



Moratorium in Islamic Hire Purchase Financing: A Shariah Perspective

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ABSTRACT - This study examined the implementation of moratorium in the Islamic hire purchase financing based on Al-Ijarah Thumma Al-Bay' (AITAB) from the Shariah perspective. The implementation of moratorium by Bank Negara Malaysia (BNM) is a new practice in the banking and finance industry in Malaysia. Implementing the moratorium causes several changes to the AITAB contract such as the extension in contract tenure and the increase in the total payment obligation due to the profit charged on the outstanding principal. This study analysed these changes from the Shariah perspective by using the *al-takyif al-fiqhi* methodology. The results of the analysis confirm the practice of moratorium by IFIs is in line with the Shariah requirements as long as it is agreed by the parties to the contract - which are the bank and the customer. Needless to say, both Ijarah Policy Document and Hire Purchase Act 1967 allow any forms of amendments including profit compounding when the AITAB contract is restructured, provided that such amendments are agreed between the contracting parties. Despite this permissibility, IFIs are still required to comply with the new ruling issued by SAC BNM that prohibits the practice of profit compounding during the COVID-19 crisis. Although, in principle, the ruling is based on the concept of *ihسان* (beneficence) which is not compulsory (*wajib*) but rather recommendation (*istihbab*) from the Shariah perspective; however, from the regulatory perspective the ruling is compulsory for IFIs to comply pursuant to section 28(1) and 28(2) of Islamic Financial Services Act 2013 (IFSA) that stated compliance with Shariah means compliance with any ruling of the Shariah Advisory Council. The moratorium is seen as a manifestation of the concept of *ihسان* (beneficence) towards the customers who are affected financially due to the COVID-19 pandemic. This commendable effort should be encouraged and continued by the Islamic financial institutions in upholding the Shariah principle of *maslahah* and lifting of difficulties (*raf al-haraj*), particularly in the current outbreak of COVID-19 and the impact of MCO.

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INTRODUCTION

Following the spread of COVID-19 globally, the Malaysian government has implemented several strategies to prevent the pandemic from spreading. Among the strategies taken was the Movement Control Order (MCO), which was a national compulsory lockdown for all government and private premises, including economic activities except for ten sectors identified as essential services, starting from 18 March until 31 December 2020 (Majlis Keselamatan Negara, 2020). Due to the compulsory lockdown of all economic activities, a large number of Malaysians were affected financially particularly those who work as informal labourers and daily earning workers (Hasbullah & Rahman, 2020; Rahman et al., 2020). This was confirmed through the press release by Bank Negara Malaysia (BNM) which stated that the Malaysian economy contracted by 17.1% in the second quarter of 2020 which reflected the unprecedented impact of the lockdown measures to control the COVID-19 pandemic (Bank Negara Malaysia, 2020a).

In attempting to ease the burden of a large number of Malaysians affected financially due to the lockdown in which all economic activities were ordered to closed, on 25 March 2020, the Malaysian government announced the implementation of the moratorium to all customers of banking institutions for six months starting from 1 April 2020 until 31 September 2020 (Bank Negara Malaysia, 2020e; Mohd Dali et al., 2020). The moratorium implementation covers all financing products (except for credit cards) for both retail customers and small and medium enterprises (SMEs). Vehicle financing products based on AITAB fall under the scope of the moratorium.

The implementation of moratorium in the Islamic hire purchase financing based on AITAB causes changes to the contract such as the extension of financing tenure and the increase in the total payment obligation. These changes raised questions about the status of the instalments or rental payments and their deferment from the Shariah perspective, whether it is allowed or otherwise. If it is allowed, how would the implementation take place in a manner within the permissible boundaries of the Shariah? Do the changes in the Ijarah financing contract's terms require mutual agreement and consent from the bank and customer? These questions will be answered in this study by discussing the mechanism of moratorium and its application in AITAB-based financing products. The study continues by deliberating the Shariah issues that arise in the implementation of moratorium in the Islamic hire purchase financing based on AITAB. These issues include the Shariah perspective on moratorium, customer's consent, increase in total payment obligation and Shariah compliance from the regulatory perspective.

LITERATURE REVIEW

Islamic Finance and Moratorium

A moratorium can be understood as a temporary suspension of activity until future considerations permit the suspension to be lifted. These considerations include situations whereby the issues that led to the moratorium have been resolved, and therefore, the need for the moratorium no longer exists. A moratorium can be imposed by the regulator, the government or a business entity. In terms of application, moratoriums are usually imposed concerning temporary financial hardships. For instance, a business might place a moratorium on new employment until the beginning of its next fiscal year due to exceeding the allocated budget (Hayes, 2020). In the context of the banking and finance industry, a moratorium can be imposed to relieve the financial burden of individuals or customers caused by a crisis such as the COVID-19 pandemic.

According to the FAQs on the Deferment Package and Conversion Package by BNM dated 21 April 2020, a moratorium refers to:

“a temporary deferment or suspension of loan/financing payment obligation (principal and interest/profit) for a limited period of time. During this period, borrowers/customers with loan/financing that meet the conditions do not need to make any payment, and no late payment

charges will be imposed. Borrowers/customers will need to honour the deferred payments in the future. Loan/financing repayment resumes after the deferment period and if such repayments are not fully settled when due, late payment penalties will be imposed” (Bank Negara Malaysia, 2020b)

The moratorium implementation was scheduled to start from 1 April 2020 until 31 September 2020 for all customers of banking institutions (Bank Negara Malaysia, 2020e). With this automatic moratorium that applies to all customers, it covers the complete spectrum of customers irrespective of their financial capabilities (Ali & Ismail, 2020), including those affected by the pandemic and those who were not. In applying the moratorium for the aforementioned period, this study classifies it as the moratorium’s first stage. Due to the prolonged COVID-19 pandemic, the moratorium was implemented again after 31 September 2020. However, this time its implementation was more targeted to the retail customers and SMEs that were financially impacted, starting from December 2020 (Bank Negara Malaysia, 2020h). This study classifies this moratorium as the second stage.

For the first stage, several takeaway points were summarised from the various publication by BNM related to deferment of payment obligation for financing (Bank Negara Malaysia, 2020b, 2020g, 2020f, 2020c) as listed below:

1. Scope of customer: The moratorium is applied to retail customers and SMEs only, which excludes corporate customers from the scope of customers eligible for the moratorium. Therefore, it is at the related financial institution’s discretion to grant a moratorium to their corporate customers.
2. Duration of implementation: The moratorium is implemented for six months, starting from 1 April 2020 until 30 September 2020.
3. Financing criteria: The moratorium will only involve financing denominated in Malaysian ringgit and financing not overdue exceeding 90 days as at 1 April 2020. This criterion excludes any financing denominated in a currency other than the Malaysian ringgit. The same applies to the financing classified as default, which is overdue for more than 90 days.
4. Mode of offering: The moratorium is offered to retail customers and SMEs automatically if they are eligible without the need for an application. However, customers have the choice to opt out of the moratorium by informing their respective financial institutions.
5. Types of financing products: All financing products are subject to the moratorium except for credit cards. Thus, vehicle financing products are part of the moratorium implementation.
6. Financial institutions involved: All financial institutions licensed by BNM will participate in the moratorium. Therefore, financial institutions not licensed by BNM such as AEON Credit Service (M) Berhad, Toyota Capital Malaysia Sdn. Bhd., credit offered by cooperatives and licensed money lenders are not obliged to grant a moratorium to their customers and borrowers.
7. Accrued profit on deferred instalments: For customers of Islamic financial institutions (IFIs), the accrued profit will only be charged on the outstanding principal of the deferred instalments, not on the outstanding profit to avoid compounded profit. For borrowers of conventional financial institutions, the accrued interest will be charged on the deferred instalments, including outstanding principal and outstanding interest. Hence, interest is compounded during the deferment period. This causes the borrowers of conventional

financial institutions to pay higher interest as compared to the customers of IFIs, as illustrated in the Figure 1 below.

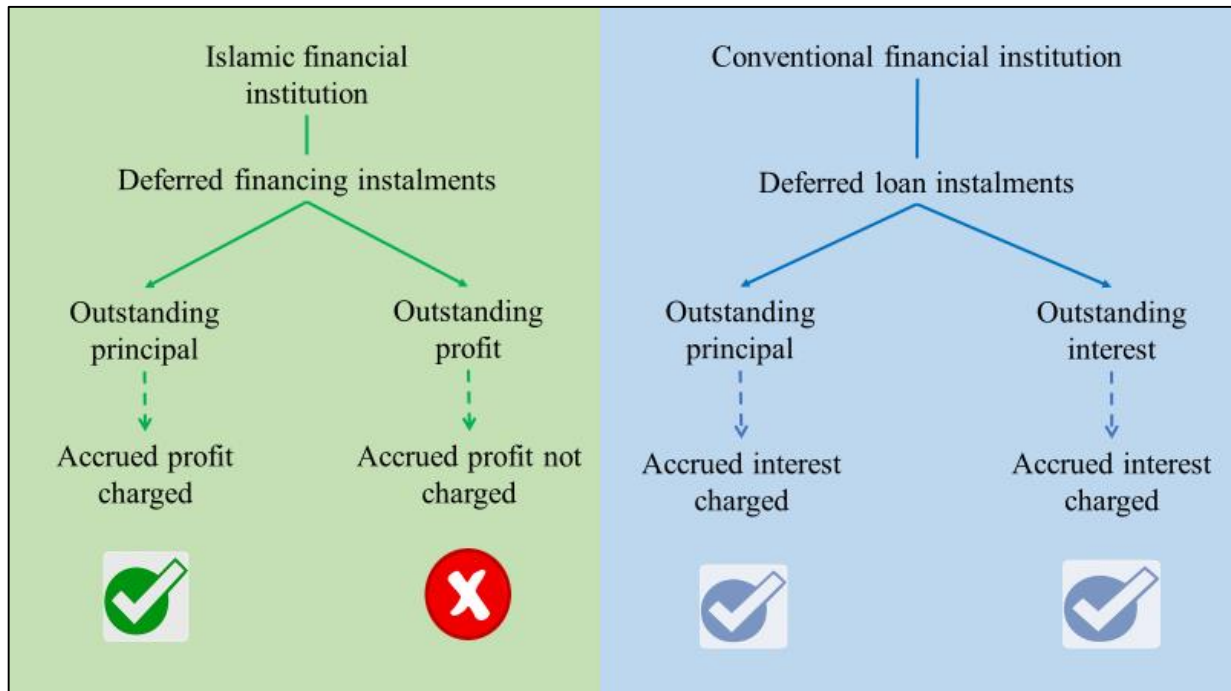


Figure 1: Difference in Accrued Profit/Interest for Islamic and Conventional Financial Institutions in the Implementation of Moratorium

8. Changes in the original contract: The total deferred instalments and accrued profits will cause several changes to the original contract such as (1) increase in total payment obligation or (2) extension in contract tenure for 6 months or both.
9. Repayment plan: Bank Negara Malaysia does not specify the repayment plan after the implementation of the moratorium. Consequently, this results in different repayment practices among financial institutions.

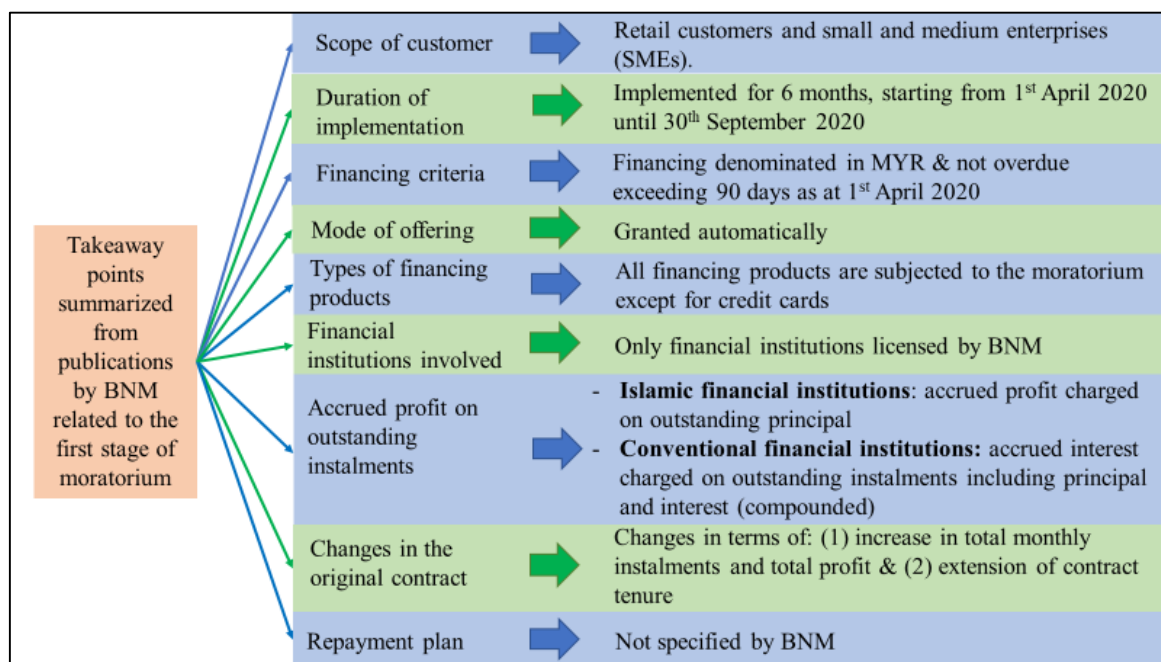


Figure 2: Takeaway Points Summarised from Publications by BNM Related to the First Stage of the Moratorium

The figure above highlights the takeaway points summarised from publications by BNM related to the first stage of the moratorium. There is a slight difference in the implementation of the moratorium for the second stage of moratorium compared to the first stage. These differences are identified in the following three aspects (Bank Negara Malaysia, 2020h):

- a) **Scope of customer:** The scope of customers is targeted in a sense that emphasis is given to the retail customer from the B40 segment (those who receive the *Bantuan Sara Hidup* (BSH) or *Bantuan Prihatin Rakyat* (BPR) assistance from the government) and microenterprises, as defined by SME Corp.
- b) **Duration of implementation:** The moratorium is extended with two options for customers. The first option allows for three months with full instalments deferment, similar to the first stage of the moratorium, while the second option allows for six months with partial instalments up to 50% reduction.
- c) **Mode of offering:** Eligible customers are required to apply for the moratorium through the confirmation of repayment options with their respective financial institutions. This means that the second stage of the moratorium is not offered automatically, unlike the moratorium's first stage.

The Moratorium Mechanism in The Islamic Hire Purchase Financing Based on Al-Ijarah Thumma Al-Bay' (AITAB)

The previous section discussed the moratorium mechanism and its implementation by BNM for all the financing and loan facilities. This section focuses on the moratorium mechanism for Islamic hire purchase financing products based on AITAB. Based on the various publications by BNM regarding the moratorium, several aspects are identified in the implementation of the moratorium in AITAB that will be discussed from the Shariah perspective.

The first aspect is the determination of the Shariah principle regarding the deferment of instalments or payment obligation by the customer. In the first stage of the moratorium, the

deferred instalments consisted of six months of full instalments, while the second stage of the moratorium consisted of either three months of full instalments or six months of partial instalments (50% reduction). Although both stages of the moratorium differ in the portion of instalments (either in full or partially); one common feature observed is the deferment of payment obligation in the AITAB contract. Hence, this study elaborates the Shariah principle that can be applied whenever the payment obligation in the AITAB contract is deferred.

The second aspect is about getting the customer's consent. Although the first stage of the moratorium was implemented automatically, unlike other loan or financing facilities, the moratorium for hire-purchase loans and Ijarah vehicle financing need to comply with the procedural requirements Hire-Purchase Act 1976 and Shariah requirements applicable to any changes made to the terms of agreement. These requirements involve formalising the agreements between the bank and the customer to reflect the changes in payment terms due to changes in the payment schedule and amount arising from the moratorium (Bank Negara Malaysia, 2020f). This results in the additional steps that the respective financial institution needs to take to formalise the agreements with their borrowers and customers through the process below:

- i. Borrowers and customers will receive a notification from their respective financial institutions via SMS, email or registered mail on the steps that need to be taken to complete the formalisation of the agreement;
- ii. The respective financial institution will provide specific details to each borrower and customer regarding the changes to the terms of agreement; and
- iii. Information provided by the financial institutions to their borrowers and customers should contain information such as the revised payment schedule and any changes to the amount of payment obligation, including the accrued interest or profit charged during the moratorium

An observation has been conducted online to survey the financial institutions' practices regarding the formalisation of agreement. A review on three banks' websites¹ in Malaysia shows that the banks require an official confirmation from their customers to participate in the moratorium. Failing to provide official confirmation by the customers will imply that they are not interested in participating in the moratorium². Besides that, the moratorium terms are disclosed to the customers through the banks' websites³. Similar to the first stage of the moratorium, the customer's consent is also required in the second stage of the moratorium. However, for the second stage of the moratorium, customers are required to sign a new financing agreement with their respective financial institution to indicate their official confirmation (Bank Negara Malaysia, 2020h). The process for both first and second stages of the moratorium for Ijarah vehicle financing products based on AITAB shows that IFIs must secure the consent from their customers in the implementation of the moratorium.

The third aspect is the profit calculation mechanism for the revised total payment obligation due to the implementation of the moratorium. The revised total payment obligation resulted from the accrued profit charged on the outstanding principal during the moratorium period. As mentioned in the previous section, generally, for all Islamic financing facilities, accrued profits are imposed on the outstanding principal only; contrary to the conventional loan facilities which charge accrued interest on both outstanding principal and interest. Initially, the accrued profit and interest are charged to the Ijarah vehicle financing and hire-purchase loan similar to other Islamic financing and conventional loan facilities. However, this position was later revised following the

¹ These three banks are Maybank, Public Bank and CIMB Bank.

² Retrieved from Maybank website: https://www.maybank2u.com.my/iwov-resources/pdf/personal/announcement/2020/FAQ-HP_ENG_20200612.pdf, assessed on 13th January 2021; and Public Bank website: <https://apply.pbekbank.com/PBRnR/HPB40faq>, assessed on 13th January 2021

³ Retrieved from CIMB Bank website: <https://www.cimb.com.my/content/dam/cimb/personal/documents/help-support/covid-19-support/faq/financing-relief-for-consumer-loans-faq-bm.pdf>, assessed on 13th January 2021

minister of finance's statement, which stated that there will be no additional charges imposed specifically for the Ijarah vehicle financing and hire-purchase loans during the first stage of the moratorium (Yi, 2020).

Therefore, it is clear that no accrued profit is charged on the Ijarah vehicle financing products based on AITAB, which means there are no changes on the financing instalment for the first stage of the moratorium. However, for the second stage of the moratorium, BNM did not explicitly mention the accrued profit charged on the deferred instalments (Bank Negara Malaysia, 2020h). Nonetheless, a review of three Islamic banks' websites⁴ in Malaysia shows that profits are indeed imposed on the deferred instalments. Hence, the second stage of the moratorium will increase the total payment obligation due to the imposed profits. This study will discuss this aspect in light of the Shariah to determine whether the imposition of profit is in line with the Shariah principles and how profits are calculated for the Ijarah vehicle financing products based on AITAB in the second moratorium.

METHODOLOGY

This study employs *al-takyif al-fiqhi* approach in analysing the implementation of the moratorium in Islamic hire purchase financing based on AITAB from the Shariah perspective. *Al-takyif al-fiqhi* is defined as “a process to determine relevant Islamic law (*fiqh*) on emerging issue or new incident based on existing or established Islamic law (*al-asl al-fiqhi*) due to the similarity of between the new issue and the established Islamic law” (Muhammad Uthman Shubair, 2014). It is also defined as a method to apply the established Islamic law (*fiqh*) on the new issues due to the similarity of scope between the new issues and the established Islamic law (*fiqh*) (Khairuldin et al., 2020).

In understanding the implementation of moratorium in AITAB, references used include publications of BNM and selected Islamic financial institutions, journal databases, classical Islamic jurisprudence writings and books, Shariah ruling issued by Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), and other established bodies on Islamic Finance are referred to and included in the analysis process and websites are referred to and included in the analysis process. Overall, this study assesses the implementation of moratorium in Malaysia's banking and finance industry from the Shariah perspective, specifically for Islamic hire purchase financing based on AITAB, by looking into specific issues relating to the revised contract terms in the financing facility.

Scope and Limitation

The moratorium implementation covers all financing products (except for credit cards) for both retail customers and small and medium enterprises (SMEs). Financing products in the Islamic banking and finance industry are structured based on a wide range of contracts including sale-based contracts such as Tawarruq, Murabahah Purchase Order (MPO), Bai Bithamanin Ajil (BBA) and Ijarah as well as equity-based contracts such as Musharakah and Mudharabah. The Shariah requirements for every contract differ from one contract to another and as a result, each financing product may require a distinctive operational process for any changes in the contract to ensure the contract remains Shariah compliant. The implementation of moratorium unequivocally caused some changes to the financing contract, therefore the scope of this study focused on the implementation of moratorium for Ijarah contract specifically in the case of vehicle financing.

⁴ These three banks are Maybank, Public Bank and CIMB Bank. Information retrieved from Maybank website: https://www.maybank2u.com.my/iwov-resources/pdf/personal/announcement/2020/FAQ-HP_ENG_20200612.pdf, assessed on 13th January 2021; Public Bank website: <https://apply.pbcbank.com/PBRnR/HPB40faq>, assessed on 13th January 2021; and CIMB Bank website: <https://www.cimb.com.my/content/dam/cimb/personal/documents/help-support/covid-19-support/faq/financing-relief-for-consumer-loans-faq-bm.pdf>, assessed on 13th January 2021

RESULTS

Moratorium from a Fiqh Perspective

As explained in the previous section, a moratorium refers to the deferment of financing obligation. In this study's context, financing obligation was fully deferred for six months in the first stage of the moratorium and for the second stage, it can be fully deferred for another three months or partially deferred for another six months. Looking from an Ijarah contract's perspective, deferment of financing obligation or instalments refers to deferment in rental payments that are agreed upon at the beginning of the contract for a fixed period. The discussion of Islamic jurisprudence scholars on deferment in rental payment would be the reference point in deciding the Shariah principle applicable in this situation. Ibnu Qudamah al-Maqsiidi explained in his book "*al-Mugni Li Ibn Qudamah*":

فَصَلُّ: الْحُكْمُ السَّادِسُ، أَنَّهُ إِذَا شَرَطَ تَأْجِيلَ الْأَجْرِ، فَهُوَ إِلَى أَجَلِهِ، وَإِنْ شَرَطَهُ مُنْجَمًا يَوْمًا يَوْمًا، أَوْ شَهْرًا شَهْرًا، أَوْ أَقَلَّ مِنْ ذَلِكَ أَوْ أَكْثَرَ، فَهُوَ عَلَى مَا اتَّفَقَا عَلَيْهِ؛ لِأَنَّ إِجَارَةَ الْعَيْنِ كَبَيْعِهَا، وَبَيْعُهَا يَصِحُّ بِمَنْ حَالَ أَوْ مُؤَجَّلًا، فَكَذَلِكَ إِجَارَتُهَا.

If he (the lessor) stipulates that the rental should be postponed, then it is for him to decide. And if he stipulates the instalments to be paid daily, or monthly, or for a period less or more than that, then it is up to what they have agreed. Because the rental of an asset is akin to the sale of an asset, if the sale of an asset permits its price to be paid immediately or in deferment, then so is the payment of its rental (Qudamah, 1968). Based on Ibn Qudama's opinion, it can be concluded that deferred rental payment is allowed similar to deferred sale payment. However, this permissibility is conditional upon the agreement and consent of the contracting parties, which is the lessor and lessee. This opinion is supported by Sayyed Sabiq as he explained in his book "*Fiqh al-Sunnah*":

ويصح اشتراط تعجيل الأجرة وتأجيلها كما يصح تعجيل البعض وتأجيل البعض الآخر، حسب ما يتفق عليه المتعاقدان لقول الرسول صلى الله عليه وسلم: "المسلمون عند شروطهم".

The requirement to advance and defer the rental payment as a whole is just as valid as the requirement to advance a portion of the rental and to defer the rest of the rental, as agreed by the contracting parties (Sabiq, 1977) based on the hadith of the Prophet "المسلمون عند شروطهم" which is translated as "the Muslims will be held to their conditions" (Al-Tirmidhi, 2007). In the context of this study, the term "conditions" in the hadith can be understood as the terms and conditions with regard to the rental in the Ijarah contract. Sayyed Sabiq's explanation also supports the permissibility of rental deferment in the Ijarah contract, stressing that it is conditional upon the agreement and consent of both contracting parties.

Although the discussion of both scholars refers to the agreement on the rental payment method between the contracting parties at the beginning of the contract formation, renegotiation between them can happen during the contract tenure to defer the rental payment to another time. This situation is allowed as long as both parties agree based on the hadith of the Prophet:

عَنْ دَاوُدَ بْنِ صَالِحِ الْمَدَنِيِّ، عَنْ أَبِيهِ، قَالَ: سَمِعْتُ أَبَا سَعِيدٍ الْخُدْرِيَّ، يَقُولُ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «إِنَّمَا الْبَيْعُ عَنْ تَرَاضٍ»

"I heard Abu Sa'eed Al-Khudri say: "The Messenger of Allah (PBUH) said: "Transactions may only be done by mutual consent." (Ibn Majah, 1952).

The above hadith clearly states that the Prophet PBUH prohibited any transaction with the element of compulsion or without the consensus of the contracting parties (Al-Sanadi, 1980). Thus, it can be said that the agreement or consensus element can be considered as a key element

in concluding any new contract or in making any changes to the terms of the existing contract. It goes without saying that although agreement or consensus is regarded, the key element in the contract and the essence of agreement or consensus itself must be in accordance with the Shariah principles, and should never contravene those principles. This is because the Prophet PBUH said in a hadith:

عَنْ أَبِي هُرَيْرَةَ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ» زَادَ أَحْمَدُ، «إِلَّا صُلْحًا أَحَلَّ حَرَامًا، أَوْ حَرَّمَ حَلَالًا» وَزَادَ سُلَيْمَانُ بْنُ دَاوُدَ، وَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «الْمُسْلِمُونَ عَلَى شُرُوطِهِمْ»

“Narrated by Abu Hurayrah: The Prophet (PBUH) said: Conciliation between Muslims is permissible. The narrator Ahmad added in his version: “except the conciliation which makes lawful unlawful and unlawful lawful.” Sulayman ibn Dawud added: The Messenger of Allah (PBUH) said: Muslims are on (i.e. stick to) their conditions.” (Abu Daud, 1900)

The hadith “المُسْلِمُونَ عَلَى شُرُوطِهِمْ” “Muslims are on their conditions” refers to the terms and conditions of a contract that are permissible as long as those terms and conditions are not *fasid* (invalid). The hadith also stresses that any terms or conditions stipulated in the agreement must be honoured by Muslims. The terms and conditions agreed can be formulated in various contracts whether it is an ownership contract, sale contract, lease contract, marriage contract and divorce contract (Al-San’ani, n.d.). Based on the discussion above, it can be concluded that Shariah permits the implementation of a moratorium in Ijarah financing if the moratorium is agreed upon by the lessor (the IFI) and the lessee (the customer).

Customer’s Consent

Following the discussion in the section which concluded that the Shariah permits the implementation of a moratorium in Ijarah financing if the moratorium is agreed by the lessor (the IFI) and the lessee (the customer), this section will examine how the customer’s consent is obtained and what is the Shariah’s view on the method used to obtain the customer’s consent.

For the first stage of the moratorium, the customer’s consent is obtained through the formal process carried out by the IFIs. A review on the websites of three banks⁶ in Malaysia shows that customers will receive a notification from their respective financial institutions via SMS, email or registered mail on the steps that need to be taken to complete the formalised agreement according to the respective financial institution’s decided method. On top of that, the terms of the moratorium are disclosed to the customers through the banks’ websites. From the Shariah perspective, formalising the agreement is in line with the Shariah principles which determine that any changes made to the original terms and conditions of the Ijarah contract require the agreement and consent from the contracting parties. This is in accordance with the Quranic verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالِكُمْ بَيْنَكُمْ بِلَيْطٍ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

“O you who have believed, do not consume one another’s wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.” (Al-Nisa, 4:29)

⁵ *Fasid* refers to “a forbidden term in a contract, which consequently renders the contract invalid”, retrieved from Islamic Finance News (IFN) website: <https://www.islamicfinancenews.com/glossary/fasid>, assessed on 13th January 2021.

⁶ These three banks are Maybank, Public Bank and CIMB Bank.

Disclosing the revised payment terms also conforms to the Shariah principles to ensure that any element of uncertainty (*gharar*) does not exist in the Ijarah contract to avoid dispute and disagreement between the two parties. Uncertainty (*gharar*) in a contract is prohibited based on the Prophet's hadith:

عَنْ أَبِي هُرَيْرَةَ، قَالَ: «نَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْخَصَاةِ، وَعَنْ بَيْعِ الْعَزْرِ»

It was narrated that Abu Hurairah said: "The Messenger of Allah (ﷺ) forbade Gharar transactions and Hasab transactions." (Ibn Majah, 2007)

According to Wahbah al-Zuhaily, uncertainty or *gharar* in sale transactions refers to the risk element that exists in a contract that will cause damage or harm to the subject matter of the contracting parties (Al-Zuhayli, 2008). In the first stage of the moratorium, disclosing the change in payment terms of the contract is imperative so as to create awareness to the customers that participation in the moratorium will result in changes to the original contract such as extension in contract tenure without affecting the payment terms. For the second stage of the moratorium, the customer's consent is required to conclude a new agreement, which usually refers to a supplemental document that is cross-referenced to the original contract. This is because unlike the first stage of the moratorium, there are changes in terms of extension in contract tenure and increase in the revised total financing instalments due to the profit charged on the outstanding principal. According to the Shariah principle, the customer's consent to the changes in the contract should be agreed mutually and reflected through the *ijab* (offer) and *qabul* (acceptance) verbally, in written form or by conduct (Al-Mausu'ah Al-Fiqhiyyah, 1984). This principle is based on the legal maxim:

لا ينسب إلى ساكت قول

"No statement is imputed to a man who keeps silence" (Majallat Al-Abkam Al-Adliyyah, n.d.).

As a general rule, article 67 of the *Majallat al-Abkam al-Adliyyah* quoted above states that silence is not considered as an expression of confirmative desire or intention (Stovall, 2014). Therefore, the requirement imposed by the IFIs for the customers to sign a new financing agreement indicating their official confirmation is deemed to be in accordance with the Shariah principle that aims to achieve mutual assent and avoid dispute and disagreement between the contracting parties.

Increase in the Total Payment Obligation

The second stage of the moratorium has led to changes in the terms of the original contract with regards to the increase in the total payment obligation due to the profit charged on the outstanding principal. From the Shariah perspective, it cannot be stressed further that any changes to the contract's payment terms are subject to the agreement of the contracting parties (Shaharuddin, 2020). This is because the majority of *fiqh* scholars have classified the Ijarah contract as a *lazim* (binding) contract based on the Quranic verse (Qudamah, 1968):

أوفوا بالعقود

Fulfil (your) obligations (al-Maidah, 5:1)

From the Quranic verse above, it is understood that all obligations that were agreed upon in the original Ijarah contract terms must be fulfilled. Therefore, any changes to the contract terms, including the increase in the total payment obligation would require a new agreement or consensus from the contracting parties. Hence, in the context of a moratorium, the increase in the total

payment obligation is allowed by the Shariah provided that the bank and the customer agree with the changes.

Moving on to the next discussion, as an increase in the total payment obligation is allowed from the Shariah standpoint, the profit calculation mechanism for the revised total payment obligation needs to be clarified. There are two main considerations concerning the profit calculation mechanism: the compounded profit and the profit on debt that may be tantamount to *riba* (*usury*).

For the first consideration, regarding compounding profit, the permissibility for the increase in Ijarah financing instalments by the Shariah is general in nature and is not confined to any specific component in the instalment, be it the principal portion or the profit portion. With that being said, in principle, accrued profit can be capitalized to the new principal amount under the new restructured account and charged with the new profit rate which may lead to the increase in the instalment amount or total payment obligation. This practice is supported and endorsed by the Shariah Advisory Council (SAC) of BNM through the publication of the Ijarah policy document which is stated under the heading Rental, number 14.6: “The contracting parties may, from time to time, mutually agree to revise the rental of the leased asset” (Bank Negara Malaysia, 2018). This affirms that the Ijarah financing instalments may be revised (either increase or decrease) subject to the contracting parties’ mutual consent.

However, in the COVID-19 situation, the SAC of BNM has taken proactive *ijtihad* in approaching the compounding profit matter. Contrary to the general permissibility explained above, the SAC of BNM has prohibited the IFIs to calculate the accrued profits in the original contract as part of the revised principal as part of the instalments of the Ijarah financing products based on AITAB. This is to prevent profit from being compounded to the customers. Accrued profits can be added to the revised amount of payment obligation but it cannot be capitalised or compounded (Bank Negara Malaysia, 2020i). The figure below illustrates the profit calculation mechanism for Ijarah financing to determine the revised amount of payment obligation. It highlights the difference between accrued profits being compounded and the accrued profits being added without any compounding or capitalising.

As observed from the Figure 3 below, with the profit compounding method, the outstanding principal amount (10k) is added to the accrued profit during moratorium (5k) and becomes the new principal amount (15k) which will be the base value for the profit rate calculation. Using this method, the revised amount of payment obligation is 27k. Compared to the profit non-compounding method, whereby the accrued profit (5k) is not part of the base value for the profit rate calculation, the revised amount of payment obligation is much lower at 23k. This shows that profit calculated with the compounded method will increase the payment obligation, therefore worsening the customers’ financial positions which are already severely affected by the COVID-19 pandemic. Thus, the approach taken by SAC of BNM to prohibit the compounding of profit is based on the principle of *ibsan* considering *maslahah* (public interest) and *raf` al-haraj* (the removal of hardship) to ease the financial burden of customers as intended by the implementation of moratorium.

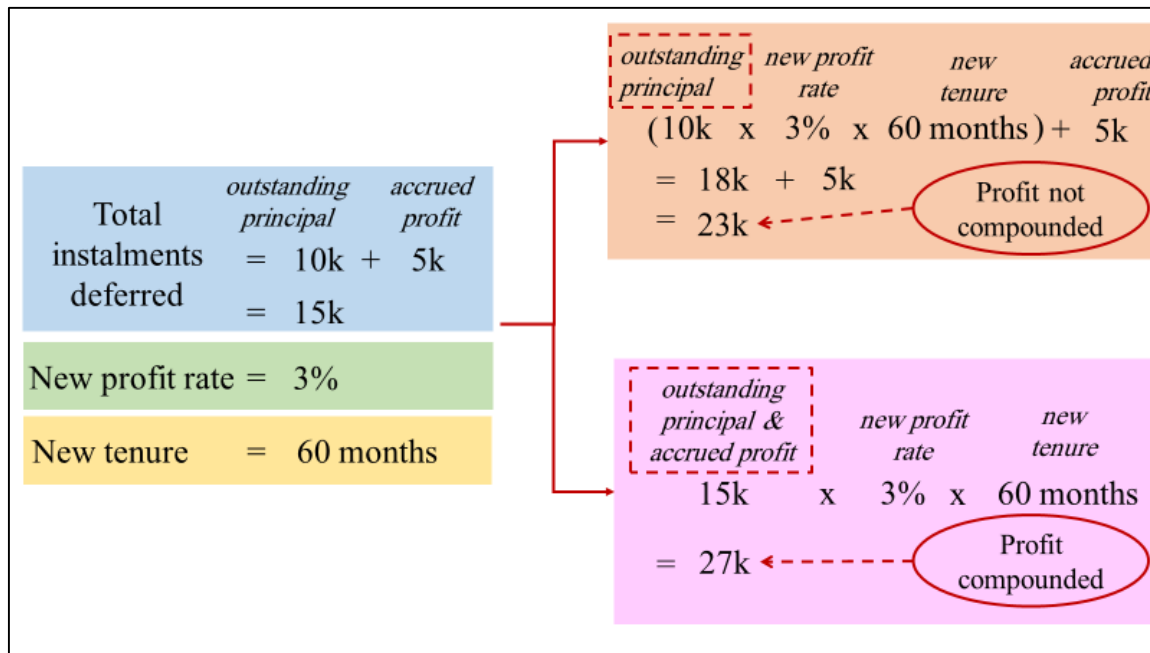


Figure 3: Profit Calculation Mechanism for the Deferred Instalments for the Second Stage of the Moratorium

In reference to the principle of *ihsan* used as the basis of the SAC BNM ruling on the prohibition of profit compounding, such basis is in line with the hadith from the prophet Muhammad PBUH that recommended the practice of *ihsan* in the *Muamalat* (transaction):

رَجِمَ اللَّهُ رَجُلًا سَمَحًا إِذَا بَاعَ وَإِذَا اشْتَرَى وَإِذَا اقْتَضَى

May Allah's mercy be upon the mild-mannered man in his buying, selling, receiving and judging (Miuhammad, 2001)

According to Ibn Battal, every Muslim is recommended to tolerate in their *Muamalat* (transaction), show good manners and avoid difficulty in the Bai' (Sale) contract ('Ali ibn Khalaf, 2003). It shows that the act of tolerance or *ihsan* is not compulsory (*wajib*) from fiqh perspective but rather *Istihbab* (recommendation). This is also supported from the discussion made by fiqh scholars in their book such as *Al-Majmu' Syarh Al-Muhbazzab* where the author has discussed the above hadith on tolerance (*samahah*) under the topic of *Istihbab* (recommendation) (Abu Zakaria, 1995). Other *fiqh* scholars also discussed the above hadith under the topic of *Adab al-Bai'* (manners in sale transaction) which denotes that the act of tolerance is not compulsory from fiqh point of view (Al-Khin et al., 1992).

Based on the above discussion, it can be concluded that the implementation of non-profit compounding by IFIs during the COVID-19 crisis not only to comply with the Shariah requirements from fiqh perspective but also taking into consideration the principle of *ihsan* as promoted and recommended by Islam. In addition to that, this approach is appropriate in providing assistance without adding more burden to the affected customers.

The second consideration concerning the profit calculation mechanism is the profit on debt that may be tantamount to *riba'* (*usury*). From the Shariah perspective, outstanding rental payments in an ordinary Ijarah contract is considered debt. On that note, the outstanding instalments (as long as not overdue exceeding 90 days as of 1 April 2020) prior to the moratorium

period for Ijarah financing based on AITAB are also equitable to debt. Hence, any profit charged on debt is tantamount to *riba* which is prohibited by Shariah. Zayd Ibn Aslam explained:

عَنْ زَيْدِ بْنِ أَسْلَمَ أَنَّهُ قَالَ: “كَانَ الرَّبَا فِي الْجَاهِلِيَّةِ، أَنْ يَكُونَ لِلرَّجُلِ عَلَى الرَّجُلِ الْحَقُّ إِلَى أَجَلٍ، فَإِذَا حَلَّ الْأَجَلُ، قَالَ: أَتَقْضِي أَمْ تُرَبِّي؟ فَإِنْ قَضَى أَخَذَ، وَإِلَّا زَادَهُ فِي حَقِّهِ، وَأَخَّرَ عَنْهُ فِي الْأَجَلِ

Zayd ibn Aslam said, “Usury in the Jahiliyyah was that a man would give a loan to a man for a set term. When the term was due, he would say, ‘Will you pay it off or increase me? If the man paid, he took it. If not, he increased him in his debt and lengthened the term for him.’” (Malik, 1985).

In order to avoid the issue of *riba* that arises from the profit charges on debt (outstanding instalments), the revised amount of payment obligation must not include the outstanding instalments as part of the revised principal. Abu Sattar Abu Ghuddah also explained that the revised instalments based on the contracting parties’ agreement and consent must not affect the deferred instalments (Ghuddah, 1998). The Shariah standards published by the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) also state:

يجوز باتفاق الطرفين تعديل أجرة الفترات المستقبلية أي المدة التي لم يحصل الا لانتفاع فيها بالعين المؤجرة أما أجرة الفترات السابقة التي لم تدفع فتصبح ديًّا نا على المستأجر، ولا يجوز اشتراط زيادته

“The amendment of future rentals is permissible by the agreement of both parties, i.e., the period for which the lessee has not yet received any benefit. The rentals of any previous periods which have not yet been paid become a debt owed to the lessor by the lessee, therefore cannot be increased” (Accounting and Auditing Organization for Islamic Financial Institutions, 2015).

From the statement above, the AAOIFI standard specifies that the outstanding instalments, which is considered debt, cannot be increased. Therefore, no profit should be charged on the outstanding instalments. Instead, IFIs are required to ensure that the outstanding instalments must be calculated separately and then added to the revised payment obligation. This is to avoid the occurrence of *riba* in the transaction which is prohibited by Shariah.

Shariah Compliance from the Regulatory Perspective

The previous section has discussed the Shariah issues that arise with the implementation of moratorium in the Islamic hire purchase financing based on AITAB. This section continues with the discussion of Shariah compliance from the regulatory perspective. This discussion is equally important and relevant as the businesses and activities of IFIs in Malaysia are subject to the Islamic Financial Services Act (IFSA) 2013. Section 28(1) of IFSA 2013 states that one of the duties of IFIs is to “ensure that its aims and operations, businesses, affairs and activities are in compliance with Shariah” (Islamic Financial Services Act 2013, 2013). The meaning of Shariah compliance is explained in Section 28(2) as follows:

A compliance with any ruling of the Shariah Advisory Council in respect of any particular aim and operation, business, affair or activity shall be deemed to be a compliance with Shariah in respect of that aims and operations, business, affair or activity (Islamic Financial Services Act 2013, 2013).

Section 28(2) of IFSA above shows that compliance with Shariah requirements by IFIs is fulfilled when IFIs comply with the rulings of the SAC of BNM and its Shariah standards (Laldin & Furqani, 2018). In the context of AITAB, complying with the Shariah requirements as discussed

above from *fiqh* perspective is not complete without looking into the ruling on Restructuring and Rescheduling of Islamic Financing Facility during COVID-19 Crisis and Ijarah Policy Document issued by SAC BNM.

As the effect of the first and second stages of moratorium involve the extension of financing tenure, the revision of the tenure is subject to the agreement from the customer. This is clearly stated in the Ijarah Policy Document under the lease period heading, paragraph 17.3: “variation to the period of the *ijarah* contract is subject to the mutual agreement of the contracting parties”. Hence, the formalization process performed by the IFIs during the first stage moratorium and execution of a supplemental letter of offer for the second stage of moratorium not only fulfil Shariah requirements from *fiqh* perspective but also complies with the Shariah standards issued by BNM in the Ijarah Policy Document.

With regard to the effect of the second stage of moratorium relating to the profit calculation mechanism for the revised instalment or total payment obligation, Ijarah Policy Document stipulates under the rental heading, paragraph 14.6: “The contracting parties may, from time to time, mutually agree to revise the rental of the leased asset”. Hence, the requirement to obtain the customer’s consent on the revision of the instalment amount (rental) is fulfilled when the Supplemental Letter of Offer is executed. In fact, a review of the Ijarah Policy Document shows that there is no clause or paragraph in the policy that specifies any method to calculate the profit for restructuring exercise. In other words, the Ijarah Policy Document doesn’t prohibit the practice of profit compounding in Ijarah financing hence gives flexibility to the IFIs to practise profit compounding when restructuring the AITAB contract (Bank Negara Malaysia, 2018).

Apart from the Shariah requirements mentioned in the Ijarah Policy Document, the AITAB contract is also subjected to the Hire Purchase Act 1967 that governs all hire purchase agreements be it Islamic or conventional. As for the revision of hire purchase contract, regardless of whether the revision is related to the tenure or instalment amount, Hire Purchase Act also requires consent from the customer to be obtained on any revision or amendment to be made to the hire purchase agreement particularly in the context of moratorium (Mat Ali et al., 2021; Shaharuddin, 2020). The initial announcement on moratorium did not require any formalization with the customer, however, BNM later in time instructed IFIs to perform the formalization process on the customer’s consent on the first stage of moratorium. This process meets the legal requirement as stated in the Hire Purchase Act 1967 under Section 39 which requires any amendment by the owner to the hire purchase agreement shall be subject to the consent and agreement from the hirer (Hire-Purchase Act 1967, 2016). In fact, the act stressed that any alteration or amendment to the hire purchase agreement without the consent of the hirer shall have no effect or force from legal perspective (Hire-Purchase Act 1967, 2016). Therefore, although the first announcement on moratorium mentioned that it was automatic without requiring proper consent or formalization to be made, nonetheless, the customer’s consent is required as per the provision stated in the Hire Purchase Act 1967 specifically for all AITAB financing. As for the profit compounding, section 39 of the Hire Purchase Act 1967 does not specify any method to calculate the profit during restructuring exercise but rather give blanket approval to amend the contract provided that such amendments are agreed by the hirer or customer.

Needless to say, both Ijarah Policy Document and Hire Purchase Act 1967 allow any forms of amendments including profit compounding when the AITAB contract is restructured, provided that such amendments are agreed between the contracting parties. Despite this permissibility, IFIs are still required to comply with the new ruling issued by SAC BNM that prohibits the practice of profit compounding during the COVID-19 crisis (Bank Negara Malaysia, 2020d). Although, in principle, the ruling is based on the concept of *ihسان* which is not compulsory (*wajib*) but rather recommendation (*istihbab*) from Shariah perspective; however, from the regulatory perspective the ruling is compulsory for IFIs to comply pursuant to section 28(1) and 28(2) of IFSA that state compliance with Shariah means compliance with any ruling of the Shariah Advisory Council.

CONCLUSION

Based on the discussion and analysis presented above, it is safe to conclude that the implementation of moratorium conforms to the Shariah principles which allow the extension in the AITAB contract tenure and increase in the total payment obligation with the agreement from the contracting parties. The extension of tenure is classified under the deferment (*ta'jil*) of rental payments in the discussion of Shariah scholars on Ijarah. Meanwhile, the increase in total payment obligation falls under the permissibility for revision in Ijarah rental payments in Shariah discussion. This legitimacy is general in nature and does not confine the revision in Ijarah rental payments to any specific profit calculation method, whether it is profit compounding or non-compounding. Despite the flexibility to employ any profit calculation method in the revision of the Ijarah rental payments, in the context of the COVID-19 crisis, IFIs are prohibited by SAC BNM to practice profit compounding. This prohibition is based on the concept of *ihsan* (beneficence) which is recommendation (*istibbab*) in nature from the Shariah perspective; however, from the regulatory perspective, the concept of *ihsan* (beneficence) is made compulsory (*wajib*) for IFIs considering *maslahah* (public interest) and *raf' al-haraj* (the removal of hardship) to ease the financial burden of customers. According to section 28(1) and 28(2) of Islamic Financial Services Act 2013 (IFSA), it is stated that compliance with Shariah means compliance with any ruling of the Shariah Advisory Council, therefore IFIs must abide by the rulings of the SAC that prohibits the profit compounding. In achieving the moratorium's intended outcome, which is to ease customers' financial burden, IFIs forgo their rights to practice profit compounding. This commendable act of practising *ihsan* in alleviating the customers' burden could be extended to situations other than COVID-19, of which customers are affected financially.

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