

A COMPARATIVE APPROACH OF MONEY LENDING ACTIVITIES PRACTICED BY THE FINANCIAL INSTITUTION AND "AH LONG" IN MALAYSIA

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Abstract

Recently, due to the easily loan facility from the financial institution, money lending activities had flourished vividly for instance in purchasing goods by way of hire purchase contract is common to the society at large. Hire purchase contract is a money lending or loan by way of leasing, the ownership shifted until the final payment is made. On the other hand, illegal financial institution, or well known as "Ah Long" had mushrooming into the society as well. Hence, without realizing both legal and illegal financial institution, imposed a strict rule upon failure of the defaulters to pay back the loan given. Upon failure, reposessor repossessed back the vehicle and mean while, "Ah Long" will use any possible forced so that they get back their money. Therefore, sometimes it creates a negative environment between them the borrower and the creditor and also between the owner (lessor) and the hirer (lessee).

Therefore, this study aims to examine the legal implication to the hirer in the case of repossession of the vehicle upon failure to pay back the loan under hire purchase contract and also the impact to the borrower upon failure to pay back the loan from the illegal financial institution or well known as "Along".

Keyword: Hire Purchase, Loan sharks, "Ah Long", Repossession, Financial Institutions in Malaysia

Introduction

Hire Purchase transaction is another latest innovative product offered by financial institution in Malaysia where it gives assistance to customers to buy the consumer goods² by way of leasing. It is distinguish from the other loan facility for example housing loan facility, because it conferred the owner³ the right to repossess when the hirer⁴ defaulted the payment. All the hire purchase transaction are governed by Hire Purchase Act 1957 (Act 212) (hereinafter referred as "HPA"). Meanwhile, "Ah Long" is other mode of lending facility that offers loan facility to the public at large especially those who are desperately need money. They are considered as illegal money borrower because they are not licensed or an authorized money borrower.

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² Section 2 of Hire Purchase Act 1957 stated that "consumer goods" mean goods purchased for personal, family or household purposes. The goods are listed in the First Schedule to the Act consists of all consumer goods and motor vehicle.

³ Section 2 of Hire Purchase Act 1957 defined "owner" as a person who lets or has let goods to a hirer under a hire purchase agreement and includes a person to whom the owner's right or liabilities under the agreement have passed by assignment or by operation of law

⁴ Section of Hire Purchase Act 1957 interpret "hirers" as the person who takes or has taken goods from an owner under a hire purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law.

All financial institutions are regulated under Banking and Financial Institutions Act (1989) (ACT 372) (hereinafter referred as BAFIA 1989) whereas the other legal moneyborrowers are governed by Moneyborrowers Act 1951 (Act 400) (hereinafter referred as MLA 1951). Meanwhile, illegal moneyborrowers for instances in Malaysia they are well known as "Ah Long" (Chinese Illegal Moneyborrowers) and "Chettiars" (Indian Illegal Moneyborrowers) are not authorised by any of the above law stated. Abuse in the granting of loans is known as predatory lending. It usually involves granting a loan in order to put the borrower in a position that one can gain advantage over him or her. Where the moneyborrower is not authorized, it could be considered a loan shark.⁵

This paper confined the discussion to the reposessor activities in hire purchase contract focusing to motor vehicle and the illegal way conducted by "Ah Long" to get back the money. This paper addresses a significant issue to whether financial institution had become irresponsible when the defaulters failed to pay the loan by hiring untrustworthy repossesors and also "Ah Long" misbehavior that have threatened the society.

Following the introduction, the next section discussed on the of Hire Purchase transaction in Malaysia and followed by the act of repossession by the untrustworthy reposessor. This followed by the emerging issues on loan sharks or well known as "Ah Long" in Malaysia, discussion will be focus on the issues of harassment by "Ah Long" when borrower failed to pay back their money.

History of Hire Purchase In Malaysia

The Malaysian hire purchase trade actually originated from the early development of banking system, where goods were exchanged in return for a promise of future payment by installment. The Chinese money borrowers and chettiars (Indian money borrowers) played an important role in hire purchase transactions long before finance companies became popular. Though they charged exorbitant interest rates, they were welcomed because their credit facilities were easily available.⁶

The last decade had shown a rapid development in the number of hire purchase transactions, which previously were most popular among the lower income groups; but now these transactions are widely practiced by middle income groups and by commercial circles as well. Due to the fact that demands for a better lifestyle in society comes hand in hand with economic progress in the country. Hire Purchase Act in 1967 (Act 212) was passed to regulate and control the form and contents of hire purchase agreements and to define the legal rights, duties and liabilities of hirers, owners and other parties to hire-purchase agreements.

⁵ <http://en.wikipedia.org/wiki/moneyborrower>

⁶ Consumer's Association of Penang, *The hire purchase trap - how you can be cheated and what to do about it?*, Consumer's Association of Penang, Penang, 1986 at 8.

Definition of Hire Purchase

Under Common Law, a hire purchase transaction is a contract whereby one party (called "the owner") lets goods on "hire" to another party, the hirer, and agrees that the hirer may (at his own option) either return the goods when he no longer needs them and terminate the hire, or elect to purchase the goods on completion of the necessary payments agreed in the contract.⁷

In simple terms, a hire purchase transaction is hire, coupled with an option to buy, provided that all the conditions are fulfilled until the end of the hiring contract. On the other hand, it is only a contract of hire when the intention is only to hire without exercising the option given. For as long as the hiring contract exists, the "ownership" of the property is with the lessor, unless it has been passed on to the lessee.

Definition of Loan Shark

A loan shark is a person or body that offers illegal unsecured loans at high interest rates to individuals, often backed by blackmail or threats of violence. They provide credit to those who are not willing or are unable to obtain it from more respectable sources, usually because interest rates commensurate with the perceived risk are illegal.⁸

Payday loans and other aspects of consumer finance have made true loan sharks rarer, though some legitimate borrowers have been accused of behaving in an exploitative manner. There are many registered and legal borrowers that lend to people who cannot get loans from the most mainstream borrowers, such as bank or financial institution. Terms such as sub-prime lending and "non-standard consumer credit" are used for this type of borrower. They often operate in cash, whereas mainstream borrowers increasingly operate only electronically, which means that they will not deal with people who do not have a bank account.

Payday loan operations have also come under fire for charging inflated "service charges" for the service of cashing a "payday advance" effectively a short term (no more than one or two weeks) loan for which charges may run 3-5% of the principal amount. By claiming to be charging for the 'service' of cashing a paycheck, instead of merely charging interest for a short term loan, laws which strictly regulate money lending costs can be effectively bypassed.

Loan Shark In Malaysia (Ah Long)

In Malaysia recently, many cases were reported that many victims had been harassed by the loan sharks. "Ah Long" are loan sharks in Malaysia, they are money borrowers who act as a 'folk bank'. "Ah Long" is illegal, they are not a

⁷ Salleh Buang, Malaysian law on hire purchase, 2nd Edition, Sweet & Maxwell: Petaling Jaya, at 5-6.

⁸ http://en.wikipedia.org/wiki/loan_shark

bank but they lend their own money to people needing money, mostly targeting habitual gamblers⁹ who are in desperate need for quick money. They charge a very high interest rate (around 120% p.a.) and frequently threaten violence towards those who fail to pay in time.

It is an easily credit family which does not requires any loan documentation. They provide credit to those who are not willing or unable to obtain it from more respectable sources, usually because interest rates commensurate with the perceived risk are illegal.

Their sources of their income is vague it is presumed that their source of income may come from illegal sources for instances it may come by money laundering. In Malaysia, money laundering was strictly prohibited by the Anti Money Laundering Act 2001 (ACT 613).¹⁰ Therefore, one the reason these Ah Long can be so actively involved in giving credit to the people at large.

In contrast to financial institutions, the sources of income are mainly from the depositor. All the financial institution is governed by Banking and Financial Institution Act (BAFIA) 1989. Thus they are monitored by the Central Bank of Malaysia for the supervision and harmonization among them.

The credit facility offered by "Ah Long" is attractive, no documentation and guarantor needed as compared to a strict requirement by the bank or the financial institution. The rule is clear, the borrower have to pay back the loan within the specified period of time and the exorbitant interest rates. The situations become worsen when the borrower failed to pay back the loan in which they used cruel and ruthless harassment method to cover their money, for instances cutting of the borrower's hand and leg. One of the trends is the deduction of the borrowers' salary using the ATM card, whereby "Ah Long" will keep the ATM card in their custody until the final payment is settled. The borrower can only used the balance after deduction. This is consider as cruel and nasty way but it become worse when it puts a threat to the family. Stories about bitter experiences with "Ah Long" ranging from cases of parents denouncing their sons, the wife denouncing the husband or the children denouncing the father when they could no longer endure the pain and the humiliation inflicted upon them by the debt collectors of these "Ah Long".

Legal Provisions On Illegal Moneyborrower

In fact "Ah Long" issues in Malaysia should be looked at in a holistic manner and may be regarded as a social ill and not as a crime issue alone. Furthermore, the activity of illegal moneyborrowers is an offence under section 5(2) of the Moneyborrowers Act 1951 Act 400.

⁹ According to the survey conducted by MCA, shows that women likely to borrow from "Ah Long" and they are gamblers.

¹⁰ Section 4 of Anti Money Laundering Act describes the offence of money laundering as any person who engages in, or attempts to engage in or abets the commission of money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or imprisonment for a term not exceeding five years or both

The said section provides that:

Section 5- Licences to be taken out by moneyborrower

(1) No person shall conduct business as a moneyborrower unless he is licensed under this Act.

(2) Any person who carries on business as a moneyborrower without a valid licence, or who continues to carry on such business after his licence has expired or been suspended or revoked shall be guilty of an offence under this Act and shall be liable to a fine of not less than twenty thousand ringgit but not more than one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment.

The licenced moneyborrowers are also prohibited to cause any hurt to the borrowers in the case of failure to pay the loan. Such prohibition is clearly stated in section 29B which provides as follows:

Section 29B. Harassment or intimidation, etc of borrower

(1) Any moneyborrower who, either personally or by any person acting on his behalf, harasses or intimidates a borrower or any member of the borrower's family or any other person connected with the borrower at, or watches or besets, the residence or place of business or employment of the borrower, or any place at which the borrower receives his wages or any other sum periodically due to him, shall be guilty of an offence under this Act and shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding fifteen months or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment.

(2) Any person who, acting on behalf of the moneyborrower, commits or attempts to commit any of the acts specified in subsection (1), shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

(3) Any person who, while committing, or attempting to commit any offence under subsection (1) or (2), causes hurt to a person, shall be guilty of an offence under this Act and shall be liable to imprisonment for a term not exceeding two years and whipping.

(4) For the purposes of subsection (1), the doing of an act of harassment or intimidation upon another person includes the making of statements, sounds or gestures, or exhibiting of any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such person or intruding upon the privacy of such person.

(5) For the purposes of this section and subsection 10I (3)–

(a) "causes hurt " means doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person;

(b) "harassment " includes aggravation, annoyance, badgering, bedevilment, bother, hassle, irritation, molestation, nuisance, persecution, pestering, torment, trouble or vexation in circumstances in which a reasonable person, having regard to all or any of the circumstances would be offended, humiliated or intimidated; and

(c) "intimidation " shall have the meaning as assigned to "criminal intimidation "in section 503 of the Penal Code.

It is crystal clear that, as far as this Act is concerned none of the provisions is obeyed.

Definition Of Repossession

Repossession is generally used to refer to a financial institution taking back an object that was either used as collateral or rented or leased in a transaction. According to Oxford Dictionary of Law,¹¹ Repossession is defined as the right of a mortgagee to obtain vacant possession of the property occupied by a mortgagor, in accordance with the terms of the mortgage. All mortgagees have a right to possession of the property from the time the mortgage is granted unless they have contracted out of the right. It is however, unusual for a mortgagee to exercise such right unless the mortgagor has defaulted in some way.

Provisions On Repossession In Hire Purchase Act 1967

It was clearly stated in Section 16-20 of Hire Purchase Act 1967 the provisions relating to the procedure of repossession. The right to repossess arose when there is a default from the hirer. Therefore, the financial institution can take legal action against them regardless of their reason. The procedure of repossession practice is outlined by the HPA 1967.¹² The right of repossession can only be exercised when the hirer has failed to pay two successive installments or the last installment.¹³ If the default in payment is due to death of the hirer, the owner cannot exercise the right of repossession unless there have been four successive defaults.¹⁴ A service of the Fourth Schedule Notice must be issued by the owner to the hirer as regards to the defaulted not less than 21 days. A hirer, who voluntarily returns the goods within 21 days after

¹¹ Martin, A.E. 2002.Oxford Dictionary of Law. 5th Ed. United Kingdom:Oxford University Press at page 426

¹² Sect 16 to Sect. 20.

¹³ HPA Sect.16(1).

¹⁴ HPA Sect.16(1A).

service of the 4th Schedule Notice, shall not be required to pay the costs of repossession, costs incidental to repossession; and costs of storage.¹⁵

If the hirer failed to make the due payments, the owner has the right to send a notice of repossession. This notice must be sent not earlier than fourteen days after the service of notice in the form set out in the Fourth Schedule and shall be sent by registered post.¹⁶

Upon repossession, the owner must immediately and personally furnish the hirer a notice acknowledging receipt of the goods.¹⁷ The document acknowledging receipt of the goods shall set out a short description of the goods repossessed and also the date, place and time of repossession.¹⁸

The next step involved issuance of the 5th Schedule Notice in writing to the hirer and every guarantor within 21 days after the repossession.¹⁹ Under the 5th Schedule Notice the hirer has the right to reinstate the agreement and to make an early settlement. The hirer may give a written notice to the owner requiring the owner to sell the goods for cash to any buyer introduced by him.²⁰

After the repossession, if the owner intend to sell the motor vehicle by public auction, he must serve a notice informing the hirer about the auction and he must give the hirer an option to purchase the goods at the price at which the owner intended to sell if that price is less than the owner's estimate of the value of the goods repossessed as stated in the 5th Schedule Notice.²¹ The hirer has the right to regain possession of the goods by payment of all the outstanding arrears or by remedying any breach under the agreement within 21 days, in which event the owner shall forthwith return the goods to the hirer. In the event of non-compliance by the owner, it is an offence under the HPA 1967.²²

Rights of Hirer After Repossession

Under the HPA 1967, within 21 days after the goods have been repossessed by the owner, the hirer can, if he so desires, send a notice in writing to the owner requiring him:²³

- (a) to re-deliver to the hirer, or to the hirer's order, the goods that have been so repossessed ; or
- (b) to sell the goods to any person introduced by the hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods as set out in the notice under the Fifth Schedule.

¹⁵ HPA Sect. 16 A.

¹⁶ Hire-Purchase (Recovery of Repossession and Maintenance of Records by Owners) Regulations 1976, Regulations 3(2).

¹⁷ HPA Sect. 16(4).

¹⁸ HPA Sect. 16(5).

¹⁹ HPA Sect. 16(3).

²⁰ HPA Sect. 16(3).

²¹ HPA Sect. 18(4).

²² HPA Sect. 19.

²³ HPA Sect 18(1).

Alternatively, the hirer may claim from the owner, in the event that the value of the goods exceeds the net amount payable. For the purpose of this section, the expression "value of the goods" means "the best price that could be reasonably obtained by the owner" at the time of taking possession of the goods, or if the hirer had introduced a person who has bought the goods for cash, the amount paid by that person, less-

- (a) such reasonable costs incurred by the owner in taking possession of the goods;
- (b) costs of storage, repair or maintenance; and
- (c) reasonable expenses incurred in selling the goods.²⁴

The expression "net amount payable" means "total amount payable less the statutory rebate for the term charges and insurance".²⁵

It is also provided under the HPA 1967 that when the owner intends to sell the goods by public auction, he must serve on the hirer a copy of the notice of such public auction not less than 14 days from the date the said auction is to be held.²⁶ If the owner intends to sell the goods otherwise than by public auction, he must give the hirer an option to purchase the goods at the price which he intends to sell if the price is less than the owner's estimate of the value of the goods repossessed. If the owner fails to comply with this requirement, he shall be guilty of an offence.

The hirer will not be able to recover anything from the owner unless he acts fast, he must within 21 days of receiving the notice under the Fifth Schedule, give to the owner a notice in writing, setting the amount which he claimed under this section.²⁷ The notice can either be signed by the hirer himself or by the solicitor or agent. After sending the notice to the owner, the hirer must then commence action in court not later than three months after the notice had been sent to the owner. At any time before the proceedings against him have been commenced by the hirer, the owner can make an offer in writing to the hirer any amount in satisfaction of the hirer's claim. If this offer is accepted by the owner, the dispute ends; but if the offer is rejected by the hirer, the owner is entitled to pay the amount into court.

If the hirer intends to regain possession of the hired goods, i.e. where he has sent a notice to the owner (as mentioned above) to deliver the goods to him, he must pay or tender to the owner any amount due under the hire purchase agreement in respect of the period of hiring up to the date of payment or tender. In addition, he is required to remedy any breach of the agreement and pay or tender to the owner the reasonable costs and expenses incurred in taking possession of the goods and redelivering them to the hirer.²⁸ If the hirer is able to do all, the law then requires the owner to "forthwith return" the goods to the hirer, and thereafter the relationship between the hirer and the owner shall be as if the breach had not occurred and the owner

²⁴ HPA Sect 18(1)(b).

²⁵ HPA Sect 18(3).

²⁶ HPA Sect 18(4).

²⁷ HPA Sect 18(5).

²⁸ HPA Sect 19.

had not repossessed the goods.

Code of Practise On Repossessor Under Hire Purchase Act

A reposessor company is appointed by the bank and the financial institution to facilitate in repossessing back the defaulters vehicle. Rewards given for successfully repossessed the required vehicle. The main significant requirement of a reposessor; is that he must be a registered member of the Association of Hire Purchase Companies in Malaysia (AHPCM) and is issued with an authority card. Non-panel members may also be engaged subject to their being registered as member of AHPCM.²⁹ The vehicle is kept in a storage space of the reposessor until the vehicle is disposed off by the purchasing or auction sale. In addition, under the Hire Purchase Act repossession fees are not fixed and the companies are allowed to impose fees based on actual expenses incurred for repossession of their goods. However, some companies taking advantage of the loophole to charge exorbitant rate.

It is noticed that the modus operandi of the reposessor is similar to "Ah Long".³⁰ They used strong arm tactics and bullying method when repossessing vehicles. Therefore, the practice of hiring repossessors was 'tantamount to hiring gangsters' as repossessors can act roughly. It should be noted that according to the legal opinion, the vehicle repossession business could not be abolished as it would mean unnecessary time spent in court. In bringing a hirer to court would mean losing precious court time which may be drag to three years. It is reported in the Malay Mail dated 26th May 1993, with the testimony of five month pregnant Bubi, as the hirer. She claimed that she was physically harassed by a reposessor in Shah Alam .There was a struggle between the reposessor and Bubi when he grabbed the ignition keys of her Mazda 323 fro failing to settle two installments. She also claimed she was laughed at by an officer from the finance company when she complained.

Code of Practice By Ah Long

Meanwhile, "Ah Long" also imposed several penalties for the defaulter as they considered themselves as "folk bank" who gained authority to the defaulters. Once there is a default, the debt collector of "Ah Long" will start using any possible force to recover back their money. Therefore, they will use illegal method to obtain back their money. For instance, harassing the family of the borrower and threatening by using physical violence. Besides that, when a person fails to pay in time, the Ah Long will spray, splash or write in red paint on the walls of the house or property of that person as a threat of violence and to shame the borrower into repaying the loan. This has placed considerable stress on those who borrow from them and in extreme cases, the borrower often resorts to suicide. It is reported in the news recently,³¹ the family had to

²⁹ Hire Purchase Training Manual On Credit Control By Azman Ahmad, Issued By Arab-Malaysian Fiance Berhad.

³⁰ The Ministry Thinks That Some Repossessors Had Mocked Their Own Code Of Ethics Requiring Them To Be Professional And To Refrain From Applying "Bullying Tactics" When Repossessing Vehicles.Malay Mail Malaysia 16 May 1993

³¹ R.S.Kamini, News Straits Times, 2th January 2007,page 16.

sleep in the car in front of the police station to escape harassment from the loan sharks. They have received threatening visits and calls from the loan sharks.

Findings & Suggestions

From our findings, there are two types of people that used these illegal and legal money lending facility, one who is genuinely in need of money due to emergency or necessity and on the other hand one desperately need money due to involving in illegal activities such as habitual gamblers.

It is observed that the reason why most people resort to "Ah Long" is because they have no access to the bank or the financial institution. The credit facility offered by "Ah Long" is an easily credit facility with no documentation and guarantors involved. In contrast to the financial institutions, where they impose strict rules and regulation to be observed in order to guarantee the liability.

Instead of having a code of practice to the reposessor, still the enforcement is poor. This is because the practice of hiring a reposessor was tantamount to hiring gangsters as they turn to be aggressive. It is recommended that, bank or financial institutions to "hire able-bodied men" to carry out repossession as hirer can sometimes become hostile. However, an opportunity should be given to the genuinely defaulters to pay back their installment.

Furthermore, it is suggested that the Association of Hire Purchase Company in Malaysia (AHPCM) should strikes off the aggressive reposessor that might harm the hirer but also the society at large. Thus is will effect the reputations and the goodwill of the bank and the financial institution concerned.

No provision in the Hire Purchase Act 1967 to safe guard the interest of the needy ones when they failed to meet the requirements. Therefore, it is recommended that, the Hire Purchase Act 1967 should be amended to extend the two months grace period to three or four months.

Another recommendation can be made is to do away with the repossession procedure of vehicle under Hire Purchase Act as other parts of the Act are sufficient to cover the owner. Where it provides for the owner to take the hirer to the court has enough clout to ensure the hirer will pay the installment if he is threatened to be dragged to the court.

Therefore, the blame is not on the bank or financial institution but effort should be channeled to promote healthy organizations that can provide easy credits to the people such as micro-credit programmne Ar-Rahnu scheme (Islamic pawn), Al-Qard Al-Hassan scheme offered by Bank Rakyat, Tabung Zakat, Amanah Ikhtiar and SME bank.

Another suggestion, a new provision in Hire Purchase Act should be introduced to monitor the enforcement of the code of practice for example section 29B of Money Borrowers Act 1951 (Act 400). Furthermore, legal action also should be taken against the borrower who takes money from the "Ah Long" when the

government has provides all the easy credit facility to the society. Therefore, it is concluded that, may all the suggestions provide herewith would help to eliminate the existence of "Ah Long" and strengthened back the reputation of the financial institution in Malaysia.

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