

# **A REVIEW ON THE APPLICATION OF MALAYSIAN HIRE PURCHASE ACT 1967 AND THE RECENT AMENDMENTS 2010**

## **Introduction**

Hire Purchase Act 1967 ('herein after referred to as "HPA") is the most common consumer credit that is used by the Malaysian community, in particular for purpose of sale and purchase of motor cycle and car. The HPA came into force on 11<sup>th</sup> April 1968. The HPA is under the jurisdiction of the Ministry of Domestic Trade and Consumer Affairs and regulates the business of hire purchase financing which is normally carried out by Credit Companies licensed under the Moneylenders Act, 1951 (or being granted exemption) and Finance Companies licensed under the Banking and Financial Institutions Act, 1989 (BAFIA).<sup>1</sup> The HPA lays down the meaning of hire purchase, the formation and nature of hire purchase agreement, rights and obligations of parties in the hire purchase agreements at different stages, important terms in the hire purchase agreement and processes and procedures for repossession. This chapter will look into the law governing the hire purchase and it will include the discussion on the recent amendments that were made to the HPA in 2010. The amendments came into force on 15<sup>th</sup> June 2011.

## **Meaning of "hire purchase" under HPA**

Hire Purchase is "a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments (whether the agreement describes the instalments as rent or hire or otherwise), but does not include any agreement;

- a. Whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before delivery of the goods; or
- b. Under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement"<sup>2</sup>

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<sup>1</sup> Yap Kon Lim, Consumer Credit Regulations in Malaysia: A Country Report, Consumers Affairs Division, Ministry of Domestic Trade and Consumer Affairs, Malaysia.

<sup>2</sup> Section 2(1) Hire Purchase Act 1967.

By referring to paragraph (a) above, it excludes an outright sale (ownership transfers to buyer upon sale) and a seller/dealer cannot be the same party. Thus, it can be simplified that a contract of hire purchase consists of the following elements:

- (i) a letting of goods by the owner to the hirer with an option to purchase is given to the hirer and
- (ii) an agreement for the hirer to purchase the goods by way of instalments.

In ordinary contract of sale and purchase, upon the completion of the contract, the property in the goods will be passed to the purchaser. However in a contract of hire purchase a property in the goods or ownership of the goods is not passed at the time of the agreement or upon delivery of the goods. This is because in a hire purchase agreement, there would be a seller or dealer who makes the dealing with the purchaser. When the purchaser agrees to purchase the goods, the dealer or seller will require the purchaser to approach the financier (that is normally suggested by the seller or dealer or any financier that is chosen by the purchaser). Subsequently the seller or dealer will sell the goods to the financier. The financier that is known as the owner of goods then will hire the goods to the purchaser under the hire purchase terms. The ownership of the goods remains in the owner until the hirer has fully paid the price agreed upon in the hire purchase agreement. Thus in a hire purchase transaction, it will involve three parties; that consist of a purchaser (hirer), a dealer/seller and a financier (owner). This explanation shows that there are two distinct contracts, the first contract is between a dealer/seller with the financier and the second contract is between the financier and the purchaser. (See Figure 1 that explains these relationships.) Thus the hire purchase is different from the credit sale because in a latter contract, there is no third party involve. There is no hirer as the seller will deal directly with the purchaser. Another point is that in a credit sale it is not necessary for the purchaser to pay a ten percents (10%) down payment on the sale price. The credit is provided by the seller. The most common credit sale in Malaysia involves the purchase of furniture and electrical items; for instance Courts Mammoth and Seng Heng Electrical.

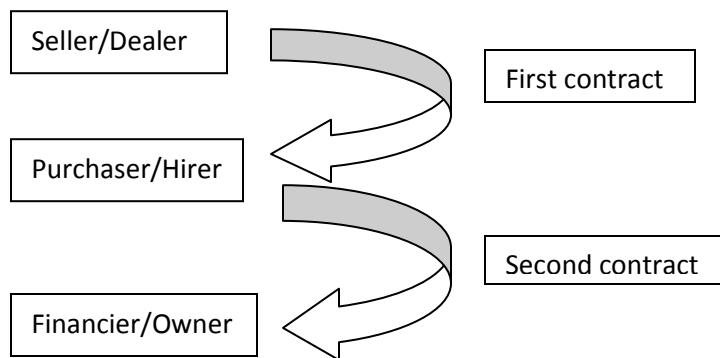


Figure 1: Parties in Hire-Purchase Agreement

### Meaning of “goods” under the HPA

The type of goods that fall within the coverage of Hire Purchase Act 1967 are;

- i. All consumer goods
- ii. Motor vehicles including invalid carriages, motor cycles, motor cars including taxi cabs and hire cars, goods vehicles (the maximum permissible laden weight does not exceed 2540 kilograms), buses including stage buses.<sup>3</sup>

The above provisions show that the HPA covers a limited range of consumer goods. “Consumer goods” refers to goods purchased for personal, family or household purpose.<sup>4</sup> In other words the hirer is a natural person who does not purchase the goods for business purpose. If a company purchase goods that is known as industrial hire purchase, the transaction is not covered by this Act, but it is governed by the common law. However, even if the goods purchased does not fall within the ambit of this schedule, the parties still can agree to bind themselves by the HPA. The financier however can impose any interest rate as agreed by the parties and all other provisions of the HPA may be included in the agreement. The enforcement of the HPA is for the purpose of protection of consumers where it enlarged or strengthens some of the existing protection

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<sup>3</sup> First schedule of the Hire Purchase Act 1967.

<sup>4</sup> Comparatively the Hire Purchase Act 1967 of Singapore (Amendment 2004), provides a more detail definition as what is the meaning of goods under the hire purchase as; any consumer goods the value of which does not exceed \$20,000 (inclusive of any Goods and Services Tax); any motor vehicle the value of which does not exceed \$55,000 but shall exclude the cost of a certificate of entitlement for the vehicle. Prior to the amendment the value of consumer goods covered under the Hire-Purchase Act was \$5,000.

available under the common law where hirers of goods covered by the Act have statutory rights not found at common law. For instance, they have the right to be supplied with certain documents and information.<sup>5</sup>

### **Formation of the Hire Purchase Agreement**

In the process of formation of the hire purchase agreement, there are three (3) different stages; (i) pre-contractual obligations (ii) construction of hire-purchase agreement and (iii) post-contractual obligations.

#### **i. Pre-contractual obligations**

It is a duty of the owner to give a prospective hirer a written statement in accordance with the form set out in the Second Schedule.<sup>6</sup> This schedule requires information on the description of goods and a summary of the financial obligations of the prospective hirer. The prospective hirer however is not obliged to enter into a hire purchase transaction. The prospective hirer also is not bound to make any payment for the preparation or service of the above mentioned statement.<sup>7</sup> If this is not been complied with by the owner, the hire-purchase agreement is void.<sup>8</sup> **Bking fee**

#### **ii. Construction of a Hire-Purchase Agreement**

The hire purchase agreement must be made in writing.<sup>9</sup> The agreement will be void and the owner will be guilty for an offence if fails to comply with this requirement. It has to be signed by or on behalf of all parties to the agreement. No owner, dealer, agent or person acting on behalf of the owners shall require or cause any intending hirer or his agent to sign a hire-purchase agreement or any other form or document relating to a hire-purchase agreement unless such hire-purchase agreement, form or document has been duly completed.<sup>10</sup> If the above requirements are not fulfilled, the said agreement is void.<sup>11</sup>

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<sup>5</sup> Wu Min Aun, Credit and Security, The Malayan Law Journals Article [1996] 3 MLJ i

<sup>6</sup> Section 4(1) of the Hire Purchase Act 1967.

<sup>7</sup> Section 4(3) of the Hire Purchase Act 1967.

<sup>8</sup> Section 4(4) of the Hire Purchase Act 1967.

<sup>9</sup> Section 4A(1) of the Hire Purchase Act 1967.

<sup>10</sup> Section 4B(1) of the Hire Purchase Act 1967.

<sup>11</sup> Section 4B(3) of the Hire Purchase Act 1967.

The information that must be stated in the hire-purchase agreement are date of commencement of the hiring; number of instalment to be paid by the hirer; amount of each instalment; time for payment for each instalment; description of the goods<sup>12</sup> and address where the goods are kept. Failure to include these particulars will render the hire-purchase agreement as void.<sup>13</sup> Apart from these particulars, the hire-purchase agreement shall specifically describe the cash price of the goods, amount of deposit paid in cash and other type of consideration given (if it is other than cash money)<sup>14</sup>, delivery cost; payment for vehicle (if any); insurance; total amount to be paid (after deducting any deposit paid); term charges; annual percentage rate for term charges and total amount to be paid. Similarly, failure to comply with the requirements, it shall affect the agreement to be void.<sup>15</sup>

#### Post Contractual Obligations

The owner is required to send a copy of the hire-purchase agreement to the hirer and guarantor (if any) within fourteen (14) days after the signing of the contract.<sup>16</sup> This is a mandatory requirement where failure to do so will make the contract unenforceable.<sup>17</sup> Similarly if there is any an insurance policy purchased by the hirer, the owner is required to serve on the hirer a copy of the insurance payment receipt. A copy of the said policy also must be served on the hirer within seven (7) days of its receipt.<sup>18</sup>

#### **Rights and Protections of Hirers**

In the course of purchasing the goods, a purchaser that will become a hirer upon completion of the hire-purchase agreement, will deal with a dealer or seller. There would be a case where a dealer or seller commits the act of misrepresentation towards a purchaser. For instance gives wrong information as to the year the goods was manufactured with the intention to deceive a purchaser, because he (a dealer/seller) knows that a purchaser may not interested to buy the car if he knows that the car manufactured in certain particular year. . In this circumstance a hirer is

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<sup>12</sup> Section 4D(1) of the Hire Purchase Act 1967 provides that if there are more than one goods, separate hire purchase agreement to be prepared for every item.

<sup>13</sup> Section 4C(1)(c) of the Hire-Purchase Act 1967.

<sup>14</sup> Section 4C(1)(b ) of the Hire Purchase Act 1967.

<sup>15</sup> Section 14D(2) of the Hire Purchase Act 1967.

<sup>16</sup> Section 5(1) of the Hire Purchase Act 1967.

<sup>17</sup> Section 5(1A) of the Hire Purchase Act 1967.

<sup>18</sup> Section 5(3) of the Hire Purchase Act 1967.

entitled to claim from the owner or any person making misrepresentation in the course of purchasing or negotiations that leading to the hire-purchase agreement.<sup>19</sup> A hirer may sue the dealer/seller or their agent as well as the owner for damages and rescind the hire-purchase agreement. However since the dealer/seller is regarded as the agent of the owner, the later may claim an indemnification from the dealer/seller.

The rights and protections of hirers according to the HPA will be available once the hire-purchase agreement has been concluded in accordance with the requirements imposed by the HPA. Those rights and protections are derived from the implied conditions and warranties that are given to the goods hired.<sup>20</sup> On the other hand, as far as the rights and protections for the owner is concerned, it will be related to right to repossess the goods hired once the hirer default in making scheduled payment.<sup>21</sup> The implied conditions and warranties that are applied for the goods hired to the hirer are similar to the implied conditions and warranties that are offered to the goods that are sold according to the Sales of Goods Act 1957.<sup>22</sup>

As to implied conditions, in hire-purchase agreements there are three (3) implied conditions where the owner has the right to sell the goods at the time when the property is to pass,<sup>23</sup> the goods hired must be of merchantable quality<sup>24</sup> and the goods hired must be fit for the hirer's purpose.<sup>25</sup> There is no definition of merchantable quality available in the Hire Purchase Act 1967. Thus the meaning of merchantable quality as provided in the Sales of Goods Act 1957 shall be referred to.<sup>26</sup> Merchantable quality means the goods are fit for particular use to which the said goods were sold. Thus, if the goods is of no quality and defective, it can be considered as of no merchantable quality. Whereby as to implied conditions that the goods hired must be fit for hirer's purpose, it does not applicable to the hirer if he purchased the second hand goods and where exclusion of the implied conditions and warranties as to fitness is expressly spelt out in the

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<sup>19</sup> Section 8 of the HirePurchase Act 1967.

<sup>20</sup> Section 7 of the Hire Purchase Act 1967.

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<sup>22</sup> The implied conditions and warranties are available in section 14,15 and 16 of the Sales of Goods Act 1957.

<sup>23</sup> Section 7(1)(b) of the Hire Purchase Act 1967.

<sup>24</sup> Section 7(2) of the Hire Purchase Act 1967. .

<sup>25</sup> Section 7(3) of the Hire Purchase Act 1967.

<sup>26</sup> Section 16 of the Sales of Goods Act 1967. To explain the meaning of merchantability. May be can refer to the cases

agreement. It seems that when the goods is of no merchantable quality it may not be fit for hirer's purpose as well.

On the other hand, there are two (2) implied warranties available in the hire-purchase agreement that include the right of hirer to enjoy quiet possession of the goods<sup>27</sup> and the goods hired should be free from any charge or encumbrances created by the owner in favour of any third party.<sup>28</sup> Quiet possession means there shall be no interference by the seller as to enable the hirer to enjoy the goods or any interference arising from lawful acts of the third party.<sup>29</sup>

### **Statutory Rights of the Hirer**

The Hire Purchase Act 1967 has clearly list down seven (7) rights of the hirer that are contained in section 9 to 15 of the Act. Those rights are right to a copy of statement of financial position,<sup>30</sup> right to appropriation of payment when more than one agreement,<sup>31</sup> right to apply for an order to remove goods,<sup>32</sup> right to assign hirer's rights under the agreement,<sup>33</sup> passing of right by operation of law,<sup>34</sup> right to early completion of agreement<sup>35</sup> and right to terminate the agreement.<sup>36</sup>

### **Repossession of Goods by the Owner and Rights of the Hirer**

If the hire purchase agreement has been duly formed according to the Hire Purchase Act 1967, the owner is entitled to exercise it's right to repossess the hired goods. The previous provision of section 16(1) stated that the owner has a right to repossess when the hirer defaults in making payments for two (2) consecutive months or when the hirer defaults in making the last payment.<sup>37</sup> However this provision has been amended recently and now the new provision is read as follows:

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<sup>27</sup> Section 7(1)(a) of the Hire Purchase Act 1967.

<sup>28</sup> Section 7(1)(c ) of the Hire Purchase Act 1967.

<sup>29</sup> This is similar to section 14(b) of the Sales of Goods Act 1957.

<sup>30</sup> Section 9 of the Hire Purchase Act 1967.

<sup>31</sup> Section 10 of the Hire Purchase Act 1967.

<sup>32</sup> Section 11 of the Hire Purchase Act 1967.

<sup>33</sup> Section 12 of the Hire Purchase Act 1967.

<sup>34</sup> Section 13 of the Hire Purchase Act 1967.

<sup>35</sup> Section 14 of the Hire Purchase Act 1967.

<sup>36</sup> Section 15 of the Hire Purchase Act 1967.

<sup>37</sup> Section 16 of the Hire Purchase Act 1967.

*“Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire-purchase agreement arising out of any breach of the agreement relating to the payment of installments unless the payment of instalments amounts to not more than one third of the total cash price of the goods comprised in the hire-purchase agreement and there had been two successive defaults of payment by the hirer and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice.”<sup>38</sup>*

This means that under the amendment, before the owner seek to exercise its right to repossess the goods, the owner must first assure that the balance of loan to be paid by the hirer must be more than one-third (1/3) of the purchase price of the goods hired. Only then the owner must comply with the requirement that the hirer has defaulted two (2) successive months; the Fourth Schedule Notice has been served on the hirer and the period fixed in the notice has expired where the repossession shall take place only after twenty one (21) days after the service of the said notice.

Besides that the new amendments also include the new provisions to section 16(1) that is read as follows:

*“(1A) Notwithstanding subsection (1), if the payment of instalments made amounts to more than one third of the total cash price of the goods comprised in a hire-purchase agreement and there had been two successive defaults of payment by the hirer, an owner shall not exercise any power of taking possession of the goods comprised in the hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless he has obtained an order of the court to that effect.”<sup>39</sup>*

This new provision require an order of court to be obtained by the owner before repossess the hired goods if the balance of loan is less than one-third (1/3) of the purchase price of the goods.

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<sup>38</sup> Section 16(1) of the Hire Purchase Act 1967 (Amendment 2010).

<sup>39</sup> Section 16(1)(1A) of the Hire Purchase Act '967 (Amendment 2010).

Only then, other requirement that must be observed by the owner is that the hirer has defaulted two (2) successive months.

The new provision also states that;

*(1B) Where an owner has obtained an order of the court under subsection (1A) and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice, the owner may exercise the power of taking possession of goods referred to in subsection (1A).*<sup>40</sup>

Reading subsection (1A) and 1(B) together would explain to us that if the repossession is conducted upon obtaining the court order, the Fourth Schedule Notice is needed to be served on the hirer. If the hirer fails to comply within a certain period that is fixed in the notice, the owner may proceed with repossession procedure where this shall take place only after twenty one (21) days after the service of the said notice.

However in the event that the hirer is dead, the owner can repossess the goods after four (4) consecutive defaults of payment.<sup>41</sup> This is to enable the beneficiary of the deceased (hirer) to make application for the letter of administration or probate (as the case may be) and make payment on behalf of the estate of the deceased. In exercising the right to repossess, it is a mandatory for the owner to comply with certain procedures, otherwise the hirer may challenge the validity of the repossession by the owner. In this regards it would involve the procedures in three (3) different stages; that is procedures prior to repossession, procedures during repossession and procedures after repossession.

#### Procedures Prior to Repossession

It is a mandatory for the owner to serve a Fourth schedule notice to the hirer before proceeds with the repossession process.<sup>42</sup> **The notice must be given at least twenty days (21) before the repossession takes place.** The notice may be served on the hirer by way of personal service or

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<sup>40</sup> Section 16(1)(1B) of the Hire Purchase Act 1967 (Amendment 2010).

<sup>41</sup> Section 16(1A) of the Hire Purchase Act 1967.

<sup>42</sup> Section 16(1) of the Hire Purchase Act 1967.

registered post to the last written address or by substitute service.<sup>43</sup> However the owner may decide not to serve the Fourth Schedule Notice if the owner has reasonable ground to believe that the hirer will conceal or remove the goods to another place unknown to the owner.<sup>44</sup> If the hirer returns the hired goods or voluntarily surrenders the goods within twenty one (21) days of this notice, the hirer shall not be liable for the cost of repossession, cost incidental to repossession process and cost of storage.<sup>45</sup> However if the owner fails to respond to the notice that requires him to furnish the payment as required within the time given, the owner has a right to proceed with the repossession step that is by serving the Notice Under Rule 3 of the Regulation. This notice is to be served after fourteen (14) days of the service of the Fourth Schedule Notice.<sup>46</sup> This is another mandatory requirement imposed on the owner in which failure to issue this notice is an offence.<sup>47</sup> This notice is to inform the hirer that the owner will proceed with the repossession.

### Procedures During Repossession

After the goods have been repossessed from the hirer, the owner must serve personally a document acknowledging receipt of the goods.<sup>48</sup> This document contains a short description of the goods, the date, time and place where repossession of the goods had taken place. If the repossession is being carried out by the owner personally, he must produce and show his identity card and provide the name and address of the company, firm, body or organization to which he belongs, to the hirer, his servant or agent or occupant or person who is in possession of the goods; or if the repossession is being carried out by the agent or servant of the owner, he must produce and show his identity card and also his authority card to the hirer, his servant or agent or person who is in possession of the goods.<sup>49</sup>

The new amendment to the Hire Purchase Act 1967 has inserted new sections in relation to permits for repossession. The new sections of section 17A and 17B are as follow:

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<sup>43</sup> Section 43 of the Hire Purchase Act 1967. The rules and procedures related to personal service, registered post and substituted service as laid down in the Rules of High Court 1980 are to be complied with.

<sup>44</sup> Section 16(2) of the Hire Purchase Act 1967.

<sup>45</sup> Section 16A of the Hire Purchase Act 1967.

<sup>46</sup> Rule 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulation 1976.

<sup>47</sup> Rule 9 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulation 1976.

<sup>48</sup> Section 16(4) of the Hire Purchase Act 1967.

<sup>49</sup> Rule 4 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulation 1976.

- 17A(1) No person shall undertake repossession of goods comprised in a hire-purchase agreement without a written permit issued by the Controller.*
- (2) Any person who contravenes subsection (1) shall be guilty of an offence under this Act.<sup>50</sup>*
- 17B(1) An owner shall appoint as his agent to undertake the repossession of goods comprised in a hire-purchase agreement a person who is a permit holder under subsection 17A(1).<sup>51</sup>*

By virtue of the above provisions, under the present law, only a person that is given the written permit can execute the repossession process. The permit is issued by the Controller which means that it is directly controlled by the government. **The controller is** The owner therefore, when it engage an agent to execute the repossession, that particular agent must have a permit. This requirement is imposed in response to the complaints that the Ministry always received from the public on the conduct of certain repossession men when they repossess the vehicles from the hirers. This amendment therefore is specifically seemed to address the common problem that is encountered in automotive industry.

#### Procedures After Repossession

After the goods being repossessed from the hirer, the owner is required to serve the Fifth Schedule Notice on the hirer, and his guarantor, if any. This must be done by the owner within twenty one days after repossession takes place.<sup>52</sup> This notice contain information on the rights of the hirer after repossession. Within twenty one (21) days after the service of Fifth Schedule Notice, if the hirer makes payment of the amount due to the owner or when the hirer has remedied any breach of the agreement or has paid the owner the costs and expenses incurred by the owner in remedying the breach, the hirer may give a written notice to the owner to request the owner to deliver the repossessed goods.<sup>53</sup> That is why the law strictly restricts the owner

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<sup>51</sup> Section 17B f the Hire Purchase Act 1967 (Amendment 2010)

<sup>52</sup> Section 16(3) of the Hire Purchase Act 1967.

<sup>53</sup> Section 18(1)(a)(i) of the Hire Purchase Act 1967.

from selling or disposing the goods until the expiration of the twenty one (21) days notice in the Fifth schedule, unless with consent of the hirer.<sup>54</sup>

The hirer may introduce a cash buyer to buy the repossessed goods by giving a written notice to the owner.<sup>55</sup> If the value of repossessed goods exceeds the money owed to the owner, the hirer has the right to recover the difference from the owner.<sup>56</sup> When the owner decides to sell the repossessed goods through public auction, the owner is required to give a notice to the hirer.<sup>57</sup> In case where the owner decides not to sell the goods through public auction, the owner must give an option to the hirer to purchase the repossessed goods, but at a price lower than the estimated value of the owner.<sup>58</sup> Whether the repossessed goods is sold through public auction or not, if the proceeds from the sale is not enough to recover the debt of the hirer to the owner, the owner shall proceed against the hirer to recover such sum through an ordinary civil suit.

## **Insurance**

The owner has to take the insurance cover in the name of the hirer for the goods under the hire-purchase agreement.<sup>59</sup> If the hired goods is motor vehicle, the owner shall take the insurance cover for the first year of the agreement. For the following years, it is the duty of the hirer to insure the goods.<sup>60</sup> As for other type of goods, the insurance cover must be taken out throughout the duration of the goods remain under hire-purchase. When the hirer renew the insurance for motor vehicle, the hirer must inform the owner that he has renewed the policy not less than fourteen (14) days before the expiry of the said insurance.<sup>61</sup> If the hirer does not renew the insurance policy, the owner may insure the motor vehicle and the cost is to be borne by the hirer.<sup>62</sup>

## **Conclusion**

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<sup>54</sup> Section 17 of the Hire Purchase Act 1967.

<sup>55</sup> Section 18(1)(a)(ii) of the Hire Purchase Act 1967.

<sup>56</sup> Section 18(b) of the Hire Purchase Act 1967.

<sup>57</sup> Section 18(4)(a) of the Hire Purchase Act 1967.

<sup>58</sup> Section 18(4)(b) of the Hire Purchase Act 1967.

<sup>59</sup> Section 26(1) of the Hire Purchase Act 1967.

<sup>60</sup> Section 26(2) of the Hire Purchase Act 1967.

<sup>61</sup> Section 26(5) of the Hire Purchase Act 1967.

<sup>62</sup> Section 26(6) of the Hire Purchase Act 1967.

Similar with other type of contract, a hire-purchase agreement must fulfill the requirements to form a valid contract. However being a special type of contract that is regulated by the specific statutes, in order to perform a valid hire-purchase agreement and enjoy the protection conferred by the HPA, the formality required by the HPA must be complied with. This means that, if the formalities prescribed by the HPA are not observed by the parties to the hire purchase agreement, they can exercise their rights according to the common law.