

**PART II:
SUPPORTING SHARIAH CONCEPTS**

Hibah means transfer of ownership of an asset to a person without any consideration in return.¹¹⁹ It is a unilateral contract and also a benevolent act. Basically, *hibah* is commendable. In the Islamic financial system, an Islamic banking institution normally applies the *hibah* concept to reward *wadi'ah* and *qard* depositors. In certain cases, there are also instances of giving *hibah* to customers, such as *hibah* to customers who conduct timely payments as scheduled. In the takaful industry, application of the *hibah* concept is used in several family takaful products in which participants may give *hibah* in the form of assigning the takaful benefit to the nominee or recipient of *hibah*.

74. *Hibah* in Interbank *Mudarabah* Investment Contract

Interbank *Mudarabah* Investment is one of the investment transactions amongst participants in the Islamic Interbank money market which is conducted based on *mudarabah* principles. The rate of return for the investor financial institution is determined based on the rate of return of the investee financial institution (or known as 'r' rate). The 'r' rate represents the efficiency of a financial institution in managing its Islamic funds or assets. This indicates that an efficient financial institution normally has a higher 'r' rate as compared to a less efficient financial institution. If the 'r' rate of the investee financial institution is low, it will offer a low return to the investor financial institution. Problems arise when the 'r' rate of some Islamic financial institutions is too low than the market 'r' rate that makes it difficult for the financial institutions to obtain funding from the market.

In order to address this problem, there was a proposal to introduce the *hibah* concept as one of the market practices in the Interbank *Mudarabah* Investment contract. Under this concept, the investee financial institution with lower 'r' rate than the market 'r' rate will offer *hibah* as a consolation gift to the investor financial institution who is willing to invest with the former. *Hibah* is payable based on a certain percentage of the 'r' rate of the investee financial institution, subject to its affordability.

¹¹⁹ Kuwait Ministry of Waqf and Islamic Affairs, *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*, 1993, v. 42, p. 120.

In this regard, the SAC was referred to on the issue as to whether the investee financial institution may give *hibah* to the investor financial institution in a *mudarabah* contract such as the Interbank *Mudarabah* Investment contract in order to give a competitive return in the market.

Resolution

The SAC, in its 8th meeting dated 12 December 1998, has resolved that the practice of giving *hibah* by the investee financial institution to the investor financial institution that amounts to a guaranteed profit ('r' rate) in Interbank *Mudarabah* Investment contract is not allowed.

Basis of the Ruling

The practice of giving *hibah* in a contract based on *mudarabah* is not allowed because *mudarabah* is based on profit sharing. If the practice of offering *hibah* is allowed, it may adversely affect the nature of the *mudarabah* contract since the *mudarib* is deemed as guaranteeing the *mudarabah* profit. Besides, the practice of giving *hibah* is also contradictory to the objective of *mudarabah* contract since it denies the elements of profit sharing and loss bearing (if any) by the *rabbul mal*.

75. Application of *Hibah* in the Contract of *al-Ijarah thumma al-Bai'*

An Islamic financial institution would like to offer *hibah* in *al-ijarah thumma al-bai'* (AITAB) as an incentive and encouragement to customers to timely observe their monthly payment of rent according to the prescribed schedule. In the proposed arrangement, *hibah* will be given to customers who pay their monthly rents in the first year without any late payment. The proposed *hibah* rate is 1% of the financing amount which will be directly credited into the account of eligible customers on the 13th month. However, customers who settle all his debts and terminate their AITAB contract within the first 12 months are not eligible to receive such *hibah*.

In this regard, the SAC was referred to on the issue as to whether the application of the concept of *hibah* in AITAB as proposed is permissible.

Resolution

The SAC, in its 13th meeting dated 10 April 2000, has resolved that giving *hibah* in an AITAB contract as an incentive to the customer who pays on schedule as proposed is permissible.

Basis of the Ruling

Giving *hibah* and gift is highly recommended as suggested in the following verse of al-Quran and *hadith* of Rasulullah SAW:

فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَرِيئًا

“...but if they choose of their own accord to make over to you a part of it, then you may enjoy it with pleasure and good cheer.”¹²⁰

أخبرنا أبو عبد الله الحافظ قال سمعت ابا زكريا يحيى بن محمد العنبري يقول سمعت ابا عبد الله البوشنجي يقول في قول النبي صلى الله عليه وسلم تهادوا تحابوا

“Abu Abdullah al-Hafiz has reported to us, he said, I heard that Abu Zakaria Yahya bin Muhammad al-Anbari said, I heard that Abu Abdullah al-Busyanji said, about the saying of the Prophet Muhammad SAW: Exchange gifts (among you) and you will love each other.”¹²¹

Besides that, there is no impediment in Shariah to apply the concept of *hibah* in AITAB contract since *hibah* is a benevolent act and is at the discretion of the giver of *hibah*.

¹²⁰ Surah al-Nisa', verse 4.

¹²¹ Al-Baihaqi, *Al-Sunan al-Kubra*, Maktabah Dar al-Baz, 1994, v. 6, p. 169, *hadith* no. 11726.

76. *Hibah in Wadi'ah Contract*

One of the methods in accepting deposits by Islamic financial institutions in Malaysia is based on the concept of *wadi'ah yad dhamanah*. Some of the Islamic banking institutions give *hibah* to *wadi'ah* depositors as token of appreciation for the depositors' confidence in the institutions. However, one of the concerns is that the practice of giving *hibah* to *wadi'ah* depositors will become an *`urf* or norm forbidden by Shariah.

In this regard, the SAC was referred to on the issue as to whether the practice of giving *hibah* by the Islamic banking institution to *wadi'ah* depositors is permissible.

Resolution

The SAC, in its 35th meeting dated 22 May 2003, has resolved that the practice of giving *hibah* by Islamic banking institutions to *wadi'ah* depositors is permissible. Nevertheless, such practice shall not become a norm in order to avoid this practice from becoming an *`urf* that resembles a condition in a deposit contract based on *wadi'ah*.

Basis of the Ruling

In the current banking practices, deposited monies by the customers will be used by the bank for certain purposes such as financing and investment. From the Shariah perspective, monies deposited into a deposit account based on *wadi'ah yad dhamanah* is equivalent to a loan based on *qard* in which the bank must refund the deposit to the customer upon request according to the agreed terms and conditions. Thus, the requirements of *qard* and its effects are also applicable in deposit account products based on the concept of *wadi'ah yad dhamanah*.

A *hadith* of Rasulullah SAW provides:

قال النبي صلى الله عليه وسلم إن خيركم أحسنكم قضاء

“Rasulullah SAW said: The best person among you is the one who does his best in debt settlement.”¹²²

In a *qard* contract, a condition that gives benefits to the lender is not allowed. For instance, a condition requiring the borrower to give a free accommodation or at a cheap price to the lender, and giving a reward or gift in return for the lender’s kindness.¹²³

The practice of giving *hibah* by a borrower to a lender is recommended in Islam. However, it must not be conditional in the contract so as to avoid the element of *riba* as stated in the following *hadith*:¹²⁴

عن علي رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: كل قرض جر منفعة فهو ربا

“From Ali r.a. who said, that Rasulullah SAW had said: Every loan that gives benefit (to the lender) is a *riba*.”¹²⁵

¹²² Al-Bukhari, *Sahih al-Bukhari*, Al-Matba’ah al-Salafiyyah, 1982, v. 2, p. 146, *hadith* no. 2305.

¹²³ Al-Juzairi, *Al-Fiqh `ala al-Mazahib al-Arba`ah*, Al-Maktab al-Thaqafi, 2000, v. 2, p. 227.

¹²⁴ Ibnu `Abidin, *Hasyiyah Radd Al-Muhtar `ala al-Durr al-Mukhtar Syarh Tanwir al-Absar*, Dar `Alam al-Kutub, 2003, v. 7, p. 395.

¹²⁵ Ibnu Hajar al-`Asqalani, *Bulugh al-Maram min Adillah al-Ahkam*, Matba’ah al-Salafiyyah, 1928, p. 176.

77. *Hibah in Qard Contract*

Qard contract is one of the contracts used to manage liquidity in Islamic finance. The contract obliges a borrower to return the loan amount to the lender without promising to pay any additional amount. However, in current practices, a borrower sometimes gives *hibah* to the lender at his own discretion when paying off the debts.

In this regard, the SAC was referred to on the issue as to whether the practice of giving *hibah* in the contract of *qard* is in line with Shariah.

Resolution

The SAC, in its 55th meeting dated 29 December 2005, has resolved that the practice of giving unconditional *hibah* in a contract of *qard* is permissible. Nevertheless, such practice shall not become a norm in order to avoid this practice from becoming an *`urf* that resembles a condition attached to the contract of *qard*.

Basis of the Ruling

Even though the act of giving *hibah* by the borrower to the lender is recommended in Islam, it cannot be conditional in the contract as it may amount to *riba*. Any addition to the amount of *qard* upon repayment, whether in terms of amount, attributes, giving of an asset or benefit, is permissible as long as it is unconditional.

The ruling on giving *hibah* to a lender is similar to the ruling on giving loan with benefit, which is prohibited if such *hibah* is conditional in the contract, but it is allowed if it is not made as conditional.¹²⁶

Please refer to basis of the ruling as explained in item 76.¹²⁷

¹²⁶ Ibnu `Abidin, *Hasyiyah Radd al-Muhtar `ala al-Durr al-Mukhtar Syarh Tanwir al-Absar*, Dar al-Fikr, 2000, v. 7, p. 395.

¹²⁷ *Hibah in Wadi'ah Contract*.

The concept of *ibra'* represents the waiver accorded by a person to claim his right which lies as an obligation (*zimmah*) of another person which is due to him.¹²⁸ In the context of Islamic finance, *ibra'* refers to rebate given by one party to another party in *mu'amalah* such as trade and lease transactions. For example, an Islamic financial institution may give *ibra'* to its customer who settled their debt prior to the agreed settlement period as stipulated in the contract concluded by both parties.

78. *Ibra'* in Islamic Financing

Most Islamic financial institutions do not include the *ibra'* clause in the financing agreement entered with their customer due to the concern that this will give rise to the issue of uncertainty (*gharar*) in the selling price. However, the exclusion of *ibra'* clause from the agreement may also lead to a dispute between the customer and Islamic financial institution on the customer's entitlement to *ibra'* arising from early settlement of outstanding debt.

In line with the need to preserve public interest (*maslahah*) and to ensure fair treatment between the financier and customer, the SAC was referred to on the proposal to mandate Islamic financial institutions to accord *ibra'* to the customer who settled their debt obligation under sale-based contract (such as *bai' bithaman ajil* or *murabahah*) prior to the agreed settlement period.

Resolution

The SAC, in its 101st meeting dated 20 May 2010, has resolved that Bank Negara Malaysia as the authority may require Islamic financial institutions to accord *ibra'* to their customer who settled their debt obligation arising from the sale-based contract (such as *bai' bithaman ajil* or *murabahah*) prior to the agreed settlement period. Bank Negara Malaysia may also require the terms and conditions on *ibra'* to be incorporated in the financing agreement to eliminate any uncertainty with respect to customer's entitlement to receive *ibra'* from Islamic financial institution. The *ibra'* formula will be determined and standardised by Bank Negara Malaysia.¹²⁹

¹²⁸ Kuwait Ministry of Waqf and Islamic Affairs, *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*, 1993, v. 1, p. 142.

¹²⁹ This decision supersedes the decision made by the SAC in its 13th meeting dated 10 April 2000, 24th meeting dated 24 April 2002 and 32nd meeting dated 27 February 2003, whereby it was held that giving of *ibra'* is at the discretion of the Islamic financial institutions and if the Islamic financial institutions promised to give *ibra'* to the customer, the institution will be bound by such promise.

Basis of the Ruling

Forgoing of rights is closely associated with *ibra'* and *dho` wa ta`ajjal* in the context whereby Islam encourages the financier to waive his right to claim the settlement of a debt (either partially or wholly). The debt obligation is recognised as a liability (*zimmah*) that is to be settled by the debtor to the financier. *Dho` wa ta`ajjal* is a term used to refer to an act of reducing partial amount of a debt in the event where the debtor makes an early settlement.

The evidence on waiving of right to claim part or total amount of debt existed during the lifetime of Rasulullah SAW as stated in the following *hadith*:

أن النبي صلى الله عليه وسلم لما أمر بإخراج بني النضير جاءه ناس منهم فقالوا يا نبي الله إنك أمرت بإخراجنا ولنا على الناس ديون لم تحل فقال رسول الله صلى الله عليه وسلم ضعوا وتعجلوا

*“Rasulullah SAW once ordered the people of bani Nadhir to leave Madinah, then he received delegates from the people who said: Oh Rasulullah! You ordered us to leave Madinah while we have outstanding debts that must be settled by the local people. Then Rasulullah SAW replied: Give discount and accelerate the settlement.”*¹³⁰

Some scholars are of the view that *dho` wa ta`ajjal* is not permissible since it is similar to the practice of *riba*. They argued that the increment in value of debt due to an extension of repayment period is considered as *riba*. Hence, the reduction in the value of debt arising from shortening the repayment period is also regarded as *riba*.¹³¹

¹³⁰ Al-Daraqutni, *Sunan al-Daraqutni*, Mu'assasah al-Risalah, 2004, v. 3, p. 466.

¹³¹ Al-Baihaqi, *Al-Sunan al-Kubra*, Maktabah Dar al-Baz, 1994, v. 6, p. 28, *hadith* no. 10924; there are other narrations in Sunan al-Baihaqi reporting on the prohibition of *dho` wa ta`ajjal* by Umar Al-Khattab r.a.; Ibnu Rusyd, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, v. 2, p. 144; Ibnu Qayyim, *Ighathah al-Lahfan min Masayid al-Syaitan*, Dar Al-Ma'rifah, 1975, v. 2, p. 12.

Besides that, there are some arguments stating that the provision on *dho` wa ta`ajjal* in a debt transaction is not allowed as it will create *gharar* in the selling price. Some scholars are also of the opinion that the provision on *dho` wa ta`ajjal* in a debt transaction is not permissible because this practice resembles the characteristic of *bai`atain fi al-bai`ah* transaction which is forbidden by *Sunnah*.¹³²

However, some scholars are of the view that *dho` wa ta`ajjal* is permissible and it is not appropriate to equate *dho` wa ta`ajjal* with *riba* given the essence of both subjects are distinct from one another.¹³³

Considering the views of scholars that allow full adoption of *dho` wa ta`ajjal* and those who allow it on a provisional basis, it is concluded that there is no restriction for the authority to mandate the implementation of such practice to be compulsory. This is because the directive issued by the authority to implement such permissible practices is intended to safeguard the interests of all related parties.

Such an action is consistent with the resolution adopted by the classical scholars, of which the settlement value of the debt that is paid prior to the agreed settlement period should commensurate with the duration prior to its settlement. Ibnu `Abidin wrote on this matter as follows:

*"If a debtor settles his debt before it is due or if he passes away and a claim proportion of his estate is claimed (to settle the debt), the contemporary scholars replied: Verily, none shall be taken from the murabahah between them except the amount that commensurates with the duration prior to its settlement."*¹³⁴

¹³² Abdul Rahman Soleh Al-Atrah, *Al-Ibra' fi al-Tamwil al-Islami: Takyifan wa Tatbiqan*, Al-Qadaya al-Mu`asarah fi al-Tamwil al-Islami: Munaqasyah fi Al-Nadwah al-Alamiyah li `Ulama' al-Syari`ah 2006, Bank Negara Malaysia, 2008, p. 355.

¹³³ Ibnu Rusyd, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, 1975, v. 2, p. 144; Ibnu Qayyim, *Ighathah al-Lahfan min Masayid al-Syaitan*, Dar Al-Ma`rifah, 1975, v. 2, p. 13.

¹³⁴ Ibnu `Abidin, *Hasyiyah Radd Al-Muhtar `ala Durr al-Mukhtar Syarh Tanwir al-Absar*, Dar al-Fikr, 2000, v. 5, p. 160: مطلب إذا قضى المديون الدين قبل حلول الأجل أو مات لا يؤخذ من المراجعة إلا بقدر ما مضى. (قوله : وسيجيء آخر الكتاب) أي قبيل كتاب الفرائض وهذا مأخوذ من القنية حيث قال فيها يرمز بنجم الدين قضى المديون الدين قبل الحلول أو مات فأخذ من تركته، فجواب المتأخرين: أنه لا يأخذ من المراجعة التي جرت بينهما إلا بقدر ما مضى من الأيام قبل له أنتفتي به أيضاً؟ قال نعم قال: ولو أخذ المقرض القرض المراجعة قبل مضى الأجل فللمديون أن يرجع بحصة ما بقي من الأيام.

79. Two Forms of *ibra'* in a Financing Agreement

In view that *ibra'* is a unilateral waiver of right by a party, an Islamic financial institution may promise to provide *ibra'* based on suitable methods. In this regard, the SAC was referred to on a proposal by an Islamic financial institution to adopt two different methods of *ibra'* in a *bai' bithaman ajil* financing agreement that is structured based on variable rate. The first method is formulated to address early settlement of debt and another method is the monthly *ibra'* in order to match the effective profit rate with the current market rate.

Resolution

The SAC, in its 32nd meeting dated 27 February 2003, has resolved that both methods of *ibra'* (namely *ibra'* for early settlement and monthly *ibra'* to match the effective profit rate with current market rate) in a financing agreement are permissible.

Basis of the Ruling

In the context of *ibra'* for early settlement, the SAC has taken into consideration the following views of contemporary scholars:

*"Whenever a debtor settles his debt before it is due, or passes away, thus the debt is matured due to his death. In the latter situation the debt is settled by claiming from his estate. However, none shall be taken from the murabahah except for the amount that commensurates with the duration of the debt prior it was settled. This is a reply provided by contemporary scholars (of Hanafi school), Qunyah, and fatwa of Mufti of Rome, i.e. al-marhum Abu Sa`ud Afandi. The effective cause (illah) that was given is al-rifq (compassion) for both parties. (He said: None shall be taken from the murabahah), its illustration: A person bought something for the cash price of 10, and then he sold to another for 20 with deferred payment of 10 months. If the buyer settled the payment after five months or passed away after such period, the seller should only take five and waive the remaining five."*¹³⁵

¹³⁵ Ibnu `Abidin, *Hasyiyah Radd al-Muhtar `ala Durr Al-Mukhtar Syarh Tanwir al-Absar*, Dar al-Fikr, 2000, v. 29, p. 348 - 349: قضى المدينون الدين المؤجل قبل الحلول أو مات، فحل بموته، فأخذ من تركته لا يأخذ من المراجعة التي جرت بينهما إلا بقدر ما مضى من الأيام وهو جواب المتأخرين، قنية، وبه أفق المرجوم أبو السعود أفندي مفتي الروم، وعلمه بالرفق للجانبين، (قوله لا يأخذ من المراجعة إلخ) صورته : اشترى شيئاً بعشرة نقداً وباعه لآخر بعشرين إلى أجل هو عشرة أشهر ، فإذا قضاها بعد تمام خمسة أو مات بعدها يأخذ خمسة ، ويترك خمسة.

For monthly *ibra'*, the SAC referred to the discussion among the scholars on types of *ibra'*. Two types of *ibra'*, which closely resemble the aforesaid practice are *ibra' muqayyad* and *ibra' mu`allaq*. An example of *ibra' muqayyad* is as follows:

"I will give you ibra' if you do such and such actions..."

Whereas, an example for *ibra' mu`allaq* is:

*"If you do such a deed, I will give you ibra'."*¹³⁶

Some of the Hanafi's scholars view that the aforesaid *ibra'* is not permissible if the condition in giving the *ibra'* becomes a normal practice (*muta`arafan*). Whilst the schools of Maliki and Imam Ahmad allow such *ibra'*.¹³⁷

Ibra' mu`allaq, as illustrated by some of *fiqh* scholars, is viewed as identical to the method of monthly *ibra'*. This is because *ibra'* which is given on monthly basis is also subjected to certain rate changes. This clearly indicates that the application of *ibra'* may be extended in accordance with current needs as long as it does not contradict with general principles of Shariah.

Besides that, offering of *ibra'* is a right of the financier. Thus, the financier may apply *ibra'* in whatever forms at his discretion.

¹³⁶ Kuwait Ministry of Waqf and Islamic Affairs, *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*, 1993, v. 1, p. 165.

¹³⁷ Kuwait Ministry of Waqf and Islamic Affairs, *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*, 1993, v. 1, p. 165 - 166: فللفقهاء في حكم الإبراء المعلق عليه آراء: (أ) عدم الجواز ولو كان الشرط متعارفا عليه. وهذا مذهب الحنفية والشافعية، والرواية المنصوصة عن أحمد، لما في الإبراء من معنى التملك، والتعليق مشروع في الإسقاطات المحضة لا في التملكات، فانها لا تقبل التعليق. (ب) جواز التعليق كان الشرط متعارفا عليه، وعدم الجواز في عكسه، وهو رأي لبعض الحنفية. (ت) جواز التعليق مطلقا، وهو مذهب المالكية ورواية عن أحمد، وذلك لما في الإبراء من معنى الإسقاط.

80. *Ibra'* in Home Financing Product Linked to a *Wadi'ah* or *Mudharabah* Deposit Account

An Islamic financial institution would like to offer a home financing product. One of the special features of the product is that the customer will receive *ibra'* on the monthly installment amount if he links the home financing to a *wadi'ah* deposit account or a *mudharabah* deposit account. Under this mechanism, *ibra'* on monthly installment will be accorded to the customer based on the outstanding balance of deposit in *wadi'ah* or *mudharabah* deposit account. In this regard, the SAC was referred to on the issue as to whether the structure of the product complies with Shariah.

Resolution

The SAC, in its 63rd meeting dated 27 December 2006, has approved the proposal on home financing product linked to a *mudharabah* deposit account with the condition that the cost associated with the *ibra'* shall be borne solely by the Islamic financial institution. However, the SAC, in its 64th meeting dated 18 January 2007, has resolved that the proposal to link the home financing product with a *wadi'ah* deposit account is not allowed because of the concern that its nature is *syubhah* to *riba*.

Basis of the Ruling

The existence of linkage or relation between home financing and a *wadi'ah* or *mudharabah* deposit account will consequently benefit the depositors. In the case of *mudharabah* deposit, the element of benefit is not an issue in Shariah. However, for *wadi'ah* deposit (which applies the ruling of *qard*), the element of conditional benefit is forbidden.

Please refer to basis of the ruling as stated in item 76.¹³⁸

¹³⁸ *Hibah* in *Wadi'ah* Contract.

Islamic banking operation materialised through financing transaction undertaken between financier and customer. Both parties are expected to observe specific obligations stipulated under the financing contract. The financier is obliged to provide financing to the customer as stipulated in the contract and the customer is obliged to settle the total amount of financing within the stipulated period. If the settlement is not made within the specified period, the financial activity of the financier will inevitably be affected. The discussion on the methods to claim compensation for losses in Islamic financial activities in Malaysia covers the aspects of default in settlement of debt, judgment debt and early settlement of debt. In the context of financing, *ta`widh* refers to claim for compensation arising from actual loss suffered by the financier due to the delayed in payment of financing/debt amount by the customer. Whilst *gharamah* refers to penalty charges imposed for delayed in financing/debt settlement, without the need to prove the actual loss suffered.¹³⁹

81. Imposition of *Ta`widh* and *Gharamah* in Islamic Financing Facilities

In conventional financial system, the problems associated with default in loan repayment are controlled by charging interests or *riba* on customers. Since the imposition of interests or *riba* is prohibited by Shariah, Islamic financial institutions do not adopt this mechanism to address cases on customers' default in settling their financial obligations under Islamic contracts. The SAC was referred to ascertain a Shariah compliant mechanism to deal with this issue.

Resolution

The SAC, in its 4th meeting dated 14 February 1998, 95th meeting dated 28 January 2010 and 101st meeting dated 20 May 2010, has resolved that the late payment charge imposed by an Islamic financial institution encompassing both concepts of *gharamah* (fine or penalty) and *ta`widh* (compensation) is permissible, subject to the following conditions:

¹³⁹ Mohammad Abdul Razaq al-Tabtabae, *Al-Ta`widh `an al-Dharar wa al-Gharamah `ala al-Ta`khir fi al-Duyun: Dirasah Tatbiqiyah `ala al-Mu`assasat al-Maliyyah al-Islamiyyah fi Daulati al-Kuwait*, Al-Qadaya al-Mu`asarah fi al-Tamwil al-Islami: Munaqasyah fi al-Nadwah al-`Alamiyah li `Ulama' al-Syari'ah 2006, Bank Negara Malaysia, 2008, p. 91.

- i. *Ta`widh* may be charged on late payment of financial obligations resulted from exchange contracts (such as sale and lease) and *qard*;
- ii. *Ta`widh* may only be imposed after the settlement date of the financing became due as agreed between both contracting parties;
- iii. Islamic financial institution may recognise *ta`widh* as income on the basis that it is charged as compensation for actual loss suffered by the institution; and
- iv. *Gharamah* shall not be recognised as income. Instead, it has to be channeled to certain charitable bodies.

Basis of the Ruling

The permissibility of imposing *ta`widh* on a defaulted customer is considered based on the following evidences and arguments:

- i. The following *hadith* of Rasulullah SAW that considers intentional delay in debt payment by a person, who is able to pay, is a tyranny:

عن أبي هريرة أن رسول الله صلى الله عليه وسلم قال: مظل الغني ظلم

“From Abi Hurairah that Rasulullah SAW had said: Delay by a rich person (in payment of debt) is a tyranny.”¹⁴⁰

- ii. There is also a *fiqh* maxim extracted from a *hadith* relating to this matter:

لا ضرر ولا ضرار

“Neither harming nor reciprocating harm (in Islam).”¹⁴¹

¹⁴⁰ Al-Bukhari, *Sahih al-Bukhari*, Al-Matba'ah al-Salafiyah, 1982, v. 2, p. 175.

¹⁴¹ Ahmad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, Dar al-Qalam, 1989, p. 165.

Based on this maxim, the delay in payment by the customer will create harm to the Islamic financial institution as the financier whereby the Islamic financial institution will suffer actual loss in terms of incurring additional expenditure, such as cost for issuing notices and letters, legal fees and other related costs. These issues should be avoided in order to ensure that business transactions are conducted according to the principle of market efficiency (*istiqrar ta`amul*).

- iii. Late payment of debt is analogous to usurpation (*ghasb*). Both share the same *`illah* which is tyrannically obstructing the use of the property and exploiting it. In the case of *ghasb*, Imam Syafii and Hanbali are of the view that the benefit of the seized property is guaranteed and shall be compensated.¹⁴² In the case of delayed payment of financing amount, the financier is also unable to utilise the fund for other business purposes, of which should be settled within stipulated period. Therefore, the customer should pay compensation to the losses suffered by the financier.¹⁴³
- iv. *Fiqh* maxim:

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“Whatever harm should be removed.”¹⁴⁴

Based on the aforesaid *fiqh* maxim, imposition of *ta`widh* and *gharamah* on delayed payment of debt is an appropriate approach to mitigate the harm suffered by the financier, and at the same time instilled discipline on customer to make payment according to the stipulated schedule.

¹⁴² Al-Syirazi, *Al-Muhazzab fi Fiqh al-Imam al-Syafii*, Dar al-Qalam, 1996, v. 3, p. 412; Al-Zuhaili, *Fiqh al-Hanbali al-Muyassar*, Dar al-Qalam, 1997, v. 3, p. 7.

¹⁴³ Majmu'ah Dallah Barakah, *Qararat wa Tawsiyyat Nadawat al-Barakah*, 1985, 3rd Convention, resolution no. 3/2.

¹⁴⁴ Al-Suyuti, *Al-Asybah wa al-Naza'ir*, Dar al-Kutub al-Ilmiyyah, 1403H, p. 83 - 84.

82. Imposition of Compensation on a Customer who Makes Early Settlement

The SAC was referred to on the issue as to whether an Islamic financial institution may impose compensation on a customer who makes early settlement in an Islamic financing.

Resolution

The SAC, in its 24th meeting dated 24 April 2002, has resolved that an Islamic financial institution is not allowed to claim compensation from a customer who makes early settlement in an Islamic financing.

Basis of the Ruling

Compensation charges imposed by an Islamic financial institution on a customer who makes early settlement in an Islamic financing is not consistent with the objective of Shariah since Islam encourages early settlement of any kind of debt. Furthermore, there is a *hadith* of Rasulullah SAW that considers intentional delay by a debtor in debt payment despite his ability to pay as tyranny.

Imposition of compensation charges for early settlement of Islamic financing is also considered as an inappropriate practice given that Islamic financial institution may use the fund for investment or to provide financing to other customers. With respect to customer who had enjoyed certain privilege at the initial stage of financing facility, the Islamic financial institution may deal with this issue by reducing the amount of *ibra'*.

83. Method of Late Payment Charge on Judgment Debt

The existing procedural law provides the court with the power to impose interest charge on the judgment debt as decided by court. This interest charge is imposed on the judgment debt at a rate of 8% per annum of the total judgment amount, which is calculated commencing from the date of the judgment until the judgment debt is settled by the judgment debtor to the judgment creditor.

With respect to Islamic finance cases, such claim also existed but the court normally exercises its discretion not to impose interest charge since the mechanism is based on *riba*. If the claim is made in court for fixed rate financing cases such as *murabahah* or *bai' bithaman ajil*, the judgment creditor will submit a claim for the total outstanding balance of selling price, subject to the amount of rebate (*ibra'*), if any.

In this regard, the SAC was referred to ascertain the mechanism to avoid delay in settling judgment debt for Islamic finance cases.

Resolution

The SAC, in its 50th meeting dated 26 May 2005, 61st meeting dated 24 August 2006 and 100th meeting dated 30 April - 1 May 2010, has resolved that the judge may impose late payment charge on judgment debt as decided by the court rules on cases of Islamic banking and takaful based on the methods of *gharamah* and *ta'widh* on actual loss according to the following mechanisms:

- i. Court may impose late payment charge at the rate as stipulated by the procedures of court.¹⁴⁵ However, from this rate, the judgment creditor (Islamic financial institution) is only allowed to receive compensation rate for actual loss (*ta'widh*);

¹⁴⁵ The SAC, in its 50th meeting dated 26 May 2005 and 61st meeting dated 24 August 2006, has resolved that the rate is 8%.

- ii. To determine the compensation rate for actual loss (*ta`widh*) that may be applied by the judgment creditor, the SAC agreed to adopt the “weighted average overnight rate” of Islamic money market as a reference; and
- iii. The total compensation charge shall not exceed the principal amount of debt. If the actual loss is less than the applicable rate for judgment in current practice, the balance shall be channeled by judgment creditor to charitable organisation as may be determined by Bank Negara Malaysia.

If the judgment creditor is an individual (for example, the payment of takaful benefits by a takaful company to participant), the judgment debtor shall only be obliged to pay *ta`widh* to the judgment creditor in addition to the judgment debt. The judgment debtor needs to channel the excess of the late payment penalty charge (if any) directly to charitable organisations as may be determined by Bank Negara Malaysia.

For judgment debt in cases which involves payment of takaful benefits by takaful company to the participant, the late payment compensation after the judgment date shall be paid from the shareholders’ fund.

Basis of the Ruling

Al-Zaila`i view that the creditor may bring an action against the debtor in court if the latter intentionally delays the payment of debt despite his affordability to do so. If such intentional delay is proven, the judge may sentence appropriate penalty on him.¹⁴⁶

¹⁴⁶ Al-Zaila`i, *Tabyin al-Haqa`iq*, Dar al-Kutub al-Islami, (n.d.), v. 124, p. 74.