced in the attempt to rehabilitate the projects);

(8) insufficient funds to generate the rehabilitation as the outstanding loan funds of the purchasers are not enough, purchasers refuse to part with their own moneys, no financial assistance from any agencies and the fact that the rehabilitating parties would incur losses if they were to proceed with the purported rehabilitation;

(9) purchasers themselves have to top-up using their own money, as the available funds are insufficient to meet the rehabilitation costs and they themselves personally have to rehabilitate the projects left abandoned (thus, they have to face all kind of problems in consequence of the abandonment and whilst initiating the rehabilitation);

(10) purchasers would not get any compensation and damages from the defaulting abandoned developers as they (the defaulting abandoned developers) may have no monetary provisions to meet the claims;

(11) there may be no party agreeable to rehabilitate the abandoned housing projects, causing the project to be stalled for an indefinite period of time or for a long period of time or in the worst situations, the abandoned project may not altogether be rehabilitated;

(12) other pecuniary and non-pecuniary losses subtle or otherwise, suffered by purchasers due to the abandonment and in the course of rehabilitation of the projects pending full completion, such as divorces, family breakdowns, dismissals from employment, nervous shocks, mental breakdowns and losses of future earnings; and

(13) due to the abandonment and the ensuing complications occurring thereafter, the ordinary machinery and enforcement of the housing, planning, building and development laws become defunct, frustrated and jammed, at the expense of the public purchasers. This also includes the inability of the public purchasers to take legal action against the defaulting developer because the action might not be beneficial or feasible.


It is perceived by certain researches that the said agreement is nearly equivalent or comparatively similar, if not fully, to the contract of

\textit{istisna}^{31} as propounded by Islamic law. The grounds for so holding are as follows:\textsuperscript{32}

(1) the said agreement involves a non-existent subject matter ie the absence of the duly completed house ready for occupation, during the session of the execution of the agreement (this is expressly and impliedly stated in the preamble to Schedules G,\textsuperscript{33} H,\textsuperscript{34} I\textsuperscript{35} and J);\textsuperscript{36}

(2) according to certain Muslim jurists, the payment of the purchase price for the subject matter to the agreement may be postponed to a future date (in the said agreement, except for the deposit payment which is normally 10\% of the purchase price, the balance 90\% of the purchase price is to be paid progressively and in stages or in the case of Schedules I and J, after the units have been completed and the CCC has been obtained, warranting the delivery of the vacant possession of the units to purchasers; the progressive stage payment is made on the evidence of the architect or engineer's certificate -- certifying the due completion of the required construction stage);\textsuperscript{37}
(3) according to certain jurists, the manufacturer/maker/seller can be required to complete the making of the subject matter/goods within a certain period (this is also the case for the purported housing unit being the subject matter for the said agreements which will be completed in 24 or 36 months, as the case may be);\(^{38}\)

(4) the terms and descriptions of the said agreement are fully disclosed in the said agreements (thus, this practice is similar to the requirement under istisna');\(^{39}\)

(5) the manufacturer/maker/seller is required to use his own money first to make the ordered subject matter/goods in istisna' (this is in line with the common practice among those in the housing industry in Peninsular Malaysia, wherein, the developer uses his own money first, to carry out the progressive construction stages and only after the construction had been duly completed, supported by a certificate issued by either the architect or the engineer, will he be entitled to the progressive payments from the purchasers);\(^{40}\)

(6) the terms in the said agreements provide that, on the agreement of the vendor/developer to build a housing unit as described, for the purchaser, the latter agrees to pay the vendor/developer a certain sum of money in accordance with the terms of the agreements (thus, this situation is relatively similar to the contract of istisna' ie the request of the purchaser to the manufacturer/maker/seller to make for him certain goods at a certain price);\(^{41}\)

(7) the delivery of vacant possession of the completed house (the subject matter) as ordered by the purchaser is made on a future date (this is in line with the feature of istisna', where the surrender of the requested goods is deferred to a future date); and \(^{42}\)

(8) in the sale and purchase of house, the purchase price must be surrendered to the vendor/developer on the completion of the progressive construction stage of the project (this tallies with the features in istisna', where the price must be paid on the completion of the goods).\(^{43}\)

**CONTRACT OF AL-ISTISNA'**

*Istisna'* means a contract with the manufacturer/maker/seller for the manufacturing/making of a certain product (ain), ie a contract to buy

from the manufacturer/maker/seller of the final product (manufactured goods) which the manufacturer/maker/seller will carry out for the request of the person/purchaser, subject to the terms and descriptions specified in the contract.\(^{44}\) The Mejelle, pursuant to its Article 124 requires that the manufacturer/maker/seller must be a skilled person to make the intended manufactured goods.\(^{45}\)

*Istisna'* is a contract nearly equivalent to salam\(^{46}\) as both involve buying non-existent products/goods (bai' al-ma'dum). Secondly, in *istisna',* the obligation on the part of the manufacturer/maker/seller is to produce the goods outright, emanates from the creation of the contract of *istisna'*\(^{47}\) with the requesting person/purchaser. However, the difference between the two (*istisna' and salam), is that in *istisna',* there is no obligation on the requesting person/purchaser to pay the price of the product immediately to the manufacturer/maker/seller or for the manufacturer/maker/seller to have a certain period of time to complete making the product and delivering it to the requesting person/purchaser. This is so according to Wahbah al-Zuhaili, because the manufacturer/seller is not entitled to receive any payment for making the requested goods from the purchaser on the date of the contract. He only has to complete making the goods and hand them over to the purchaser. Only upon the delivery of the goods being in compliance with the terms of the contract, shall he be entitled to payments from the purchasers. However, certain contemporary jurists opined that the payment in *istisna'* may be made promptly, deferred or paid in instalments.\(^{48}\) The manufactured products/goods too must be one which cannot be found in the common market.\(^{49}\) Some jurists, especially the modern jurists, opine that there must be an adequate period of time for the making and delivering of the requested products/goods.\(^{50}\)

Contract of *istisna'* is rejected by qiyas, as it involves non-existent goods (bai' al-ma'dum). The transaction of non-existent goods is prohibited by the Prophet Muhammad (PBUH).\(^{51}\) It is only recognised under istihsan,
according to the Hanafi school because of its popularity and is accepted in practice by businessmen. Similarly, this is the position of the Shafie, Maliki and Hanbali schools on the ground of prevailing custom (urf) and as an extension of salam. One of the conditions contract of istisna according to these schools is -- full payment must be made in the course of aqad (contract) similar to salam.

**CONDITIONS FOR ISTISNA’**

1. The subject matter involved in istisna’ must be of goods (common things) which people always deal with (taammul) such as food appliances (awani), shoes, other kinds of facilities for animals used as transportation (dabbah) and building construction. Thus, there will not be a contract of istisna’ if the subject matter involves rarely used products. Nevertheless, the contemporary jurists opine that this should not be a condition for istisna’. They opine that as industrialisation booms in the world today, manufacturing is becoming common, thereby warranting the use of the contract of istisna’, such as in contracts involving heavy, medium and primary industry, high technology industries for instance -- aircraft industries, locomotives, ships, cars, electronics and machines produced in big factories as well as items such as satellites. Contract of istisna’ can also be used to finance intangible assets, such as electricity and gas or even infrastructures. In addition, istisna’ can also be used as an international mode of investment in pre-shipment financing of the acquisition of capital goods in projects for which no other suitable mode of financing is available.

2. The contract of istisna’ does not prescribe the duration for the manufacturer/maker/seller to manufacture the intended manufactured goods requested by the requesting person/purchaser for otherwise, it will become a contract of salam. This is the view of the Hanafi and Shafie schools. However, other jurists do not stipulate that this as one of the conditions for istisna’, ie in the contract of istisna’, it is permissible to set out the duration within which the manufacturer/maker may have to complete the manufacturing of the goods and deliver it to the purchaser (the requesting person).

3. The requested manufactured goods/products to be made by the manufacturer/maker/seller must be fully described during the contract session.

4. The full purchase price need not be surrendered by the requesting person/purchaser during the course of the contract entered into (contract session - Majlis al-Aqad). However, some jurists opined otherwise, in that the payment may be made in advance or may be deferred or even paid in instalments.

Reverting to the issue of this paper, it is opined that the said agreement is a modified type of istisna’ to suit the needs of the housing industry. However, the said agreement may also fall under the category of contract of salam. It is argued as such, because the purchaser has to pay in advance the purchase price before the duly completed house (with the CF or the CCC) can be delivered to him and the unit is ready and suitable for occupation. Secondly, in a contract of istisna’, the seller has to use his own money first (according to certain jurists) to make the ordered goods and upon the delivery of the goods to the purchaser and upon satisfaction of the purchaser, in that all the specifications and descriptions have been complied with, the seller will then be entitled to the full purchase price. However, this is not the case when buying a house in Peninsular Malaysia, as the vendor/developer uses the purchasers’ money by way of progressive claims/receipts to construct the housing units until the same are duly completed and then hands the completed houses over to the purchasers (with vacant possession and with the CF or CCC obtained). On the expiry of the defect liability period and provided that there are no defective works that require the vendor/developer's attention, the vendor/developer is entitled to the balance of the purchase prices. The latter feature is arguably similar to the contract of salam.
ABSENCE OF GHARAR (RISKS/FRAUD/PERILS)

Despite the prohibition in Islam against contracts which contain a non-existent subject matter that may cause gharar (risk/fraud/uncertainty/peril), what is crucial in a contract is the elimination of gharar (fraud/risk) and not as to whether the subject matter exists at the time of the contract (majlis aqad). This type of contract, the contract of istisna', is approved by istihsan.63 In other words, although selling and purchasing a non-existent subject matter is generally prohibited by the legal texts, as this contains the element of gharar, this kind of transaction may be allowed due to necessity as propounded by istihsan, provided that in such a transaction, there is a certainty in the existence of the subject matter as promised in the future and the interests and rights of the parties to the contract are fully protected.64

LEGAL ANALYSIS

Based on the above, it would appear that the said agreement (Schedules G, H, I and J) is acceptable to Islamic law although there is no specific supporting permission/authority from the primary legal texts, ijma', qiyas (analogy), istihsan (juristic preference), istidla65 and sadd' zarari',66 provided that there is no gharar (fraud/risk/peril) or possibility (ihtimal) of any commission of gharar especially gharar al-fahish (exorbitant risk/peril/fraud/uncertainty).

The justification for the application of the said agreement is solely based on the ground of equity, customs and istihsan and to hinder hardship in business transactions, as well as for complying the maqasid al-shariah67 -- being the objectives of the Shariah (specifically in the protection of wealth) and in the name of public interest (maslahah ammah and maslahah mursalah).

However it is opined, that the above contention which is based on the fact that the said agreement is comparatively similar to istisna' (ie quasi istisna') or a hybrid of or a synthesis of istisna' and salam contracts, which are recognised by Islamic law by way of istihsan -- not the primary texts, may not altogether be acceptable in the event; the said agreement does not provide sufficient protection to purchasers against abandonment of housing projects and the consequential losses. The reason is -- in abandoned housing projects, the subject matter (the duly completed housing unit with CF or CCC obtained) does not exist both at the time of the signing of the agreement and after the expiry of the promised date for completion and for the delivery of the unit purchased. Thus, the element of gharar exists; the very element that is not acceptable (void) to Islamic law (according to the majority of the jurists, as the rukun (pillars) and the conditions (syarat) of the contract have not been fulfilled)68 insofar as the contract (aqd) is concerned.69

It is opined, in abandoned housing projects, that the absence of the subject matter (the duly completed housing unit with CF or CCC) and the losses suffered by purchasers as the resultant consequences of the abandonment, becomes gharar al-fahish. To be acceptable in Islamic law, the element of gharar must be absent or at least, there is only gharar al-yasir (immaterial risk) such as minor, but not major,

defective works.70 Whether there is minor or major defective work in the completed constructed building or the purported project had altogether been left incomplete and abandoned, is dependent on the facts of the case; it is opined, and subject to the evaluation and certification of the building experts (such as the MHLG officers, building engineers, contractors and professional builders).71 However, according to al-Shatibi, the law in many cases does not provide what is to be considered as an exorbitant gharar (gharar al-fahish) and what is an insignificant gharar (gharar al-yasir). What has been done by the jurists is to compare between what was prohibited by direct provisions of the texts and what was not insignificant gharar is the one which the people feel at ease with, as no dispute will arise from it and people are very much in need of such a contract.72 In addition, according to Article 1199 of the Mejelle, things are of excessive damage (dharar fahish) if they damage a building, that is to say, weaken it and become the cause of its falling down or which interfere with the essential requirements, that is to say, the original benefit which is expected from the building, like dwelling in it.73 It is opined, when a housing project is abandoned, it has caused excessive damage (dharar
fahish) to purchasers as the purported purchased unit could not be occupied on time and purchasers have to suffer other kinds of losses, pecuniary or non-pecuniary.\(^{74}\)

Alternatively, it is submitted that, even though the present system of housing delivery and the said agreement contain gharar al-fahish elements which can affect the legality of such agreements according to Islamic law, the said gharar can be tolerated, ie it can be considered being or can be transformed into an insignificant or minor gharar (gharar al-yasir) not amounting to the nullity of the agreement, if there are systematic and concrete provisions for undertaking effective rehabilitation protecting the rights of purchasers or if there is certain preventive and curative measures which are fully able to protect the interests of purchasers and provide sufficient remedies to aggrieved purchasers or that the current system of housing delivery applies the ‘full build then sell’ system.

Again, it is reiterated that the said agreement does not provide sufficient provision and terms of protection against abandonment and the ensuing grievances, occasioned by the abandonment, for purchasers. Due to this absence, gharar al-fahish may possibly (ihtimal) be committed by the vendor/developer. The following are some examples of the possible (ihtimal) occurrence of gharar al-fahish because of a lack of certain provisions in the said agreement.

1. No guarantee that the purported housing development project will not be abandoned and/or fail in the future. Even though there are legal provisions for the preservation and management for the releases of the purchasers’ monies in the housing development account as provided in the Housing Development (Housing Development Account) Regulations 1991, these are not fully capable of avoiding abandonment of housing projects and leading to the ensuing grievances, sufferings and losses to the stakeholder, especially the purchasers. This happens because the architect and the engineer, who may act, in concert with the bank managers, approve fraudulent claims on the instruction of the developers for the release of the purchasers’ monies from the housing development account.\(^{75}\) In the alternative, the costs for construction of the housing project may not commensurate with the available monies held under the housing development account and the vendor/developer’s reserve.\(^{76}\)

2. No provisions concerning the management of development of the housing project or the occurrence of abandonment, on the default of the vendor/developer and how to legally and equitably face it with the intention of preserving the interests of purchasers (public interests) and the stakeholders.

3. No specific provision for rehabilitation and regulating it in the event the inevitable abandonment occurs.

4. No requirement to have a CF or a CCC in the delivery of the vacant possession of the completed unit. This absence may lead also to gharar -- maybe the completed house is not suitable for occupation.

5. No provision conferring damages and compensation to purchasers for their sufferings and grievances, in the event that the project is abandoned and in the course of waiting for the completion of the rehabilitation.\(^{77}\)

6. No mandatory, legal requirement and legal rights for carrying out necessary supervision, verification, inspection, examination and monitoring by the purchasers, MHLG, local authorities and technical agencies over the building and construction works as well as against the progressive claims made by the vendor developers.\(^{78}\) Thus, in this situation, it is similar to the sale of al-

\textit{Munabadhah} (an example of a gharar contract) -- a sale effected by the vendor without leaving the buyer the opportunity to examine or check the goods or a sale of al-mulamasah (an example of a gharar contract) -- a sale finalised without examination by the buyer, who is allowed merely to touch the product.\(^{79}\)

7. No legal requirement for obtaining housing development insurance by the vendor/developer,
against any possible abandonment, non-completion and defective works in the completed building houses, which may result in the frustration of the contract -- ghārār al-fahish, in the event that the vendor/developer is late, proven not being able to meet financially, with the demand of the purchasers to undertake rehabilitation, completion, repairing and rectification works.\\(^{80}\)

(8) The completion date of the said agreement does not altogether require the full transfer of the title to purchasers. This may also lead to ghārār in which purchaser may become the aggrieved party even though he has paid all the purchase price but because of default, unwarranted and other unconscionable acts of the developer, the purchaser could not get a good title to the unit purchased.

(9) Specification of the building, in the Third Schedule to the said agreement was not fully disclosed and particularised warranting possible (ihtimal) commission of ghārār by the vendor/developer.

(10) Insufficient enforcement of the law by MHLG, the local authorities and the technical agencies (such as TNB, Sewerage Service Department (JPP), Canal and Irrigation Department (JPS), Fire and Rescue Department (Bomba), Public Works Department (JKR), etc), resulting in possible (ihtimal) commission of various fraudulent conducts and ghārār by the vendor/developer at the expense of purchasers/stakeholders, yet the vendor/developer finally got off scot free without any punishment.\\(^{5\text{ MLJ i at xxvii}}\)

(11) Insufficient capability and qualification, particularly in respect of the financial ability, on the part of the vendor/developer to implement the purported housing project due to unreasonable extravagant spending of money (safīh), lack of skills/expertise (ghaffālah), dishonesty, mismanagement and negligent financial and construction management (disqualified in the legal capacity -- ahliyat al-Ada'). This is due to insufficient legal and practical requirements or failure on the part of the authorities to select the suitable persons (the contracting parties/vendor developers) to carry out the project, supervisory failures, breach of duty of care and problems of enforcement.\\(^{81}\) These incapacities could cause the agreement to become void as it affects the root (rukun -- pillars) of the contract, viz the capability and qualification of the parties (ahliyat al-Ada') to carry out the contract.\\(^{82}\)

(12) Total inability of the vendor/developer to surrender the purported duly completed housing unit to purchasers on the promised date or there might be no delivery at all. This would cause the contract to become void due to ghārār.

(13) Inability of the vendor/developer to duly complete the purported housing project and to rehabilitate the same but received benefits and profits at the expense of purchasers (gharār).

(14) Even though equitable, statutory and legal remedies are available for the aggrieved parties, yet these would remain futile because when the time comes for instituting such actions, the intended actions and their outcomes might not be practical and feasible nor beneficial as the developer might have been wound up, disappeared, and having no asset/financial capabilities to meet the claims for damages. Thus, in abandoned housing projects, usually the purchasers fall prey to the unscrupulous vendor/developer.\\(^{83}\)

Thus, it is submitted that the said agreement is not acceptable to Islamic law and thus void. According to majority of the jurists, a contract (aqād) which does not fulfill the pillars (rukun) and conditions (syarāt) of the contract is void.\\(^{84}\) For instance, in the sale and purchase of houses, if the subject matter is later abandoned, the subject matter is absent at the time for delivery (gharār al-fahish) and secondly, the vendor/developer is an unqualified party to the contract. Further, usually in the abandoned housing projects, there is no guarantee that the purchasers could get the duly completed houses as the developer is financially incapable of resuming the construction. The purchasers also have to face all the troubles and incur costs due to the abandonment (gharār al-fahish). Hence, these catastrophes (gharār) surely tarnish the pillar (rukun) and condition (syarāt) for a valid contract.\\(^{85}\) In short, there are inherent elements of gharār or possibilities (ihtimal) for the commission of gharār in the said agreement, to the detriment of the public purchasers.
To recapitulate, the said agreement is in conflict with the Quranic verses, the hadith of the Prophet Muhammad (PBUH),\(^{86}\) qiyas, istihsan,\(^{87}\) the maqasid shariah and the maslahah ammah and maslahah al-mursalah (public interest) itself. In abandoned housing projects, the protection of wealth being one of the major necessities of mankind (ie purchased housing property) is not there ie it is absent despite certain payments made by the purchasers, especially on the promised date of delivery, which in turn, contravenes the requirement of maqasid shariah.\(^{98}\)

It is opined that unless and until certain terms and provisions which are capable of avoiding the gharar (abandonment and the ensuing losses, sufferings and grievances), especially gharar al-fahish, are provided in the said agreement, Act 118, SDBA 1974 and UBBL 1984, the said agreement per se, with due respect, is neither acceptable nor recognised by Islamic law. It is opined that, even though there exists gharar al-fahish in the said agreements, it can still be valid if the elements which can cause gharar al-fahish are eliminated or substantially reduced to only become gharar al-yasir, if the current system of housing delivery is replaced by a better system of housing delivery, such as by implementing the ‘full build then sell system’ or by imposing a requirement for the vendor/developer to obtain housing development insurance to guard against any possible occurrence of abandonment of housing projects and to meet the costs of the rehabilitation, if abandonment is inevitable, as well as to meet the losses of the purchasers as the direct consequences of the abandonment and defaults of the vendor/developer in the course of development of their purported housing projects.

The suggested provisions and terms of agreement and the necessary actions by regulatory bodies, which must be made, are to eliminate the possible occurrence of the gharar al-fahish (abandonment of housing project and ensuing grievances, the causes leading to it, losses, damages and sufferings).

To put it in a nutshell, it is opined and again, it is reiterated that the acceptable agreement of sale and purchase of house in accordance with Islamic law, is the agreement which can ensure that there is no possibility (ithimal) for the commission of gharar (abandonment and its ensuing grievances) especially gharar al-fahish, the rights and interests of the purchasers are fully protected, the subject matter (the duly completed house) can be delivered on the time as promised in accordance with the terms and conditions of the agreement and the guarantee of obtaining the full title for the unit purchased.

**SUGGESTION AND CONCLUSION**

It is proposed that the agreement which is based on the ‘full build then sell’ system of housing delivery is the most appropriate agreement; it is suggested, tallying with the requirements of Islamic law as it will totally avoid the occasion of gharar al-fahish. The contention as highlighted above is also in tally with the legal maxims -- ‘repelling an evil is preferable to securing a benefit’\(^{89}\) and ‘injury/damage is removed as far as possible’.\(^{90}\) The meaning of the ‘full build then sell’ system is that, only the completed constructed housing units with the full CF or CCC obtained are ready for due transfer to each individual purchaser on full settlement, are allowed to be sold. The vendor/developer is also required to obtain an Islamic housing development insurance to cover any losses suffered by the stakeholders, especially the purchasers, due to the defaults of the developers. Thus, by applying this suggestion, it is opined, that the issue of abandonment of housing projects and its consequential losses would not arise at all.

If the above could not be implemented, the Government can utilise the 10-90 system -- ‘quasi build then sell’ system, whereby purchasers are only to pay the 10% of the purchase price on the execution of the contract of sale and purchase. The balance of 90% is only to be paid upon the completion of the houses with the CF or CCC obtained and the title to the unit purchased shall also be ready for due transfer to purchasers upon full settlement.\(^{91}\)

Apart from the above suggestion, a special rehabilitation legal regime is required to be provided in Act 118, to control and monitor the progress of any rehabilitation if abandonment is inevitable.
To avoid insufficiency of funds for rehabilitation, in respect of the 'quasi build then sell system', as an addition, it must be made a condition for all applicants/developers to get the necessary housing development insurance, recognised by Islamic law, to meet any possibility of losses due to abandonment, its ensuing problems as well as to serve as a support to meet any expenditure to run the rehabilitation.

Further, effective enforcement, administrative and legal reforms, during the stage of alienation of land, planning permission, building and other plans' approvals, application for housing developer's licences and advertisement and sale permits, and in respect of the housing and rehabilitation law and practices, as far as they are permitted by Islamic law, in line with the elaborations provided in this writing, for example on 'ita', planning, insurance, damages, compensation and the principles of al-hisbah, the said agreements should be amended so as to be in harmony with the principles of Islamic law as suggested and discussed in the previous pages to this writing, to avoid many gharar, particularly gharar al-fahish, elements which are detrimental to the interests of the purchasers.

Following the above elaborations, the said agreements and the provisions in Act 118, Town and Country Planning Act 1976, Street, Drainage and Building Act 1974 (Act 133) and the Uniform Building By-Laws 1984 (‘UBBL 1984’), should also need to be rigorously amended to the effect of avoiding the possibility (ihitimāl) of the happening of the gharar and providing certain preventive and curative measures to the effect of fully protecting all the rights and interests of the stakeholders, especially of the purchasers, against any losses due to abandonment and the subsequent grievances.

According to Imam al-Ghazali, any ruling for the preservation of the public interest, and in respect of this writing, on the sale and purchase of houses, must fulfill three conditions. First, the essential necessity (darurah); second, categorical (absolute) (qat’iyah); and thirdly, consideration of the majority. It is contended that the above suggestions for facing and avoiding abandonment of housing projects, will achieve these three requirements -- ie the suggestions are being an essential necessity and categorical as they would protect the rights of the stakeholders against the consequential losses due to the abandonment. The suggestions will also be beneficial and affordable to the larger population of public purchasers and their rights and interests (majority) against the occurrence of severe losses incidental to the abandonment and not just merely benefitting the small portion of them as compared to the sheer solitary capitalistic interests of the vendor/developer.

The modus operandi of housing purchase in Peninsular Malaysia is open and prone to abandonment unless appropriate steps are taken to curb the problem. The current system, insofar as abandoned housing projects are concerned, it is opined, brings more evil than good. Thus, such a system should be rejected and be replaced with a better system (such as the ‘full build then sell’ system) to the effect of bringing substantial benefits to the public purchasers and stakeholders.

As the application of the said agreement may be void according to Islamic law, based on the above arguments, it follows that, Islamic banks and other Islamic window banks in Malaysia, are acting contrary to the elements approved by the religion of Islam under s 2 of the Islamic Banking Act 1983 (Act 276).
5 Introduced by reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (PU (A) 58/1989) of the Housing Development (Control and Licensing) Act 1966 (Act 118). Schedule G is for sale and purchase of house by way of 'full sell then build' system.

6 Introduced by reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (PU (A) 58/1989) of the Housing Development (Control and Licensing) Act 1966 (Act 118). Schedule H is for the sale and purchase of house by way of 'full sell then build' system.

7 Schedule I is the statutory standard Sale and Purchase Agreement (Land and Building) (sub-reg 11(1a) of the Housing Development (Control and Licensing) Regulations 1989), inserted by reg 15 of the Housing Development (Control and Licensing) (Amendment) Regulations 2007 (PU (A) 395/2007) (2007 Regulations). See also reg 8(b) of the 2007 Regulations.

8 Schedule J is the statutory standard Sale and Purchase Agreement (Building or Land Intended for Subdivision into Parcels) (sub-reg 11(1a) of the Housing Development (Control and Licensing) Regulations 1989), inserted by reg 15 of the 2007 Regulations. See also reg 8(b) of the 2007 Regulations. Schedule J is for sale and purchase of house by way of 'quasi build then sell' system.

9 Ibid., at p 374.

10 Means 'detrimental act', causing harm or damage. Gharar transaction means undertaking buying and selling activities based on unknown or unspecified terms, conditions and subject matters or inability to surrender the subject matter of the contract. See Majma' al-Lughah al-Arabiah al-Idarah al-'Ammah Lil Mu'jamat Wa Ahya', al-Mu'jam al-Wasit (4th Ed) Maktabah al-Shuruk al-Dauliah, Cairah Egypt, 2005 at p 648.


13 Reported by Muslim, quoted from Haji Mohd Saleh Haji Ahmad, Risalah Ahkam, Hajjah Salihah Haji Ab Halim (ed), Intel Multimedia and Publication, 2005 at p 275.


20 Ala'uddin Abu Bakr bin Mas'ud Al-Kasani Bada'il al-Sana'i, Vol 5, Matba'at al-Jamaliyyah, Qahirah Miar, 1328H at p 137. Also a hadith of the Prophet (PBUH), reported by Bukhari and Muslim from Anas said that the Prophet (PBUH) prohibits selling of fruits until the fruits have existed (the fruits have ripened and are ready for harvesting). See Naylu al-Awtar, Vol 5 at p 172. quoted from Wahbah al-Zuhaili, al-Fiqh al-Islami Wa Adillatuahu, Vol 5, Dimasq Syria, 1988 at p 175. School of Malik, School of Shiah Imamiah, Ibnu Taimiyah and Ibnu Qayyim from Hanbali School, allow the selling of fruits which are seen physically ripened or otherwise as a facility for sale and to hinder hardship in business dealings. However, for Hanafi, Hanbali, Zaidiah, Zahiri and Ibadiah schools, selling of the mixture between ripened and not ripened fruits, is prohibited. See Wahbah al-Zuhaili, al-Fiqh al-Islami Wa Adillatuahu, Vol 5, Dimasq Syria, 1988 at p 176.

22 Ibid. See also Surah al-Nisa’ (4):29: ‘O ye who believe!, eat not up your property among yourselves in vanities ...’.


27 Ibid.

28 See the news in the *New Strait Times* (NST) dated 12 September 2007, about the Auditor-General’s Office in 2006, reporting that due to the inefficient and poor management of funds, lack of enforcement and manpower, lack of appropriate training, mal-administration and poor monitoring, unreasonable overspending, and corruptions in the states and federal agencies (including the MHLG and local councils) causing huge losses to the Government. See at http://www.malaysianbar.org.my/content/view/11104/2/ on 12 September 2007. Also in the NST, Wednesday, 12 September 2007 at pp 1, 4 and 12.


30 See for example, the abandoned housing project at Taman Bistari Kamunting, Taiping, Perak developed by Sri Ringgit Properties Sdn Bhd where this project had been abandoned since the mid-1980s. There were several attempts made by certain interested parties to rehabilitate the project but their attempts were proven futile. However, fortunately, with the injection of welfare funds and rehabilitation carried out by Syarikat Perumahan Negara Berhad (‘SPNB’), a government linked company (‘GLC’) funded by the Ministry of Finance in early 2001, the project has now fully been rehabilitated and ready for occupation, after it had been abandoned for almost 20 years. This is based on file No: KPKT/08/824/3957/E.

31 *Istisna* means contract with the manufacturer/maker for manufacturing/making a certain product (ain), ie a contract to buy from the manufacturer/maker the final product (manufactured goods) which the manufacturer/maker would do for the requestng person/purchaser subject to the terms and descriptions specified in the contract. Nevertheless, if the manufactured product/goods are made by the requesting person (mutasi`) and not from the manufacturer/maker himself, then this type of relationship is called ijarah (lease/let) and not istisna. The Mejelle, pursuant to its Article 124 warrants that the manufacturer must be a skilled person to make the intended manufactured goods. See Al-Zuhayli, 4:631; Razali Hj Nawawi, *Islamic Law on Commercial Transaction* (Kuala Lumpur: CT Publication Malaysia, 1999) at p 95 and Ismail Haqqi Effendi *The Mejelle*, translated from Arabic by CR Tyser, DG Demetriades, (Pakistan: The Book House, Lahore, Pakistan, nd) at p 18. See also Muhammad al-Bashir Muhammad al-Amine *Istisna* (Manufacturing Contract) in *Islamic Banking and Finance, Law & Practice*, (Kuala Lumpur: AS Noordeen, 2001) at pp 6-13.


33 Clauses 4 (Schedule of Payments), 13 (Materials and Workmanship to Conform to Description), 16 (Infrastructure and Maintenance), 18 (Maintenance of Services), 19 (Water, Electricity, Gas Piping, Telephone Trunking), 22 (Time for Delivery of Vacant Possession), 23 (Manner of Delivery of Vacant Possession) and 24 (Vendor to obtain the Certificate of Completion and Compliance).

34 Clauses 4 (Schedule of Payment), 11 (Separate Strata Title and Transfer of Title), 13 (Materials and Workmanship to Conform to Description), 16 (Infrastructure and Maintenance), 17 (Common Facilities and Services), 22 (Water, Electricity, Gas
Piping, Telephone Trunking, 25 (Time for Delivery of Vacant Possession), 26 (Manner of Delivery of Vacant Possession), 27 (Completion of Common Facilities), and 28 (Vendor to obtain Certificate of Completion and Compliance) and 30 (Common Rights of Purchaser).

35 Clauses 4 (Schedule of Payments), 13 (Materials and Workmanship to Conform to Description), 16 (Infrastructure and Maintenance), 18 (Maintenance of Services), 19 (Water, Electricity, Gas Piping, Telephone Trunking), 22 (Time for Delivery of Vacant Possession), 23 (Manner of Delivery of Vacant Possession) and 24 (Vendor to obtain the Certificate of Completion and Compliance).

36 Clauses 4 (Schedule of Payment), 11 (Separate Strata Title and Transfer of Title), 13 (Materials and Workmanship to Conform to Description), 16 (Infrastructure and Maintenance), 17 (Common Facilities and Services), 22 (Water, Electricity, Gas Piping, Telephone Trunking), 25 (Time for Delivery of Vacant Possession), 26 (Manner of Delivery of Vacant Possession), 27 (Completion of Common Facilities) and 28 (Vendor to obtain Certificate of Completion and Compliance) and 30 (Common Rights of Purchaser).

37 See cl 4 (Schedules G, H, I and J) and the Third Schedule (Schedules G, H, I and J).

38 See cl 22(1) (Schedules G and I) and cl 25(1) (Schedules H and J).

39 See the preamble to Schedule G, cl 1, 2, 11, 13, 14, 17, 19, 20, 25, 27, First Schedule, Second Schedule, Third Schedule and the Fourth Schedule (Schedule G) and for Schedule H -- the preamble, cl 1, 2, 11, 13, 14, 17, 18, 19, 23, 24, 27, 28, 29, 31, First, Second, Third, Fourth and Fifth Schedules. See also the corresponding clauses in Schedules I and J.

40 See the Third Schedule (Schedules G and H). See also the corresponding Schedules in Schedules I and J.

41 See the Preamble and the Third Schedule to Schedules G and H. See also the corresponding clauses in Schedules I and J.

42 See cl 22 and 23 of Schedule G. For Schedules H -- cl 25 and 26. See also the corresponding clauses in Schedules I and J.

43 See cl 4 and the Third Schedule to Schedules G and H and Razali Nawawi, Islamic Law on Commercial Transactions, CT Publications Malaysia, 1999 at p 96. See also the corresponding clauses in Schedules I and J.


46 According to the School of Hanafi, salam means a contract of sale and purchase in cash payment but the delivery of the product/goods is deferred to a future term or a sale of goods/product by way of specification only and the goods/product shall only be delivered later but the price has to be paid in advance and in cash. See Sharh al-Kabar, Maqdisi, Vol 3 at p 195 quoted from Dr Abdul Halim Muhammad, Undang-undang Mu'amalat dan Aplikasinya Kepada Produk-produk Perbankan Islam, undated, FakultiUndang-undang Universiti Kebangsaan Malaysia at p 136, Razali Hj Nawawi, Islamic Law on Commercial Transactions, CT Publications Malaysia, 1999 at pp 91-92. According to Wahbah al-Zuhaili, Salam or Salaf means the sale and purchase of goods where the payment is paid in advance, at the time of the making of the contract, but the delivery of the goods is deferred to a future date. Salam and Salaf are similar in meaning. Salam is used by the people of Hijaz (Mekah and Madinah) but salaf is a terminology used by the people of Iraq (ahl-il-Iraq). See also al-Zuhaili, Wahbah al-Fiqh al-Islami wa Adillatuhu, Vol 4, Darul al-Fikri, Damascus Syria, 1988 at p 598 and Muhammad bin Ismail al-Amir al-Yamani al-Soni' Subul al-Salam Sharah Bulugh al-Maram, Min Jami' al-Ahkam, Vol 3, Darul al-Fikri, Beirut Lubnan, not dated at pp 90-92.

47 During the contract session.


49 Dr Abdul Halim Muhammad, Undang-undang Mu'amalat dan Aplikasinya Kepada Produk-produk Perbankan Islam, undated, Fakulti Undang-undang Universiti Kebangsaan Malaysia at p 136 and Razali Hj Nawawi, Islamic Law on Commercial Transactions, CT Publications Malaysia, 1999 at pp 91-92.


54 Ibid, at p 633.


60 Dr Abdul Halim Muhammad, Undang-undang Mu’amalat dan Aplikasinya Kepada Produk-produk Perbankan Islam, Fakulti Undang-undang Universiti Kebangsaan Malaysia, undated at pp 87 & 142.


65 ‘Isti‘dEEl’ means reduction -- it is the striving after a basis for a rule. The term connotes a special source of law derived from reason and logic, not from the textual side of the law (al-‘UrfEEn and al-Sunnah). The following example clarifies the issue. A sale is a contract; the basis of every contract is consent; it is necessary therefore, that consent be the basis of sale. See Qadri, Anwar A Islamic Jurisprudence in the Modern World (Delhi: Taj Company, 1986) at pp 226-227.

66 Zarai’i is a means, regardless of whether one uses something as a means to a benefit or an evil. The rule of the means has two parts. One of them is the means to the desired object, whether it is obligatory, recommended, or permissible, has the same legal value as the object and has what is expressed, as opening the means (sadd’ al-zari’i). The other is that the means of a forbidden act is forbidden and what leads to an evil is prohibited. This part is called blocking the means (sadd’ al-zari’i). In this case, we are concerned with this second part. The principle of blocking the means is to forbid a lawful act when it often leads to an evil or to prohibit a permissible act when it leads to an unlawful act. See Dr HH Hamid Hassan, An Introduction to the Study of Islamic Law (New Delhi: Adam Publishers & Distributors, 2005) at p 187.


68 For a Hanafi School, such a contract may be fasil contract ie contract which complies with the rukun (pillars) but does not comply with the features of the contract for example selling uncertain/non-existent goods. The result is that the contract becomes not binding. Secondly, the contract (the said agreement) can become a batil contract, ie a contract which does not
fulfil the rukun (pillars) requirements and conditions (syarat). For example, the parties to the contract are not being qualified parties. The result of this contract (contract batil) is -- there shall be no legal force and be void ab initio. See Kasani, Bada’ai, Vol 5 at p 203, al-Mabsut, Sarakshi, Vol 12 at p 124, Mughni al-Muhtaj, Sharbini Vol 2 at p 1012, al-Muntaha, Ghayat Vol 2 at p 71 and Ibn Idris, Khashaf al-Qana, Vol 3 at p 276, quoted from Dr Abdul Halim Muhammad, Undang-undang Mu’amalat dan Aplikasinya Kepada Produk-produk Perbankan Islam, Fakulti Undang-undang, Universiti Kebangsaan Malaysia, not dated at p 135.

69 See hadith of the Prophet (PBUH): ‘Those who does certain practice contrary to our requirements, the practice is rejected and those who invents foreign element into our religion, he is rejected’. See Ali Khafif Ahkam al-Mu’amalat al-Shari’yyah, Darul Fikri al-Arabi, Egypt, not dated at p 392.


71 Because of the element (ilaah) of gharar, the contract is void. See also Razali Nawawi Islamic Law on Commercial Transactions, CT Publications Malaysia, 1999 at pp 75 and 90 and Dr Abdul Halim Muhammad Undang-undang Mu’amalat dan Aplikasinya Kepada Produk-produk Perbankan Islam, Fakulti Undang-undang, Universiti Kebangsaan Malaysia, undated at p 86. Even though gharar can vitiate a concluded contract, the conditions of gharar can change according to the environment, custom and technology. For instance, scholars of the past forbade the purchase of fish in water under the assumption that gharar al-fahish will occur. Nowadays, this ruling can change if it can be proven with certainty that modern equipment has the ability to catch fish in water with accuracy. See www.zaharuddin.net -- Gharar & Gambling in Daily Transactions.


73 Ismail Haqqi Effendi The Mejelle, translated from Arabic by Tyser, CR, Demetriades, DG (Pakistan: The Book House, Lahore, Pakistan, nd) at p 195.

74 See also Dr Liaquat Ali Khan Niazi, Islamic Law of Tort (Lahore: Research Cell, Dyal Sing Trust Library, 1988 at p 118).

75 See for example, the case of Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor [1997] 1 MLJ 690, [1997] 2 CLJ 548 and Taman Lingkaran Nur at PT No 6643, HS (D) 16848, Mukim of Cheras, Daerah Hulu Langat, Selangor (Developer: Saktimuna Sdn Bhd), as provided in file No: KPKT/08/824/4275.

76 See for example, Taman Shoukat, Lot 2219, Mukim 13, NED, Penang as provided in file No: KPKT/08/824/337.

77 See hadith of the Prophet (PBUH), in his farewell address on the occasion of his pilgrimage in the 10th Hijrah -- ‘Your blood (life), your property and your honour (dignity) are sacred as is the sacredness of this day in this city of yours and in this month of yours’. See M Musleh-ud-Din Concept of Civil Liability in Islam and the Law of Torts, Islamic Publication Ltd, Pakistan, 1982 at p 52. See also the Quranic verse -- ‘The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah: for (Allah) Loveth not those who do wrong’ (Surah al-Shura (26):40).


79 Razali Nawawi, Islamic Law on Commercial Transactions, CT Publications Malaysia, 1999 at p 90.


83 See for example, in Taman Universe (developer: Cariwang Properties Sdn Bhd), NED, Penang, as provided in file No KPKT/BL/19/1171.

85 According to Hanafi School, if there is *gharar al-fahish* or certain *gharar al-yasir*, they would render the contract voidable. However, for Hanbali and Shafi'i schools, if there is *gharar al-fahish*, the contract would be of no effect (not-binding). See Wahbah al-Zuhayli *al-Fiqh al-Islami wa Adillatuhu*, Vol 4, Darul al-Fikri, Damascus Syriaat pp 223-224.

86 Which prohibits contracts of non-existent subject matters.

87 Which allows *istisna* and other modes of contract initially not recognised by the Quran, Hadith and Qiyas -- justifying contracts of non-existent but without any element of *gharar* especially *gharar al-fahish* due to necessity.


89 Also, in Article 30 of the Mejelle. See Tyser, CR, Demetriades, DG, Effendi, Ismail Haqqi *The Mejelle* (tr), The Book House, Lahore, Pakistan, undated at p 7.

90 Also, in Article 31 of the Mejelle. See *ibid*.

91 This suggestion is equivalent to the terms contained in Schedules I and J of the Regulations 1989. However, the difference is that, in Schedules I and J, there is no term requiring the vendor developer to transfer the title to the buyers immediately after the payment of the 90% balance purchase price.

92 According to Wahbah al-Zuhayli -- ‘*ita*’ means the grant of idle/dead land to a qualified and eligible person by the State/Muslim leader for the former to develop the land whether in perpetuity or for a certain duration. See Wahbah al-Zuhayli *Fiqh al-Islami wa Adillatuhu*, [Dimashq; Dar al-Fikri, 1989], 5:575. Qar'i, Rawwas Qar'i & Hamid Sadik Qunaybi *Mu'jam Lughat al-Fuqaha' Arabi -- Inklizi*, (Bayrut: Dar al-Nafaiz, 1985) at p 84 and Sa'ad Abu Jayb Al-Qarnus al-Fiqhi, *Lughatan wa Istilahan*, [Dimashq; Dar al-Fikri, 1989] at p 307. However, according to the Hanbali School, ‘*ita*’ may involve other than an idle/dead land such as kharaj land, provided that the grant is beneficial to the public and that it is necessary. Yet, according to the Maliki School, an ‘*ita*’ land shall not include confiscated by force-land such as land in Iraq, Sham and Egypt. See [Surah al-Zuhayli (5):578.]

93 Al-Hisbah ‘is an institution developed by the Muslims to help regulate the society and economy and to ensure that the full flowing of the Islamic norms of behaviour and justice are done’; in other words, to ordain good and forbid evil. In a greater sense, the purpose of *hisbah* is to ensure that justice prevails over society and daily life. Subtly, the purpose of the Islamic law will be fulfilled if there is justice. According to Ibnu Taymiyyah, the affairs of men in this world can be kept in order with justice and a certain connivance of sin, better than with pious tyranny. The consequence is, God upholds the just state even if it is unbelieving, but does not uphold the unjust state even if it is Muslim. It is also said that the world can endure with justice and unbelief, but not with injustice and Islam. The reason for all this is that justice is the universal order of things. So when worldly administration is just, it works, even if the man in charge has no share in the rewards of the hereafter. See Al-Shaykh al-Imam Ibn Taymiya, *Public Duties in Islam, The Institution of the Hisba*, translated from Arabic by Muhtar Holland, (London: The Islamic Foundation, 1982).


96 Fakhr al-Din al-Razi al-Mahsul fi 'Ilm Usul al-Fiqh, Vol 5, Taha Jabir al-Alwani (ed), Mu'assasah al-Risalah, Beirut Lubnan, 1412/1992 at pp 165 and 166. Otherwise, it is regretted that the sale will be a nullity due to being a void instrument (the said agreement) according to Islamic law

97 Based on the Quranic verses, Hadith of the Prophet (PBUH), qiyas, istihsan, maslahah al-ammah, masalah al-mursalah (public interest) and the maqasid al-shariah (objectives of the Shariah) itself.

98 According to s 2 of the Islamic Banking Act 1983 (Act 276), ‘Islamic banking business’ means ‘any company which carries on Islamic banking business and holds a valid licence ...’. While the definition for ‘Islamic banking business’ means ‘banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam’. (Emphasis added.)