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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v10-i4/7132>

DOI:10.6007/IJARBSS/v10-i4/7132

Received: 09 February 2020, **Revised:** 10 March 2020, **Accepted:** 26 March 2020

Published Online: 19 April 2020

In-Text Citation: (Nor et al., 2020)

To Cite this Article: Nor, A. M., Ibrahim, S. N., & Daud, S. (2020). Recovery Issues on Murabahah Financing in Malaysia. *International Journal of Academic Research in Business and Social Sciences*, 10(4), 304–317.

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Vol. 10, No. 4, 2020, Pg. 304 – 317

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Recovery Issues on Murabahah Financing in Malaysia

Amirudin Mohd Nor, Siti Nurulhuda Ibrahim, Shahreena Daud

Faculty of Business and Management, Universiti Teknologi MARA, Melaka, Malaysia

Abstract

This qualitative research paper considers the recovery issues on Murabahah financing as the theme as to add to the existing Murabahah literature. The purpose of this paper is to investigate the recovery issues on Murabahah financing in Malaysia, specifically on the recovery via court cases. A descriptive and content analysis were performed on six Murabahah cases heard in the Malaysian court extracted from Lexus Nexus database. The results suggest that the issue on ta'widh, Murabahah restructuring and guarantees is of common weight while the issue on ibra is also important lately. Apart from the recovery issues, it is noted that failure to adhere to the guidelines formulated by the regulator persists and heavy reliance on common laws is unavoidable and continue to be the subject matter. Future research should further discuss on the efficiency of the recovery activities and discuss the area of developing Islamic banking laws appropriate to cater for the issues discussed herein.

Keywords: Murabahah, Recovery, Ibra, Ta'widh, Islamic Financing

Introduction

Murabahah financing is the most dominant financing in majority of the Islamic banks in the world (Ismal, 2009; Usmani, 2003; Wulandari, Putri, Kassim, & Sulung, 2016). In Malaysia, it accounts for 37.2% of the total Islamic financing of approximately RM436 billion in 2016, way surpassed its counterparts, the Al Bai Bithaman Ajil and Ijarah at 15.9% and 16% respectively. The trend is upwards with 17.2% domination in 2012 to 37.2% in 2016.

Notwithstanding the above, the non-performing financing in value remain huge at approximately RM5.5 billion as of 2016. Such amount remains significant and worthwhile to be discussed since each defaulted account contributes to the provisions for bad debts. Consequently, the provisions imposed on these defaulted accounts will directly reduce the banks' profitability. This substantiate the common banks' operational recovery departments setup.

Empirically, few studies have attempted to assess the recovery cases on Murabahah financing in Malaysia (see Zandi and Shahabi, 2012; Yamaludin, 2014). This paper considers the issues on recovery activities on Murabahah financing as the theme as to add to the existing Murabahah literature. Hence, the objective of this paper is to investigate the recovery issues on Murabahah financing in Malaysia, specifically on the recovery via court cases. The present study is different in a few ways: (1) presents descriptive analysis on the Murabahah court cases in Malaysia and (2) combined six Murabahah cases for 2016-2017 extracted from Lexus Nexus database simultaneously

in one paper. The descriptive analysis helps to determine the respected issues while the six cases illustrate the current issues surrounding the Murabahah financing.

The scope of this paper has been specified to focus on the default of Murabahah financing in Malaysia given that Malaysia is among the pioneer and active participant in the development of the Islamic financing products. This paper does not cover all issues in Murabahah, however will only discuss Murabahah recovery issues arising from court cases. Hence, the aim of this paper is to identify the current recovery issues with regards to Murabahah financing in Malaysia from the perspectives of legal action. The objective will be answered through descriptive analysis and content analysis.

The results suggest that the issue on tad'widh, murabahah restructuring and guarantees is of common weight while the issue on ibra was also important lately. Apart from this recovery issues, it was noted that failure to adhere to the guidelines formulated by the regulator persists and heavy reliance on common laws is unavoidable and continue to be the subject matter.

The rest of the paper is structured as follows. The next section highlighted related empirical literature. Section 3 outlines our research methodology and cases under study. Section 4 presents the descriptive and analyses of the issues concerned and lastly, section 5 concludes the findings with some concluding remarks.

Literature Review

Murabahah Overview

Originally, Murabahah was a trade activity and is not a mode of financing (Usmani, 2003). The basic encompasses the mark-up cost plus activity in which a person buys an asset at a specific price and later sells it to another party at a profit, with the cost and profit portion made known and agreed by the buyer. This entails the element of trust between the purchaser and the seller in two aspects. First, the buyer put an order to buy a specified asset putting a trust that the seller will purchase the asset at a reasonable cost and second, the seller sell the asset to the buyer at profit made known to the buyer.

As time goes by, the need and demand for shariah compliant product emerged, particularly from the muslims customers as they are not allowed to practice riba. Notwithstanding the above, given the high price of some assets, customers could not afford to pay full in cash, subsequently give rise to the need to make payment via instalment. In such situation, the sale price is deferred to some time in the future and to be settled by way of instalments according to an agreed payment schedule normally tied up to an individual or entity's source of income.

Owing to the deferred payment nature, the transaction is in fact a debt-based contract arising from a trading activity. Experts in shariah try to find ways to accommodate these situations and as a result of innovation in financing products, Murabahah was later identified as one of the concepts to resolve the matter. This is the time when Murabahah, apart from the traditional view of trading activity, is considered as a method of financing in the modern world.

Table 1 depicts an example of a Murabahah transaction in a modern financing transaction. Mr A, the customer entered into an agreement with Islamic Financial Institutions (IFI) for a Murabahah contract to purchase asset (raw material) together with other arrangement consistent with the shariah requirement. Upon signing which binds both parties, the IFI buy the raw material from a supplier at a cost of say RM1,000. Next, the IFI proceed to sell the raw material to Mr A at RM1,200 which consist of RM1,000 cost plus RM200 being the profit portion. Both cost and profit was made

known and agreed by the buyer. Mr A then has the option to pay the purchase price via lump sum cash or on deferred payment. At this instance, the trade transaction is completed. Should Mr A opt to pay via instalment terms, the transaction then become a debt contract where the debt will be settled in instalment over time until full settlement.

Table 1 Murabahah Transaction

	Supplier	Islamic Financial Institution (IFI)	IFI Customer (IFIC)
Phase	Phase 1	Phase 2	Phase 3
Process	IFI buys raw material (asset) from a supplier. (purchase cost of RM1000).	IFI sells the raw material (asset) to IFI customer. Selling price of RM1200 (consist of RM1000 cost plus RM200 profit).	IFI customer pays the settlement amount in instalments or lump sum.
Trust	IFIC relies upon the integrity of IFI to acquire the asset at reasonable cost.	IFI disclose the cost and profit element.	-
IFI Roles	Trader	Trader	Financier
Nature	Trade	Trade	Debt
Contract	Purchase order between supplier and IFI.	Asset Sale Agreement (ASA) between IFI and the customer.	Financing Facility Agreement (FFA) between IFI and the customer.
Monetary consideration	Cash basis or on credit basis	Credit basis	-

Source: Author's own diagram inspired by BNM Murabahah Policy Document dated 23 December 2017

Arrangement of Murabahah With Assurance

Referring to Table 2, in the trading phase 1 and 2, the seller in the Murabahah contract secure ownership from the supplier prior to selling the asset to the purchaser, the bank is exposed to operational and market risk. Assurance at the Wa'ad stage is needed to ensure the purchaser buys the assets as ordered to the IFI. In the Murabahah contract phase 3 where the trade is paid full in

cash or converted into a debt contract for deferred payment cases, assurance for payment until full settlement should be considered. Here, the seller is exposed to credit and default risk.

In view of the risk incorporated in murabahah transaction, arrangement of murabahah contract with other contract or concepts are also allowed. These concepts are for the purpose to protect the murabahah parties in the event of default.

Table 2 Murabahah Risk and Risk Mitigation

	Supplier	Islamic Financial Institution (IFI)	IFI Customer (IFIC)
Phase	Phase 1	Phase 2	Phase 3
IFI Roles	Trader	Trader	Financier
Nature	Trade	Trade	Debt
Ownership	Secure ownership	Transfer of ownership	-
Risk Mechanism	IFI takes risk	IFI takes risk	IFI transfer risk
Risk Type	Operational risk	Market risk	Credit & Default risk
Risk Mitigation	Hamish Jiddiyah Urbun	Kafalah	Kafalah, Rahn, Takaful, Tad'widh, Gharamah.

Source: Author's own diagram inspired by BNM Murabahah Policy Document dated 23 December 2017

Hence, it is a risk mitigation undertook by respective parties based on their initiatives:

- (1) *Kafalah*: This is a guarantee for (a) the payment of the assets purchased under the murabahah transaction during the trading stage and (b) the payment of the outstanding debt throughout the tenure of the murabahah periods. A third-party guarantor whether from individuals or institutions should be of good financial standing. The guarantee will only take place until the Murabahah contract is duly executed (Bank Negara Malaysia (BNM), 2009). This is a normal standard requirement from bank should the IFIs is not comfortable with the financial standing of the customer.
- (2) *Takaful* coverage: The seller can require the purchaser to provide a takaful coverage to guarantee the repayment in the event of loss in legal capacity by the purchaser.
- (3) *Rahn*: Collateral (*marhun*) where the purchaser provide security against the debt outstanding. In the event of default, the collateral will be liquidated to cover any debt outstanding. It can be in the form of shares of landed property, shares, land and other acceptable assets. The collateral reduces the IFIs risk in times of default.
- (4) *Hamish Jiddiyah*: A security deposit to secure the undertaking to purchase the contract. Should the purchaser fail to perform his obligation to purchase the assets and breaches the promise or *Wa'ad*, the security deposit will be used as compensation against loss by the seller. Notwithstanding the above, the security deposit can be treated as partial payment of Murabahah selling price.

- (5) *Urbun*: A down payment or an earnest money. The IFI may require a down payment from IFI customer upon the signing of the contract. The *urbun* will be forfeited by the IFI if IFI customer terminates the contract

Apart from the abovementioned initiative, an arrangement of murabahah with penalty for late charges is also available known as (1) *ta'widh* and or (2) *gharamah*. Both are late payment charges applicable to late payment customers and can be included in the contract agreement. *Ta'widh* is a compensation for actual lost borne by the seller. Payment received from *ta'widh* can be recognized as income to the seller (Bank Negara Malaysia, 2012). *Gharamah* is a penalty for late payment. Payment received cannot be used as income to the seller but instead must be channelled to charitable bodies (Bank Negara Malaysia, 2012).

Event of Default and Recovery Exercise

Default refers to financial distress arising from unmanaged huge liabilities and poor cash flow. The situation effects the borrower's ability to serve instalment payment due arising from a debt contract between borrowers and the IFI. It also means defaulting on future contract set forth in the agreement whereby any of the contracting party fail to fulfil its obligation under the agreement (Kamarudin et al., 2014).

In general circumstances, default in Murabahah is triggered when any of the parties fail to honour its obligations as spelled out in the terms and conditions of the agreement. In the trading phase, default may occur when the IFI customer fail to honour his *wa'ad*. In the debt contract side, an event of default is triggered for instance when the IFI customer fails to meet his payment obligation to the IFI. Other defaults may occur depending on the terms and agreement in the contracts.

Ismal (2009) highlighted the issue on moral hazard in Murabahah concept. He identifies price risk, default risk, commodity risk and market risk to be associated with Murabahah financing. His paper focuses on the price risk referring to the price volatility of the assets transacted under Murabahah financing within the financing period. Moral hazard problem occurs in a situation where price changes especially during the increase in the price of the assets after purchase, the buyer (who is also the purchaser in this case) can dishonestly pretending to be defaulted, terminating the contract and gain from the price increase. Such problem will negatively affect the IFI cash flow and to mitigate it IFIs conduct investigation and charge some cost including penalty. The issue is more on the default arising from an intentional action with an evil intention to gain monetary benefit from the situation.

Default has negative correlation with the IFIs business. The IFIs will face: (1) interrupting cash flows on its assets side and adjustment has to made accordingly with the liability side of the IFIs balance sheet, (2) disrupting Murabahah profit calculation and (3) involve additional expenses for the disposal of assets purchased and even the costly recovery exercise (Ismal, 2009).

Upon default, the outstanding is due and require immediate settlement. Should the IFI customer is not able to make settlement, the outstanding amount is claimable from the risk mitigating arrangement. In the case of the recovery strategies of Danaharta Nasional Berhad in Malaysia, recovery is done in 2 approaches, (1) soft approach and (2) hard approach (Danaharta, 2009). Soft approach includes (a) loan restructuring and recovery by way of rehabilitation of NPLs into performing accounts. (b) moratorium of payment after sending a reminder and (c) Scheme of

arrangement where both the IFIs and IFIs customer agrees voluntarily to restructure the defaulted debts.

The hard approach includes (a) foreclosure and (b) taking legal action. Foreclosure involved the sale of property or share collateral pledged as security (rahn) for a loan. In the case of murabahah facility, the security and collateral will be liquidated (security realization) or disposed off with the proceeds used for settlement of the debt outstanding. Legal action against the guarantor (kafalah) will be considered as a last resort after all other recovery strategies had been exhausted (Danaharta, 2009).

The scope of this paper has been specified to focus on the default of Murabahah financing in Malaysia only given that Malaysia is among the pioneer and active participant in the development of the murabahah as one of the Islamic financing products. The focus is on the recovery issues via legal action through the court of Malaysia.

Research Methodology

This research adopts the qualitative approach to assess the issues murabahah financing recovery in Malaysia. Library based information gathering was done consisting of primary data from case law while secondary data was gathered via books, relevant articles and journals available in the internet and online databases. Since this study is intended to analyse the recovery issues in relation to the murabahah financing, focus is on selected cases covering six cases in Malaysia for the period from 2016 to 2017. The recent law cases on Murabahah based financing in Malaysia extracted from Malaysia Law Journal (MLJ) using the Lexus Nexus database was used. At the end, descriptive and analytical approaches were employed where all related cases will be scrutinized and presented in the form of table to identify the frequency of related issues. Finally, analysis on the selected issues is done on those issues on a critical mode.

Table 3 depicts the list of cases selected for this study:

Table 3 Lists of selected cases 2016-2017 via Lexus Nexus database under key word Murabahah

No	Source & Year	Case	IFI	Concepts/ Facility Types
1.	MLJ Unreported / 2017	Bank Muamalat Malaysia Bhd v Ten-Tel Construction Sdn Bhd	Bank Muamalat Malaysia Bhd	Murabahah / RM1.5M Tawarruq: Muamalat Cashline-i
2.	MLJ Unreported / 2017	Azmer Idris v Malaysia Debt Ventures	Malaysia Debt Ventures	Murabahah/ RM4.5M To purchase machine
3.	MLJ Report /2017	Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor	Maybank Islamic Bhd	Murabahah RM3M Murabahah overdraft
4.	MLJ Unreported /2016	Dawn City Car (M) Sdn Bhd v Bank Islam Malaysia Berhad	Bank Islam Malaysia Berhad	Murabahah RM2M Al-Murabahah Working Capital Financing
5.	MLJ Unreported /2016	Dato' Dr Pang Chow Huat v RHB Islamic Bank Berhad	RHB Islamic Bank Berhad	Murabahah RM0.25M Commodity Murabahah Overdraft-i
6.	MLJ Unreported /2016	Kuwait Finance House (M) Bhd v Koperasi Perkhidmatan Bhd	Kuwait Finance House (M) Bhd	Murabahah RM18.7M Murabahah Tawarruq Working Capital Financing-i

Results and Discussion

Issues Detected from the Law Case

Issues

The study was undertaken to identify the issues with regards to the recovery on Murabahah based financing arising from the selected court cases. This section covers four issues namely ta'widh, ibrah', debt restructuring and guarantee as elaborated below

(1) Ta'widh

Ta'widh is categorized as a financial fee for penalty for default. Malaysia, via Bank Negara Malaysia (BNM) practices two types of penalty of default: (1) ta'widh and (2) gharamah.

Case 1

Bank Muamalat Malaysia Bhd v Ten-Tel Construction Sdn Bhd & Ors [2017] MLJU 398

In the case of Bank Muamalat Malaysia Berhad v Ten-Tel Construction Sdn Bhd & Anor, the plaintiff claimed for some RM1,894,476.14 debt outstanding arising from RM1.5 million Muamalat cashline-I based on Tawarruq concept. The sum claimed is inclusive of Ta'widh at 1% per annum on the amount in arrears from the due date until termination and Ta'widh at 1% per annum on the balance principle sum from the date of termination until judgment day at a market rate of Islamic money Market. The learned judge has found that the defendant has managed to raise a triable issue via the Tad'widh computation and further mentioned that the certificate of indebtedness contains errors. The plaintiff has claimed in words but failed to submit a computation deriving the actual claimed amount inclusive of the Ta'widh calculation. Further, there are discrepancies between BNM guidelines on Late Payment Charges 2012 and the provision on Ta'widh under the Facility agreement.

Case 2

Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69

Maybank Islamic has charged Ta'widh on a defaulted facility extended to M-IO Builders. It involves a RM3 million Murabahah Overdaft Facility (MOD) that was restructured to a RM5 million MOD. The case was heard in the High Court but was later heard in the Court of Appeal. One of the issues is on the legality of the adherence to the murabahah principals under the MOD and whether the same assets can be used multiple times for Islamic transaction. The High Court judge has made it clear that the murabahah principles was not adhered to but instead the Bai Inah contract applies. Subsequent to the default, the bank has terminated the facility and claim the ta'widh on the sum owed. In this case, the ta'widh is granted to the IFI as non-compliance of the murabahah principles did not render the contract unenforceable and void. IFI has the rights to charged compensation as a result of the delay in making payment by the IFI customers. The defendant further argued on the ground that the calculation of tad'widh was not substantiated by the guidelines issued by BNM, however the judge was satisfied with the appearance of the maker of the statement of account who testify with detailed calculation supported by section 73A(1) of the Evidence Act 1950.

Discussion

In murabahah financing, the amount of selling price cannot be amended. There should be one fixed selling price throughout the financing period and any amount above the selling price is not allowed.

Dishonest IFI customers take advantage of this situation to default in payment, and benefit in reduced cost since the amount settled in the murabahah cannot be increased over time. This creates moral hazard and it negatively affect the IFIs business (Ismal, 2009; Usmani, 2003). Some scholars have suggested that the dishonest customer be charge a penalty equivalent to the amount the IFIs pay to the depositors since it is a direct cost borne by the IFIs. Some have allowed with restrictions for instance the defaulter should be given time via a notice to settle the debt say one month, failing which the default penalty applies. Both agrees that only the dishonest should be penalized and genuine cases due to valid excuses should be dealt with differently (Ishola & Solahudeen, 2015; Ismal, 2009). Usmani (2003) and majority scholars are of the view that such practice is no different from riba during the jahilliyah times.

Bank Negara Malaysia has come out with a guideline for operational use of the default penalty. Quoting the Murabahah policy documents: "Pursuant to paragraph 19.2, the late payment charges shall consist of: (a) ta'widh (compensation) for actual loss borne by the seller, which may be recognised as income to the seller; and/or (b) gharamah (penalty), which shall not be recognised as income. Instead, it shall be channelled to charitable bodies" (Bank Negara Malaysia (BNM), 2013). This is a financial fee claimable by the IFIs.

The issue on the additional charge based on Ta'widh is not a concern in the case on Bank Muamalat Malaysia Bhd v Ten-Tel Construction Sdn Bhd & Ors [2017] MLJU 39. Ta'widh claim based on BNM guidelines was not adhered to and evidence on the final calculation resulting on the final Ta'widh claim was absent. The provision under the Ta'widh clause in the Facility Agreement was not drafted in accordance to the BNM guidelines. This indicates the lack of awareness from the practitioners on the guidelines issue by the regulator. The situation could lead to injustice to the IFI customers due to excessive penalty claim.

In the second case, the opposite happens when the judge is satisfied with the claim as detailed calculation was presented to substantiate the claim. The only difference is at the time of claim, the IFI failed to follow the guidelines on murabahah principles thus making the contract void, nevertheless maintain its rights under the section 74 of the Contract Act 1950 to claim on the ta'widh as the contract is still enforceable. It is obvious that the common law prevailed and could be used with respect to claims under the Islamic principles. Nevertheless, the section 74 used in this case, the claim for damages that is direct and foreseeable is in line with the Islamic law creating no legislative conflict (Muneeza, 2015).

(2) Ibra'

Case 1

Bank Muamalat Malaysia Berhad v Ten-Tel Construction Sdn Bhd & Anor (MLJU 398 2017)

Cases mentioning ibra was discussed in the case of Bank Muamalat Malaysia Berhad v Ten-Tel Construction Sdn Bhd & Anor (MLJU 398 2017). In this case, the plaintiff admits that they have not taken into consideration the ibra in the amount claimed and therefore has denied the defendant rights under the facility agreement. The Facility agreement spells out: there is a provision on Ibra in section 3.14 of the Facility Agreement wherein section 3.14(a) provides that "The Bank shall grant ibra' in case of early settlement of the Facility to the Customer." The learned judge also pointed out his concern on the meaning of the said clause whether or not it applies to terminated facility or just applies to early settlement for performing account. The judge is quoted a saying "In my opinion, the

facility is cancelled prematurely in either case and a rebate ought to be given in principle: otherwise the bank would be unjustly enriched. It would have been different if there is a clear express provision in the aforesaid clause 3.14 that Ibra would not apply in a terminated facility for default. I also noticed that in *Affin Bank Bhd v. Zulkifli bin Abdullah* [2006] 3 MLJ 67 and *Bank Islam Malaysia Bhd v. Azhar bin Osman & Other Cases* [2010] 9 MLJ 192, the courts were hesitant to permit the bank from denying the customer earning the rebate on unearned profit practiced by Islamic banks”.

Discussion

Rebate on early payment has been long dispute in Malaysia. Majority if the scholars are of the view that rebate on early payment should not be a condition in an agreement and the borrower’s intention to settle the debt early for a rebate is prohibited. Instead, the rebate is at the discretion of the lenders on voluntarily basis (Finansman, Etkinli, & Kar, 2016). Despite this view, Malaysia adopted a reverse view based on public interest (masalah). The Shariah Advisory Council allows a rebate clause to avoid uncertainty and ambiguity with the intention to protect the public interest. Nevertheless, in many cases the rebate is only applicable during early settlement and not after an event of default has occurred. The inclusion of the Ibra clause should be elaborated in line with the guidelines issued by BNM to avoid confusion, justice and further support the Islamic banking system. The court supports granting the rebate for default cases as well.

(3) Debt Restructuring

Case 1

Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69

Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69 touches the issue on a RM3 million Murabahah Overdaft Facility (MOD) that was restructured to a RM5 million MOD. The case was heard in the High Court but was later heard in the Court of Appeal. One of the issues is on the legality of the adherence to the murabahah principals under the MOD and whether the same assets can be used multiple times for Islamic transaction. The High Court judge has made it clear that the murabahah principles was not adhered to but instead the Bai Inah contract applies.

It is therefore clear that there were no asset purchase and asset sale contract and therefore the transaction is void. However, the Court of Appeal judge reiterated that non-compliance with shariah principles did not render the contract illegal and unenforceable. In this case, the Contract Act 1950 applies as it governs the Islamic contracts. On the issue of whether the same assets can be used for the RM3 million MOD and the subsequent restructuring of RM5 million MOD, it was deliberated that the assets used are different as under the first Letter of Offer the underlying assets for the first LO were 'the rights, title, interest and benefit of the customer as derived from Project 1 and Project 2; whereas the underlying assets for the second LO were the four parcels of lands over which the first respondent had created first and second party legal charge in favour of the appellant. The judge also quoted as saying that under the bai' al inah transaction the same assets can be sold and purchased pursuant to an Islamic Banking facility multiple times without affecting Syariah since the asset under the first agreement has been completed before the signing the second agreement making it free from available and free to be transacted.

Case 2

Dr Pang Chow Huat v RHB Islamic Bank Bhd [2016] MLJU 437

In the case of Dato' Dr Pang Chow Huat v RHB Islamic Bank Bhd [2016] MLJU 437, the plaintiff has defaulted in its obligation under the Commodity Murabahah Facility Agreement dated 07.09.2016 and Multi Trade Lines Facility, dated 07.09.2009. In this arrangement, the Plaintiff has agreed to provide two (2) loan facilities known as the Multi-Trade Lines Facility of RM2,250,000.00 and a Commodity Murabahah Overdraft-I Facility of RM250,000.00 to Asia Pinnacle Sdn Bhd. The defendant has entered into a Settlement Agreement under the proposed debt restructuring scheme with the plaintiff for settlement of the debts. Amongst others, it involves an Option Agreement with the terms that the IFI customer will place some 8.9 million shares of Sanishi Technology Berhad for additional security. In the Put Option agreement, the defendant is to purchase the said shares at the option price of RM0.15 per share upon issuance of Put Option notice by the IFI. The option agreement is a conventional practise in the financial market.

Nevertheless, failure of the IFI customer to honour the debt settlement give rise to subsequent default and the IFI has exercise its right under the settlement agreement by issuing a Put Option Notice for the IFI customer to purchase the shares under the Put Option Agreement. Failure of the IFI customer to purchase the said shares made the IFI to forced-sell the shares under the Option Agreement, without prior notice to the defendant at the prevailing market price at RM0.078 which at the time is lower than the Put Price of RM0.15 per share. The defendant raised an issue of the disposal of the shares below the Put Price spelled out under the Option Agreement, resulting in loss to the defendant. The learned Session Court judge has dismissed the defendant's appeal with cost stating that the Option Price does not bind the plaintiff and the disposal price at RM0.078 in the open market is justified since the plaintiff has secured the best price for the share.

Discussion

Signing the option agreement as part of the settlement agreement is an effort to help the IFI customer to settle the debt outstanding. In this debt restructuring exercise, the IFI has requested for additional security in the form of shares to further protect its interest. Such action is allowed as long as the debt amount is fixed until full settlement. The IFI has also granted sufficient time to the IFI customer to rectify the default situation. The procedure seems in order in terms of granting time for settlement using the soft approach via debt restructuring and even through reminders and many more prior to the recovery action taken against the IFI customer. This is in line with the Islamic principles of granting time extension for settlement of the debts. The issue is more on the different interpretation of the agreement clauses rather than shariah issue. The IFI has the option to dispose the new security at its discretion to cover the amount outstanding.

Again, different understanding and interpretation of Islamic contract heard in the conventional court were discussed. In the Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor [2017] 2 MLJ 69 case, the issue is on the assets for restructuring purpose and the structure of the murabahah that was found to be different from what is supposed to be. Both cases imply failure of the IFI to meet the Bank Negara guidelines on murabahah financing and the reliance of Islamic facilities on conventional laws such as the Contract Act which govern the Islamic concept. In addition, the Option Agreement under the Dato' Dr Pang Chow Huat v RHB Islamic Bank Bhd [2016] MLJU 437

case is conventional in nature and to enforce it must go through the court of law. Hence, the IFI can act within secular commercial and contract law to serve their legitimate interest (Wilson, 2002).

(4) Guarantee

Case 1

Azmer bin Idris v Malaysia Debt Ventures Bhd [2017] MLJU 454

Case 2: Kuwait Finance House (M) Bhd v Koperasi Perkhidmatan Bhd [2016] MLJU 438

In the case of Azmer bin Idris v Malaysia Debt Ventures Bhd [2017] MLJU 454, the Bank has proceeded to institute legal action against the customer until up to the bankruptcy notice stage. Nevertheless, it was done against the guarantor concurrently with the principal debtors. The customer argues that he is merely a social guarantor and debt recovery should be done against the guarantor only after all recovery effort against the principal debtors has been exhausted. In a similar case involving the securities, Kuwait Finance House (M) Bhd v Koperasi Perkhidmatan Bhd [2016] MLJU 438 an event of default was triggered after KPB failed to remit the monthly instalment payment. However, the termination of the facility was done prior to liquidation of the proceeds in KPB escrow account in conjunction with the assignment on receivables and designated account.

The learned judges are in favour of both financial institutions. In the case of Idris v Malaysia Debt Ventures, the judge justified on the basis of the agreement where in the event of default, the financial institutions is allowed to proceed concurrently on both the principal debtor and the guarantors, treating both as the same. The guarantor liability in such case is equivalent to the principal debtor liability. The same goes with the case of Kuwait Finance House (M) v Koperasi Perkhidmatan Berhad where KFH has acted in accordance to the financing facility agreement which give them the power to do so in the default clause. There is no issue of non-compliance on the bank's side as their act is in accordance to the agreement and the current law.

Discussion

Both cases give rise to the issue of justice to the Islamic financing customer. Realization of securities under the Murabahah account is not the main issue here as such action is permitted under the shariah principles. In the customers eyes, the issue of fairness emerges as by right the financial institutions should have had exhausted all recovery effort against the principal debtor as the principal debtors used the financing and gain direct benefit from the financing. The act is in accordance to the common laws and should be treated with respect. Nevertheless, a view which protects individuals particularly the guarantor should be considered wisely. In Islam, the wellbeing of the poor is always a priority in order to gain social harmony. Nevertheless, the new amendment on the Bankruptcy (Amendment) Bill 2016 where social guarantors cannot be made bankrupt suggest the improvement on the well-being of the guarantor who has done it voluntarily.

Conclusion

The paper's main theme is on the recovery of Murabahah financing in the event of default. The objective of this paper is to investigate the recovery issues on Murabahah financing in Malaysia, specifically on the recovery via court cases. The objective is answered through descriptive analysis and content analysis. The recovery activities performed by the IFIs are normally in line with the terms

and conditions under the contract agreements. All the risk mitigation measures secured by the IFIs will be taken to recover the amount outstanding. This includes execution against the guarantors under kafalah concept and disposal of the collateral (rahn), normally in the form of cash or landed property. Restructuring and settlement agreement were also part of the recovery action done by the IFIs. The results suggest that the issue on tad'widh, murabahah restructuring and guarantees is of common weight while the issue on ibra was also important lately. Apart from this recovery issues, it was noted that failure to adhere to the guidelines formulated by the regulator persists and heavy reliance on common laws is unavoidable and continue to be the subject matter. Future research should further discuss on the efficiency of the recovery activities and discuss the area of developing Islamic banking laws appropriate to cater for the issues discussed herein.

Corresponding Author

Amirudin Mohd Nor
Faculty of Business and Management
Universiti Teknologi MARA, Melaka, Malaysia
Email: amirudinmohdnor@gmail.com

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