



Megat Hizaini Hassan  
Partner  
**Islamic Finance**  
T: +603 6208 5863  
E: [mh@lh-ag.com](mailto:mh@lh-ag.com)

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### **Recent Shariah Advisory Council Ruling on Restructuring of Islamic Financing Facilities**

The Shariah Advisory Council (**SAC**) of Bank Negara Malaysia (**BNM**) recently issued a ruling on restructuring of Islamic financing facilities in view of COVID-19 (**New Ruling**) that complements earlier rulings issued by the SAC of BNM in respect of restructuring of Islamic financing facilities.

The New Ruling deals with the following matters:



Sharmeen Dahlia  
Associate  
**Islamic Finance**  
T: +603 6208 5826  
E: [smd@lh-ag.com](mailto:smd@lh-ag.com)

(1) ***Restructuring of Islamic financing facility based on original Shariah contracts***

An Islamic financing facility may be restructured by way of a supplemental agreement, without the need to enter into a new agreement, and the terms and conditions of the original facility agreement may be cross-referred in the supplemental agreement dealing with the restructured facility.

However, if the restructuring involves: (a) the application of a different Shariah contract; or (b) the consolidation of several Shariah contracts into a new single Shariah contract, then a new agreement is required.

(2) ***Restructuring of conventional loan to Islamic financing***

Islamic Financial Institutions (**IFIs**) are allowed to restructure an existing conventional loan into an Islamic financing facility. However, IFIs are not allowed conversely to restructure an existing Islamic facility into a conventional loan.

(3) ***Non-compounding of profit on restructuring***

In restructuring a facility, IFIs are not allowed to add the accrued profits from the original facility into the new principal amount under the newly restructured facility. However, the accrued profit from the original facility may form part of the profit under the newly restructured facility.

### **Implications of the New Ruling**

(1) Past Shariah rulings on restructuring of Islamic financing facilities

It may be noted that the New Ruling complements previous SAC BNM's rulings on restructuring of Islamic financing facilities, as set out below:

- (a) execution of rescheduling and restructuring agreements with cross reference to the original agreement for purposes of stamp duty exemption is allowed, provided that such agreements are executed after the original agreement has been cancelled (SAC of BNM, 2002);
- (b) based on mutual consent in the agreement, the period of financing can be extended without entering into a new *aqad*, provided that both parties perform all their promises and the price is not more than the original contracted selling price (SAC of BNM, 2003).

The New Ruling is also in line with a previous ruling issued by another Shariah regulator i.e. SAC of the Securities Commission (**SC**) on a similar issue, i.e. Sukuk restructuring, whereby SAC of SC ruled that *qalb al-dayn* (conversion of an existing debt to a new debt) is permissible subject to the following conditions:

- (i) execution of a new contract where it creates a new payment obligation and a revised payment period;
- (ii) proceeds from the new contract may be used to pay the initial outstanding debt which consequently results in the termination of the old contract; and
- (iii) the debtor is categorised as *musir* (solvent) as determined by the Sukuk trustee or sukukholders. (SAC of SC, 2016)

(2) Implications of New Ruling on Shariah transactions for the Restructured Facility

*(a) Supplemental agreement and new Aqad*

Even though the New Ruling specifies that “no new agreement is required” in a restructured facility, yet upon going through the details of the New Ruling, it would appear that if a new *aqad* (contract for a Shariah transaction) is required due to variation of the original sale price pursuant to the restructuring, then such new *aqad* may be documented in the supplemental agreement. For example, if parties enter into a new *tawarruq* transaction pursuant to the restructured facility and a fresh commodity sale transaction is executed by the financier and the customer, then a new *aqad* evidencing such fresh commodity sale transaction may be documented in the supplemental agreement in line with the New Ruling.

*(b) Agency under the Restructured Facility*

If both the original and the restructured facility utilise the *tawarruq* structure, then the IFI needs to ensure that the agency arrangement between the IFI and the customer (such agency being an essential feature of the *tawarruq* transaction) would subsist for the *tawarruq* transaction under the restructured facility. Typically, such agency arrangement would usually end upon completing the *tawarruq* transaction under the original facility — if so, then a fresh agency appointment would need to be made as well for the restructured facility.

### (3) Implications on Security Documents

Following a restructuring of an Islamic facility based on the New Ruling, existing security documents may need to be amended or substituted with new security documents, depending on the circumstances. In addition, the parties also need to consider the implications of any amended/new security documents on any security under the original facility that were previously lodged and registered with the relevant authorities, such as the land office and the Companies Commission of Malaysia (**SSM**). It may be noted that if the particulars of any security previously lodged with the land office and SSM are to be changed, then such change would need to be done by applying to court for an order to amend the particulars in question — the implications of such a court order should be taken into account in determining whether security documents should be amended or substituted afresh.

## Conclusion

In any event, the New Ruling is much welcomed, especially as it may be of help to those who currently face financial hardship (due to the COVID-19 situation) in meeting their financing obligations, and it complements earlier announcements by BNM on a moratorium on the payment of financing/loans in view of COVID-19.

**Megat Hizaini Hassan** ([mh@lh-ag.com](mailto:mh@lh-ag.com)) and **Sharmeen Dahlia** ([smd@lh-ag.com](mailto:smd@lh-ag.com))

If you have any queries on Islamic finance, please contact associate Sharmeen Dahlia or her team partner **Megat Hizaini Hassan** ([mh@lh-ag.com](mailto:mh@lh-ag.com)).

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia

T +603 6208 5888  
F +603 6201 0122/0136  
E [enquiry@lh-ag.com](mailto:enquiry@lh-ag.com)  
W [www.lh-ag.com](http://www.lh-ag.com)

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