CONSUMER PROTECTION UNDER ISLAMIC LAW IN THE SERVICE INDUSTRY[1]

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Abstract

Consumer protection refers to safeguards against malpractice and exploitative techniques by suppliers of goods or services that adversely affect consumers. The area that seems to be most neglegted is consumer protection in the service industry. However, they are becoming important to consumers and have raised complicated legal issues. Unlike the supply of goods, in which the product quality can be assessed before a sale, a supply of services involves human activity that cannot be subject to such control. Furthermore, consumers often lack technical expertise and are therefore in a weak bargaining position. They are not in a capacity to discuss fully their requirements with service providers and thus can be at the latter's mercy. The aim of this article is to examine the principles under the Islamic law of transactions that give protection to consumers in the service industry. The discussion focuses on the Islamic values and references are made to the opinions of scholars of four schools of thought i.e. Hanafi, Shafi', Hanbali and Maliki. It is submitted that Malaysia should adopt these principles into the legislation and consumer policy so as to strengthen the consumer protection in the country.

Introduction

Islam provides a complete way of life and its values of truth, justice and brotherhood protect consumers in their daily transactions. There are two obligations imposed on the mankind which are the rights of man which regulate the relationships between two parties according to their wills and the rights of God in which the law provides duties owed to other persons generally. These two obligations have been outlined in such a way to protect consumers in all occasions whether they are the parties to the transactions or not.

However, Islam does not provide a specific area of consumer protection since the consumer's legal rights derived primarily from the Islamic law of transaction which outlines many principles and sets many ethical standards that provide sufficient protection

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to consumers regardless whether they are the parties in the transactions or not. For example, Allah (swt) imposes obligations as the trust to transact honestly and justly based on the principle of Islamic brotherhoods. Allah (swt) has emphasized this obligation in several Qur'anic verses. For example in Surah *Al-Humazah* 104:1-4, Surah *Al-Baqarah* 2: 188, Surah *Al-Rahman* 55:9, Surah *Al-Anam* 6:152, Surah *Al-Isra'* 17:35, Surah *Al-Baqarah* 2:177, Surah *Al-Isra'*17:34, Surah *Al-Mu'minun* 23:8, Surah *Al-Baqarah* 2:190.

The values of trustworthiness and truthfulness will benefit consumers at large either they are parties in the transactions or merely persons who consume goods and services. What make the Shari'ah values differ from the man-made obligations are that the former exist with strong foundations; which are the belief in the oneness of Allah (swt) and the god-consciousness (*al-taqwa*). Without this belief, it is impossible for the mankind to follow whatever obligations and injunctions in the law of transactions which are mostly derived from the divine guidances i.e. the Holly Qur'an and the Sunnah of the Holy prophet (saw). This paper will discuss the extent to which Islamic law provides protection to consumers in its ruling particularly in the service industry. Malaysia should adopt these principles into consumer policy and legislation so as to strengthen the consumer protection in the country.

The Types Of Service Transactions

Under Islamic law, the services can be categorised under several types. Each type is governed by specific rules. The first type is known as *istisna* which means the giving of the order to a workman to make a definite thing with the agreement to pay a definite wage or price of that thing when made. The second type of services is known as the contract of hire *(ijarah)*, which is a hire of a workman to do a job. It is a sale of usufruct and also includes a contract for rendering services such as mechanics. There are two types of service provider under the contract of hire. The first type is private hire (*ajir khass*) who is employed to work for the hirer alone such as a servant. The other one is common hire (*ajir mushtarak*) who is not restricted to work for anyone other than the hirer. The examples are a tailor, a porter and also includes a mechanic. The third type is job wages (*jahalah*) which refers to the fixed amount of money given by someone to another for the latter's performance of a certain task. For each type, there are several principles to safeguard the rights of consumers. For example, in the contract of *istisna* there is an option (*khiyār*) in which the consumer may either take or reject the products as he thinks fits due to the reason that the subject matter is not existed at the time of the contract. The supplier of services, however, has no similar option and he can be compelled to do the work. Nevertheless, the discussion in this paper is only limited to a contract of hire since it is the type of services which is governed under the Malaysian Consumer Protection Act 1999.

A Contract Of Hire (*Ijarah*)

The scholars of the four schools (Shafi', Maliki, Hanafi and Hanbali) agree that the contract of hire means a contract of using the benefits, usufruct or services in return for a consideration. The issue is whether the service (usufruct) which is intangible can be associated with property and therefore worth for protection. Imam Shafi' associated usufruct with tangible goods since it could be retrieved like goods though it could not be measured. The opinion was further supported by Malikis in which they have considered usufruct as property since it has monetary value and accordingly compensation for its damage is reasonable.

The problem with this type of contract is that the subject matter is not in existence at the time of the formation of contracts. This makes the consumers in the detrimental position since they cannot evaluate the services when they enter into the transactions. There are two opinions in this respect. The minority groups which comprise of the opinions of al-Hasan al-Basri, al Asamm, Isma'il ibn Olaiyah, al-Hazawani, al-Qashani, Abdul Rahman Al-Asim and Ibn Kaysan stated that a hire contract is illegal as it is a contract of non-existent things. The benefits are non-existent at the time of the conclusion of the contract and they accumulate gradually which later leads to uncertainty (*gharar*) and the sale of uncreated thing. The majority opinion of Muslim juristsprudence, however, considered hire transaction permissible through preference (*istihsan*). This is because the transaction has been in customary use and there is the need for it in the society. Furthermore, though they are uncreated at the time of the contract, they are usually retrievable. The Islamic laws have acknowledged those benefits which recovery and non-recovery are equal. Ibn Qayyim has also stated that it is sufficient if it can be shown that it can be retrievable in the future to make the contract valid. The non-existence in the contract will be eliminated progressively once the hirer begins to perform. For these reasons, the jurists have recognised the contract of hire as they have acknowledged the contract of *salam* and *istisna.*

Even though the majority have recognised the needs for these contracts and allow the strict rule regarding the existence of the subject matters to be relaxed, they acknowledge that there is uncertainty (*gharar)* in the hire transaction but are in the opinion that the *gharar* is tolerable (*gharar yasir)* and the need for its validity is greater from the *gharar* itself. Therefore, they have formulated several rules to combat the existence of uncertainty *(gharar)* and believe that these rules though cannot completely eradicate *gharar* can reduce it to the absolute minimum and indirectly can protect consumers. The following discussions are on the rules to eradicate *gharar* associated with the contract of hire.

The Rules To Eradicate *Gharar* (Uncertainty)

The Islamic law requires that all the essential pillars (*rukn*) in the hire contract must be clearly defined, failing of which will lead to *gharar* and the consumers will be at risk. The jurists generally agree that there are three important points that must be clear and precise in order to make the hire transaction as valid. They are the nature of the service (obligations), the time limits of the service and the price. These to a certain extent are similar to the implied guarantees as provided by the Consumer Protection Act 1999.

1. Precise Determination of the Obligation (Service)

Specifying an obligation of performance is a condition in the hire contract. Both parties need to precisely describe the work that need to be done by fixing the task and how they are going to perform it. The *Majallah al-ahkām al-'adliyya* gives an example; when clothes are to be dyed, it is necessary to specify the colour and describes the coarseness and fineness of them. Even though the Hanafis do not impose such a requirement in a hire contract, they give options of cancellation to consumers upon receiving the services (*khiyar al-ru'yah* and *khiyar al-ta'yin*). This will provide adequate protection to consumers.

Another issue that needs to be considered is in the situation where the supplier performs more than the agreed task. For instance when the consumer sent his car for service work but the supplier did a repair work in addition to it without permission. The jurists including Imam Shafi′ grant consumers the option (*khiyar*) to either continue with the agreement or to rescind it. If he wishes he can accept the work on the supplier's expenses. Even if there is an urgency to carry out the repair work, the supplier must inform the consumer. Without any effort to get the permission, the supplier will entitle nothing as the payment for his work. The same ruling is applicable if the supplier performs contrary to the order of the consumer and the disparity is in relation to the types of work. For example; instead of doing alignment and balancing of the wheels, the garage performs the radiator service. In this situation, the consumer will have the option either to claim compensation or accept the work and pay according to the equivalent price (*ajr al-mithl*). Imam Ahmad is in the opinion to the extent that *ajir mushtarak* will be responsible for the disparity though there was no fault on his part.

If the disparity is in relation to the 'attribute' of the work, the consumer will also entitle for an option (*khiyar*) either to claim compensation for the damage done to the vehicle or accept the work and pay according to the equivalent price. For example, if the consumer asked the garage to paint the car red but the workman painted it yellow, the supplier is not entitled for the agreed price (*ajr al-musamma*). If the disparity is in relation to the quality of the work, the right of consumers will prevail. For example, the garage used the spare parts which were low quality compared to the agreed one, the consumer could only pay the price according to the spare parts used and not the agreed price Wahbah. Similarly even if the garage used a better quality of the spare parts, he was not entitled for the agreed price. This shows that in whatever situations, the garage must work according to the agreed terms. The *Majallah al-ahkām al-'adliyya* provides that any performance which is contrary to the clear instruction of the consumer amounts to disobedience which is a wrongful act and the supplier must make compensation if there is any damage.

Another issue that needs to be considered is whether the supplier can sub-contract other people to do the work. When a person has been hired to do the task personally, he cannot employ another in his place. It is necessary to work on it himself and in the case he has let another perform it, he must make compensation if it is destroyed. If there is no such condition, he is entitled to the agreed hire. Therefore, the obligations of the supplier of services will depend on the promises made by the contracting parties. This view corresponds with the Tradition from the Prophet (saw): "*Muslims are bound by their contractual agreements*"(Ibn majah, kitab 12,chapter18). In order to protect consumers, the Islamic rulings have emphasized on the importance of making clear of the obligations in the contract to avoid uncertainty especially if the subject matter is not exist at the time when they enter into the agreement. This could be justified by a verse of the Holy Qur'an surah *Al-Ma'idah* 5:1 when Allah (swt) says to the effect;

"Fulfill all (contractual obligation)"

Another requirement under the contract of hire is that the parties must be able to perform the contract. Therefore, if the supplier promises to do unrealistic work, the contract is void since the subject matter is considered as uncertain. This ruling again will protect consumers since it deters the supplier to promise everything including those beyond his capability in order to secure a contract.

2. Precise Determination of the Time Limits of the Service

The obligations in the hire contract can also be determined by fixing the period during which the work has to be done. For example, Ali agrees to work for Ahmad for a certain period and the time limits must be clearly specified. However, the jurists were in disagreement in relation to the issue whether the contracting parties can stipulate both the service and the period simultaneously in the same agreement. The Malikis, Shafi`is and Imam Abu Hanifah have agreed that these two conditions cannot be put together while Abu Yusuf, Muhammad (Hanafis) and Imam Ahmad have allowed these two conditions to be put simultaneously. Despite these disagreements, both groups brought forward reasons for their arguments that protect consumers.

The first group has emphasized that putting together two conditions in the same contract will lead to uncertainty since there is doubt whether the subject matters of the contract are the stipulated time or the task itself. Uncertainty in all events is definitely not preferable for consumer protection. The second group is of the opinion that it will not lead to uncertainty since the obligation in the contract is the work that need to be done which must be precisely determined. Putting the period in the contract is only to encourage the supplier to perform the contract the soonest possible which is better for consumers. If the supplier completes the work earlier than the agreed period, he has to return it to the consumer. However, if he fails to complete it on the stipulated time, the consumer has the right of option either to rescind or affirm the contract. Therefore, both opinions provide protection to consumers.

3 Precise Determination of the Wages

The majority of Muslim jurists maintain that the wage (*ajr*) must be fixed by the contract, failing which the contract can become void. For instance, if the price is to be fixed at a later date by preference to the market price, it will be voidable. The types of currencies and their quantum must also be clearly specified. This is because the wage is a consideration in the contract like the price of goods in the contract of sale. Therefore, uncertainty is prohibited in it for reasons of risk to both parties. The Prophet (s.a.w) has been reported to say;

"He who hires a person should inform him of his wages."

The problem in the service industry is that the supplier usually provides an estimate cost to consumers before undertaking any work. No actual cost can be ascertained since it depands on the nature of the work to be done and also the spare parts needed. Even though the general rule is that the wages must be clearly ascertained, Ibn Taimiyyah has maintained that the contract is still valid even though the parties say nothing about the price as long as there is a mechanism to ascertain it without much difficulty. It is in line with the provision in the *Majallah al-ahkam al-'adliyya* in which it states that if someone employs a workman without naming the wage and the daily wage is not known, he gives a wage equivalent to the work i.e. *ajr al-mithl* in which reference is made to the price of similar services that are offered in the local market.

Another issue that needs to be considered is when the consumers' duty to pay wages will arise: either after the formation of the contract or after the work has been done. According to Malikī scholars, Imam Abu Hanifa, Yusuf and Muhammad, the responsibility to pay wages will not arise from the contract itself. The payment of the wages becomes due gradually in parts in proportion to the gradual acquisition of the benefits, unless this is stipulated (complete payment) or there is reason for prior payment. Therefore, both parties can make agreement to postpone or to allow prior payment with the condition that this must be clearly stipulated in the agreement. If there is no such stipulation, they were in the opinion that the payment should be made gradually depanding on the work done.

Zufar, however, agreed that it must be made after the workman finished the work and this opinion is in line with the provision in the *Majallah al-ahkam al-'Adliyya* which provides that the right of *ajir mushtarak* to pay arises on the work being done. Ibn Majah reported that the Prophet (s.a.w) said to the effect;

Give a servant his fee before his sweat dries up"

This ruling is good for consumers since the obligation on their parts to pay wages only arise after the services have been gradually acquired or after the supplier has finished the work and not on the conclusion of the contract. Therefore, the consumers have room to evaluate the services before tendering any payment.

The other principle related to the wages is that it should not be attached with any condition (*syurut*) since it will make the contract uncertain. For example, an offer to hire with a condition that if the task is performed today the wage would be RM1000 but if the performance is delayed to tomorrow, the wage would be RM500. The majority of jurists including Imam Shafi, Imam Abu Hanifah, Hambalis, Zufar and Haddad nullified the contract together with the conditions. They have considered the contract as *fasid* and according to Imam Shafi'ī the supplier is only entiled for *ajr al-mithl.* According to Malik, Zufar and Abu Hanifah, the first part of the contract is valid but not the second part. Therefore, if the supplier performs the task today he will entitle for RM1000 but if he performs it tomorrow he can get only the *ajr al-mithl* with a condition that it cannot exceed RM1000. This ruling is good for consumers since it can eradicate *gharar* in the transaction. *Gharar* in whatever situations is not favourable for consumers such as in the situation where they are not certain which price is binding on them. By making the transaction as void will encourage the parties to clearly define all the terms in the agreement to avoid any dispute in the future.

The Obligations Of The Service Providers

As has been mentioned earlier, there are two types of service providers; *ajir khass* and *ajir mushtarak.* The responsibility of *ajir khass* is like a custodian. When the property is destroyed in his hands without his working on it or without wrongdoing, there is no compensation. He will not be responsible even he makes mistake in relation to the work done. On the other hand, the jurists unanimously agree that *ajir mushtarak* will be responsible to any damages caused due to his fault either on purpose or negligence. This is because the subject matter is a trust (*amanah*) in the the hand of the supplier. If there is any fault or negligence that cause destruction to the property or loss of value comes on the thing, the compensation becomes necessary. Imam Shafiī stated that if the things lost in the supplier's possession, he will be responsible for the loss unless he can prove that he has taken a good care of it. The supplier will be responsible irrespective whether the damage happened in the present of the consumers or in his absence; at the premises of the consumers or at the suppliers'.

The supplier cannot give the thing, which is in his charge, into the custody of another without leave. If he does, and afterwards it is destroyed, he is responsible. Imam Hambal went further by stating that the suppliers who embezzle or misappropriate the things in his possession not only commit the offence of theft but they are severely punished by *Hadd*. He will also responsible if he purposely breach any condition imposed in the agreement since it will also amount to unlawful act.

However, there are disagreements among the Muslim jurists in relation to the obligations of *ajir mushtarak* in the situations where there is no evidence of bad intention or negligence. Abu Yusuf and Muhammad, Abi Layla and one view of Imam Shafi' are in the opinion that the obligations of *ajir musytarak* are *daman.* They are liable for what is destroyed in their possession caused by the acts of other people even if there is no bad intention or negligence on their parts unless evidence is adduced that the destruction is caused by factors beyond their control. The rule in Malik's opinion is that the suppliers will compensate all that is caused at their hands like fire, breakage of the article when they are working in their own shops, even if the owner is standing next to them, except where the risk is inherent in the work such as the burning of bread by the baker. Imam Abu Hanifa made a distinction between working for wages and not working for wages. If he takes possession for wages, then the benefits accrues to both contracting parties and therefore the supplier has to be responsible for any damage. They came to this ruling on the basis of *maslahah* and *sadd al-dhara'i* in order to protect the consumers' rights as the whole and to prevent the supplier from taking their responsibilities lightly. They also relied on the hadith of Rasullullah (saw):

" He who takes will be responsible until he return it.

It had also become the practices of Khulafa' Al-Rasyidin especially Imam Ali (ra) and Imam Umar (ra) who put strict obligations on the supplier of services. Ibn Qudamah had differentiated the obligations of *ajir mushtarak* and *ajir khass* in which the responsibilities of the latter depends on the period of services not the services itself. However, the responsibilities of *ajir mushtarak* related to the performance of services and his wages depends on the work being supplied to the consumers failing which he would be responsible for the failure. This opinion clearly protects consumers' rights since the suppliers have to take full responsibilities to the subject matter.

The supplier also must be responsible if he makes a mistake in carrying out his work even though the mistake is genuine without any evidence of bad intention or negligence. This is because, though the mistake constitutes a ground of defence, it is not an excuse as far as the rights of people are concerned i.e the consumers. For example, instead of repairing the vehicle he causes its condition to deteriorate. This is the opinion of the Hambalīs which stated that the supplier will be responsible for his mistake irrespective of whether it happens in the presence of the consumers or not; or at the places of the suppliers or the consumers. The *Majalllah al-ahkam al-shariyyah* of Imam Ahmad stated that the supplier will be responsible if the thing is destroyed due to his act even without intention. Hanafi and Hambali jurists and one group of Shafi'is were in the opinion that the suppliers will be responsible for their mistake if the work is carried out at their places without the presence of the consumers. This is because their wages will depend on their performance of the work and it must be delivered to the consumers as agreed.

Therefore, by referring to the rulings under Islamic law, very strict obligations have been imposed on the service providers. They will be responsible to all damages that happen irrespective of whether they purposely commit it or not; either cause by his negligence act or by mistake. These support the argument that the Islamic laws give great emphasis on consumers' rights in their transactions.

Suppliers' Tortious Liability In Negligence

The jurists are in the opinion that the tortious liabilities under Islamic laws are founded on *daman* which are redressible by an award of adequate damages to the aggrieved person. The claim to civil damages is independent of any contract between the plaintif and the defendant and therefore, the suppliers will be responsible not only towards the other contracting parties but towards the consumers at large. Under common law, tortious acts have been classified under self-contained branch of law. Nevertheless, Islamic law considers the wrongful acts under various headings and negligence is categorised within the ambit of conversion (*itlaf*).

Islamic law imposes strict obligations on the service providers to the extent that the jurists of all schools make the suppliers liable for their negligence acts. The duty imposed on the supplier is more stringent from that of trust, in which the supplier is absolutely liable for the loss and inevitable accident cannot be accepted as a defence. This is because the supplier has a moral and ethical duty to take care of the rights of other people and he has to discharge his duty to the best of his capabilities.

Therefore, it is in line with the neighbour principle under common law. However, in respect of the onus of proof, the liability under Islamic law is determined by looking at the damage and the defendant is held liable if the damage is the direct result of his act irrespective of whether the act is intentional or accidental, or whether he can reasonably foresee it or not. This is because the civil liability in Islam is not 'fault liability' or 'strict liability' but it can be described as 'damage liability.' This ruling is good for consumer protection since they are required only to prove damages and the burden is on the suppliers to prove otherwise. This will overcome the hindrance to prove liabilities under the common law of negligence and the Consumer Protection Act which require a consumer to prove various complex elements in proving the supplier's fault.

Conclusion

The majority opinion of Muslim jurisprudence have considered service transactions permissible through preference (*istihsan*) though the subject matter is intangible and is not in existence during the formation of the contract. In order to protect consumers in the service industry, various rulings have been provided. The Islamic law requires that all the essential pillars (*rukn*) in the service contract must be clearly defined which are the nature of the service (obligations), the time limits of the service and the price. Thus, the consumers must have a perfect knowledge of the transactions, otherwise they can use their right of option (*khiyār*) to invalidate the contract.

The Islamic law also has imposed very strict obligations on the service providers in which they have to be responsible to all damages that happen irrespective whether they have purposely committed it or not; either have been caused by his negligence act or by mistake. The burden of proof is determined by looking at the damage. As such, the supplier is liable if the damage is the direct result of his act irrespective of whether the act is intentional or accidental, or whether he can reasonably foresee it or not. This ruling is good for consumer protection since they are required only to prove damages and the burden is on the supplier to prove otherwise. It is different compared to the approach under the Malaysian Consumer Protection Act 1999 in which requires the consumers to prove that the services are not carried out with reasonable care and skill. The success of each case is objectively determined by the reasonableness of the supplier's conduct according to the ordinary level of skill, competence and diligence of other suppliers who are specialized in the same field. The difficulty for consumers is that in many situations they are ignorant of the practice in the industry in order to successfully prove that the service is defective.

Lastly, the Islamic law is remarkably in favour of the consumers though the rights of the suppliers are not forgotten. Malaysia should adopt these *hukm* into the legislation and consumer policy so as to strengthen the consumer protection in the country.

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