



## TA'WIDH: AN ANALYSIS OF ISSUES ARISE IN LIGHT OF RECENT DECIDED CASES IN MALAYSIA

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### ABSTRACT

This study investigates the issues that have come into light in regards to the application of Ta'widh and Gharamah by the Islamic financial institutions (IFIs) in Malaysia. The concept of charging penalty on customers who failed to make repayment of Islamic financing as scheduled has been introduced by the Bank Negara Malaysia (BNM) through their guideline in 1998 but the concept of Ta'widh and Gharamah was introduced in 2010 and only in 2012 that the guideline which explains the method of calculation of the Late Payment Charge (LPC) which consists of Ta'widh and Gharamah was introduced. The application of LPC, especially Ta'widh which is allowed by the BNM to be included in profit distributable to the depositors and investors has to be treated by the IFIs with utmost precautions as mistakes in the application may expose the IFIs towards the risk of Shariah Non-compliance (SNC). The study adopts a qualitative method of study where data which is the reported court cases were obtained from online databases such as Lexis Advance Malaysia and CLJ Law and journal articles that helps in the process of analysing the data were acquired from results in search engines such as Google and Google Scholar. This study suggests that the knowledge in Ta'widh and Gharamah is yet to be fully acquired by the contracting parties. In hope to play a part in the development of the Islamic finance industry in Malaysia, the study is significant in ensuring any discrepancy between the issuance of SAC BNM's regulations and its application by the IFIs is addressed and consequently helps in reducing the risk of SNC.

**Keywords:** Ta'widh, Gharamah, Case Analysis

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### BACKGROUND OF RESEARCH

Generally, the role of Shariah Advisory Counsel, Bank Negara Malaysia (SAC BNM) is to advise BNM on Shariah matter and validating the Islamic banking and takaful products to ensure its compliancy to Shariah. SAC BNM will produce resolutions and guidelines from time to time or whenever there are issues of Shariah law in regards to the Islamic banking that need to be addressed. The IFIs are then obliged to refer to and adhere to the resolutions and guidelines in order to maintain the Shariah compliancy of their products and institutions as





a whole. However, producing resolutions and guidelines alone will not be effective in the effort to ensure these IFIs are Shariah compliant. This is because, it is the application of these resolutions and guidelines by the IFIs that will decide whether Shariah law is truly observed. Therefore, this study intends to act as an examiner, to see if the IFIs apply the resolutions and guidelines in a correct manner. In optimising the finding of this study, legal actions brought to court are analysed, which this study believes will reflect the current issues faced by the IFIs and their customers. This is also supported by the study of Nor et al. (2020) who has analysed six Murabahah cases and found that Ta'widh is one of the issues disputed in court together with Murabahah restructuring and guarantees, followed by the issue of ibra'. Nevertheless, from the two elements of LPC in the SAC BNM Guideline, more focus will be given to discussion on Ta'widh as the issue seems to hold more harm, considering that it can be used as profit and distributable to the depositors.

## LITERATURE REVIEW

### Ta'widh and Gharamah

Penalty for default in payment in Islamic banking has been firstly introduced by the SAC BNM in 1998 via their letter to the relevant financial institutions or also referred to as the BNM Guideline 1998, the terms 'Ta'widh' and 'Gharamah' were not specifically mentioned in the 1998 Guideline but the IFIs were highly encouraged to charge the penalty according to actual loss incurred by the IFIs. They were also required to give consideration to default cases which involved defaulters who are facing financial problem. The guideline also mentioned that it is the prerogative right of the banks to not charge penalty. Later, the BNM in their resolution has defined Ta'widh and Gharamah as "Ta'widh refers to claim for compensation arising from actual loss suffered by the financier due to the delayed in payment of financing/debt amount by the customer. Whilst Gharamah refers to penalty charges imposed for delayed in financing/debt settlement, without the need to prove the actual loss suffered." Then, in 2012 SAC BNM has produced a guideline on Late Payment Charges for Islamic Banking Institutions (2012 BNM Guideline) which explains that the Late Payment Charge applicable by the IFIs is the combination of Ta'widh (compensation) and Gharamah (Penalty) where IFIs may charge the customer on either one or both.

According to the guideline, the IFIs are eligible for compensation up to the amount of actual loss incurred as a direct result of delay in repayment or default by customers subject to the reference rate provided. It is also stated that the Ta'widh earned shall be included in the profit distributable to depositors or investment income holders while Gharamah need to be channelled to charity. Besides, a research paper by Norazlina and Ridzwan (2019) had stated that Ta'widh can also be understood as agreed fine by parties of contract as compensation for the creditor when the customer fails or delays in his obligation to repay the debt. From the definition given above, it can be understood that Ta'widh as introduced by the SAC BNM is a compensation that can be claimed by IFIs subject to the provided reference rate, situation of the customers in default and based on the actual loss incurred caused by their customers default or delay in repayment of financing.

From the perspective of history, there is a hadith by Prophet Muhammad ﷺ which stated "Procrastination (delay) in paying debts by a wealthy man is injustice. So, if your debt is transferred from your debtor to a rich debtor, you should agree." According to Ezani et al. (2014) the hadith justifies punishment for delayed payment of debt by a rich person, injustice from the hadith is also translated as 'tyranny' and types of punishment for tyranny are lashing, imprisonment, or financial penalty. From the view of contemporary Islamic scholars, some of the scholars allow late payment charge if it does not permit the unlawful and vice versa, and





agreed willingly by the parties. However, it needs to be highlighted that their view on late payment charge can be divided into three groups which are, it is in the form of financial penalty, the financial penalty needs to be channelled to charity and no penalty should be imposed (Sina Ali Muscatti 2006-2007; Ezani et al. 2013; Ezani et al. 2014; Norazlina and Ridzwan 2019).

For the first view, Norazlina and Ridzwan (2019) stated that Mustafa Al-Zarqa, Wahbah Al-Zuhayli and Muhammad Taqi Al-Uthmani among others, together with majority of Shari'ah committee in Islamic banks has opined that financial penalty for default in payment is allowed and can be considered as income to the banks. They agreed to the idea of financial penalty based on *masalih mursalah* as has been stated in the resolution of SAC BNM, in preventing malicious customers who purposely delay the repayment and harm the IFIs. Then, the second view is that the financial penalty be channelled to charity. Institutions or scholars settled with this opinion in order to avoid involving the IFIs with usury or Riba'. Thirdly, where some Muslim scholars who prohibits such penalty being enforced onto the customers, Sina Ali Muscatti (2006-2007) mentioned that a significant number of scholars interpret the Shari'ah law to the extent that any kind of late payment penalty will tantamount to Riba'. They are of the view that the Prophet Muhammad ﷺ had known on the risk of default in payment but never mention on the exemption of Riba' in dealing with such matter, they believe that alternatives should be taken in dealing with default in payment such as client screening.

### **Application in Contract**

In Malaysia, matters regarding Islamic banking and finance fall under the jurisdiction of civil courts where discussions also include transactional laws such as Contracts Act 1950 and Evidence Act 1950. Thus, as a mean of compliance, IFIs introduced clause on late payment charge in their contracts to reflect the impact of late payment. Islamic contract law has similar application where as a method to mitigate risks in order to cope with the development of Islamic banking, *syart jazaie* which means 'a penalty clause in a contract that stipulates an agreed amount of money to be paid to a counterparty if the other counterparty is late in fulfilling a given contractual obligation' is introduced as a way to hold parties responsible in fulfilling their obligations in a contract (Aishath Muneeza et al. 2019).

### **Reported Court Cases**

In Malaysia, the existence of dual judicial systems whereby the civil court co-exist with the Shariah court has previously give confusion to most of the people when it comes to which court will have the jurisdiction over Islamic banking matters. However, this matter has become a settled law after several judgements given such as in the High Court case of Mohd Alias Ibrahim v RHB Bank Berhad & Anor where the learned judge explained any law concerning finance, trade, commerce and industry falls within the ambit of the Federal List in List I, Ninth Schedule to the Federal Constitution. It is also supported in another Court of Appeal case of Bank Kerjasama Rakyat Malaysia Bhd v EMCEE Corporation Sdn Bhd where Tun Abdul Hamid Mohamad (the former Chief Justice) laid down the reasons why Shariah court is not a competent forum to adjudicate Islamic banking and finance cases.

It is interesting to observe on any differences in the treatment of Ta'widh and Gharamah by the court before and after the introduction of LPC. However, from the two online databases used in this study, despite the earliest BNM guideline on penalty of default in payment was in 1998, the court cases which significantly discussed on the issue of late payment charge only started in 2011. However, it should be noted that there are some of the financing agreements that were entered into by the parties in the court cases, before the existence of the 2012 BNM Guideline or even before the 1998 BNM Guideline. Other than that, generally it can be





observed that the disputes regarding Ta'widh that were brought to court involved millions of Ringgit Malaysia where the amount of Ta'widh claimed will also be amounting to thousands or millions of Ringgit Malaysia. It is also worth to mention that none of the reported cases has mentioned on issues in regards to Gharamah other than a few simple explanations on what is Gharamah which were mostly extracted from the resolutions or guidelines of the BNM.

This study has observed that there is a group of cases which accommodate the argument on wrong calculation of Ta'widh by the IFIs, other than the two cases that have the issue of Ta'widh charge was inconsistent to the financing agreement, while the balance of the cases carry their own issue which are whether Ta'widh capped at date of winding order, the admissibility of document consisting Ta'widh, the Ta'widh charge imposed was conflicted with BNM Guideline and whether the IFIs can charge Ta'widh.

**Wrong calculation of Ta'widh by the IFIs.** This study has come to notice that the amount of financing involved in these cases is significantly huge where most of the IFIs were claiming millions of Ringgits of outstanding amount from their customers in default. Instinctively, the amount of Ta'widh claimed by the IFIs was also huge where more often than not will be amounting to hundred thousand or even millions of Ringgits. Hence, extreme care ought to be put on the calculation of Ta'widh claimed as the miscalculation on this matter will leave a massive loss to the afflicted party.

In an appeal case of Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd and Another Appeal, the Appellant in this case had appealed on the decision of the High Court which earlier had decided that the calculation made by the Respondent was right however, the decision was later repealed by the Court of Appeal. The appellant in this case has made repayment of the outstanding amount before the maturity date of the financing which inclusive of the Ta'widh charge as requested by the respondent. Nevertheless, the issue in this case was on the rate of Ta'widh that should be charged on the outstanding balance by the respondent.

The Court of Appeal has agreed that the rate used should have been 1% instead of the other Islamic Interbank rate (IIMM). The extra amount that was required to be refunded to the Appellant was around RM 5 million. It is clear that the appellant would incur a significant loss if there were no appeal and the superior courts had disregarded the learned High Court judge's ruling. This is concerning given that the money is already being dispersed to the depositors.

Meanwhile in the Court of Appeal case of Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor, it is where the learned High Court judge in the earlier decision had disallowed Ta'widh to be charged due to the Court was of the view that respondent has not defaulted. In the appeal, the respondent claimed that the appellant has charged Ta'widh retrospectively and that the calculation of Ta'widh was erroneous. However, the Court of Appeal allowed the appellant's claim on the customary practices of the industry where IFIs have been allowed to charge penalty for late payment since 1998 although guideline on Ta'widh and Gharamah was only introduced in 2012. Therefore, as the respondent has breached the terms of contract by not completing the repayment within the stipulated time, it gives the appellant the right to charge Ta'widh in the event of default of the repayment of financing by the respondent.

Subsequently, in the High Court case of CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor, the defendant in this case argued that the calculation of Ta'widh by Plaintiff is compounded. The court in this case has mentioned on the 1998 BNM Guideline and uphold that the calculation was correct by following the rate stated by BNM guideline and the court also uphold the agreed terms on Ta'widh by the contracting parties in the letter of offer. The judgement of this case has been upheld by the High Court case of Bank Pertanian Malaysia Berhad v Maple Amalgamated Sdn Bhd and anor where in replying to the claim that the Ta'widh claimed was excessive, the learned high court judge stated that "In my view, the





Plaintiff has merely exercised their right to impose Ta'widh in the present case which is pursuant to Section 73 of the Asset Sale Agreement (ASA)".

Therefore, it can be seen that in the claim of wrong calculation of Ta'widh, as long as the clause in regards to Ta'widh that has been agreed by the parties does not contradict to the Shariah, or in this context the BNM guideline, then the court ought to honour the terms of the contract. Nevertheless, some exception such in the case of Pan Northern was based on the facts of the case.

**Ta'widh charge was inconsistent to the financing agreement.** In the case of Bank Muamalat Malaysia Bhd v Ten-Tel Construction Sdn Bhd & Ors, the Plaintiff in this case was applying for Summary Judgement against the Defendant. The application was dismissed by the learned High Court judge as he found triable issues to be tried including the matter of Ta'widh. The Defendant in this case argued that the Ta'widh claimed by the Plaintiff was not in accordance to the Facility Agreement. The learned judge stated that the Ta'widh claimed was not wholly adhered to the clause 5.5.2 of the BNM Guideline, the Plaintiff has not produced the actual calculation and the exact amount of overdue principal sum is unverifiable because there is an issue of *ibra'*. The learned judge also stated that "a provision for compensation of Ta'widh in section 3.17 of Facility Agreement which is not identical to that provided in the BNM Guidelines."

Different from the treatment of the same issue in the case of Pan Northern, where in that case the agreement was signed by the contracting parties even before the introduction of 1998 BNM Guideline. Thus, no provision regarding Ta'widh was mentioned in the agreement. Therefore, the Court of Appeal in this matter decided that, a notice should have been issued by the Respondent (IFIs) in order to inform the Appellant (borrower) beforehand in regards to the charging of Ta'widh.

**Ta'widh capped at date of winding order.** In Bank Islam Malaysia Berhad v Abu Talib Bin Mohamed, the Defendant raised the question on whether the Ta'widh claimed by the Plaintiff ought to be capped as at the date of the winding order made. The court held that pursuant to clause 2.6 of the financing agreement, the Defendant is liable to pay Ta'widh. The court has relied on section 8 (2A) of the Bankruptcy Act where it is applicable to a secured creditor in relation to a winding up situation and a secured creditor is only entitled to charge interest after the date the company is wound up if the secured creditor realised the charged property within 6 months after the date of the winding up order was made. Therefore, in quoting Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd, which mentioned that 'the same law applicable to conventional banking also applicable to Islamic banking', the learned judge in this case is of the view that the principles of section 8 (2A) of the Insolvency Act applies to this case in respect of imposition of Ta'widh. The court also mentioned that "The Ta'widh charged by the Plaintiff as seen from the statement of account is at the date of Order for Sale granted which is actually not the date of full payment because the Charge has yet to be realized. Thus, the Defendant is not prejudiced.

**The admissibility of document consisting Ta'widh.** In the case of Small Medium Enterprise Development Bank Malaysia Berhad v Armada TPCE Sdn Bhd & Ors, the Summary Judgement applied by Plaintiff was granted by the High Court. However, it is worth mentioning on the argument raised by the Defendant in regards to the inadmissibility of Exhibit CJL-1 of Enclosure 13, which is a printout of the Islamic Interbank Money Market (IIMM) rate for 2.12.2019 to 31.12.2019 from the Bank Negara Malaysia website. The Defendant contended





that the exhibit was inadmissible by virtue of Section 81 of Evidence Act 1950 “Presumption as to Gazettes, newspapers, etc.” because the Defendant has relied on a judgement in *Usama Industries Sdn Bhd v Jati Bahagia Sdn Bhd* [2009] 1 LNS 713 saying that “there was no evidence that the documents were kept in the form required by law and they were not produced from the proper custody of a person authorized to do so as required by section 81 of Evidence Act 1950”. The said Enclosure 13 was said to be a part of the Plaintiff’s Certificate of Indebtedness and the court ought to reject the same. However, the court found that the rate stated in Enclosure 13 will not be used in calculating the Ta’widh rate as the date of the IIMM will not be up to date when the calculation of Ta’widh using the IIMM rate is done in the future. Thus, it will not affect the validity of the Certificate of Indebtedness.

**The Ta’widh charge imposed was conflicted with BNM Guideline.** The Defendant in the 2021 case of *Mega First Marketing Sdn Bhd & Anor v OCBC Al-Amin Bank Bhd* contended that the Ta’widh claim in the letter of offer was inconsistency with the BNM Guideline. However, after the comparison made between the Ta’widh claimed and the BNM Guideline, the Ta’widh claimed was in compliance with the guideline and the Defendant’s argument was unsustainable.

**Whether the IFIs can charge Ta’widh.** Finally, in the case of *MK Associates Sdn Bhd v Bank Islam Malaysia Berhad*, the financing agreement was entered into by the disputed parties in 1994 which was before the 1998 BNM Guideline which first introduced the concept of penalty/compensation for default in payment, no terms on Ta’widh or whatsoever was included in the agreement and the Defendant has never mentioned to the Plaintiff on the facts that they are charging Ta’widh against the Plaintiff. Both experts of the Plaintiff and Defendant have the same opinion on definition of Ta’widh and permission to impose late payment charges by the IFIs. However, the expert of the Plaintiff was of the opinion that the Defendant in applying Ta’widh must have acted fairly and justly. She opined that the Plaintiff must be made known of that the Plaintiff is subjected to Ta’widh and its rate before the Ta’widh was charged. While, the Defendant’s expert was of the opinion that it is the right of the Defendant as the lender to charge Ta’widh and it is not a condition precedent to a valid contract.

Having taken into account both opinions from the experts, the learned High Court judge decided to rely on the opinion of the expert of Plaintiff where her opinion was heavily substantiated compared to a skeletal opinion given by the expert of the Defendant. Therefore, the Defendant was not allowed to charge Ta’widh on Plaintiff. In addition to the issue of notice, in the 2020 Court of Appeal case, *Pan Northern Air Services Sdn Bhd v Maybank Islamic Bhd* and Another Appeal, in regards to situation where the Ta’widh is agreed but the IFIs decided to make a change in the rate, the court has mentioned that “As for the BNM Guideline 1998 being silent on the need to give notice for the rate set for the Ta’widh, all it simply means is that in the absence of any Guideline on the giving of notice, then the contractual requirement of notice for any change in the Ta’widh has to be followed unless the Bank is imposing the contractually agreed rate of 1% per annum”.

**Significant reasoning of the learned judges.** In the case *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor*, the learned Hamid Sultan JCA in delivering supporting judgment of the court mentioned that the learned judge in the previous court should have considered that the unilateral reduction of the banking facility made by the IFIs has given and adverse impact on the borrower and the borrower was suffering loss and damages due to the inequitable action of the IFIs and that it is against the Shariah principle. The learned judge has also erred in failing





to hold that the action of unilaterally reducing the facility has not follow the Equitable Principles of the Holy Quran.

Other than that, in the case of *Mega First Marketing Sdn Bhd & Anor v OCBC Al-Amin Bank Bhd*, the learned High Court judge has mentioned that “The courts have consistently taken a disapproving view of customers of Islamic based facilities who have benefited from the facilities taken and then avoid their payment obligations by raising the issue that the Islamic financing facilities granted are non-Shariah compliant, as the Plaintiffs are doing in the present case.” From these two statements, the study derives that despite the fact that the same law applicable to Islamic banking matters, it is not to be ignored that the soul or values of the Islamic law need also be infused in the decision made by the learned judges in respect of deciding Islamic banking cases.

A general observation from all of the reported cases is that, there is space for improvement in regards to the understanding of Ta’widh and this study agreed with a conclusion of Nor et al. (2020) in one of the cases on Ta’widh from their paper that “This indicates the lack of awareness from the practitioners on the guidelines issue by the regulator. The situation could lead to injustice to the IFIs customers due to excessive penalty claim.” This also concerns every party involves, ranging from the customers receiving financing, counsels for parties in dispute, IFIs and also the learned judges. This is because, despite the resolutions and guidelines provided by the SAC BNM, understanding on the resolutions and the guideline itself might be challenging to many people. Some of the Ta’widh issues that were argued in the court cases involved technical understanding of Shariah law. This is exemplified from the issue on wrong calculation of Ta’widh by the IFIs. The study identified that the solution or the judgement for some of the cases are obtained after reference made to the 2012 BNM Guidelines and the judgement given was quite straight forward, like in the case of *Bank Pertanian Malaysia Malaysia Berhad v Maple Amalgamated Sdn Bhd* dan satu lagi, Defendant’s claim that the Ta’widh was excessive but was rejected because the calculation adhere to the BNM Guideline. Other than that, this study found that, cautious need to be taken in applying the civil law on Islamic banking matters. Especially when the Shariah law is not only about the law in its physical form, but the moral values and its spirit are also of equal importance. This is because, with due respect, the decisions made by some of the learned judges especially High Court case which was appealed to the High Court, were erred in a way that will harm the essential purpose or *Maqasid Shariah* under the ambit of essential purpose of Shariah which is the protection of wealth. This is because, when the learned judge decided Ta’widh cases with a wrong understanding of the applicable Shariah law, the Ta’widh amount will be interest for loan which will tantamount to Riba’.

Besides, from all of the issues discussed above, discrepancies may happen in the application of Ta’widh when human greed is involved. Basically, disputes pertaining to Ta’widh are brought up to the court of law by parties who were charged with it. Usually, legal suits will be firstly initiated by the creditors against customers who had default in making repayment of financing, the creditors then will include Ta’widh charge in their claim to court together with the outstanding amount and the customers in default will raised defence in regards to the Ta’widh charged. The argument of the customers in default varied depending on the facts of their case, some of the arguments were convincing and has help to bring light in the treatment of law related to Ta’widh but there were also some arguments of the customers that could be seen as simply an excuse for them to avoid paying the amount of Ta’widh charged. For example, when the defence raised was ‘wrong calculation of Ta’widh made by the IFIs and contradicts to the BNM guideline’, there was a situation where the customer could not prove to the court how the calculation was actually wrong.





## Issues and Challenges in the Application of Late Payment Charge

SAC BNM has laid down conditions for applying Ta'widh and it must be monitored as conditions are meant to be fulfilled or the application will be rendered invalid (Mohammad Firdaus Mohammad Hatta and Siti Akmar Abu Samah 2015) and consequently tantamount to Riba'. Zuhaira Nadiah Binti Zulkipli (2020) has listed down conditions in permitting Ta'widh and Gharamah by the SAC BNM which are firstly must be on exchange contracts and qard then secondly, it is imposed only after the settlement date became due. Thirdly, Ta'widh can be considered as income only if the compensation is for actual loss suffered by the institution and lastly Gharamah need to channelled to charitable bodies and not as income.

Sherin Kunhibava (2016) has also raised the issue of charging Ta'widh only on customers who delay due to negligence. She opined that the requirement of negligence as has been expressed in the SAC BNM resolution need to be fulfilled and some decisions of the court where Ta'widh were automatically allowed once default occurs is with due respect, wrong. The SAC BNM's guideline has also stated that "default or delay of payment is due to negligence", she contended that the wordings of 'due to negligence' has negates the rights of the Islamic banks to automatically charge Ta'widh to defaulting customers. In current practice, as she refers to the case reports, does not pay attention to the condition of the customers, Ta'widh were rewarded in those cases without taking into consideration the financial problems faced by the customers. Atikullah Abdullah (2018) has also expressed his disappointment when the difference of capable and incapable debtors is not mentioned in the guideline of the SAC BNM as they should be treated differently to suit their situations.

Other than that, literatures in discussing Ta'widh hardly touch on the requirements that need to be fulfilled in allowing IFIs to claim for Ta'widh against their customers. What can be extracted from the resolution and the Guideline of the SAC BNM is that there are two significant conditions that must be fulfilled in permitting Ta'widh which are firstly, the amount of Ta'widh claimed by the IFIs must be of direct actual loss incurred due to late payment by the customers. Secondly, IFIs should consider the situations of the customer, IFIs should consider not imposing late payment charges on customers who are facing genuine financial hardship or calamity (Sherin Kunhibava 2016).

Even though the term 'actual cost/loss incurred' is vastly used whenever Ta'widh is discussed, its actual meaning and how to determine the actual cost are yet to be the focus of the relevant literatures. Literatures discussing on what is meant by actual loss incurred as stated in the Guideline was hardly discovered. Perhaps the reference rate given by the Guideline has satisfy the need to understand how much can the Islamic Financial Institutions charge their customers for late payments as the rate is provided by the authority which is the SAC BNM. However, it is not to forget that even after the amount of Ta'widh is calculated using the reference rate provided and duly charged to the customers, the IFIs need to ensure that the amount taken is only of the actual loss incurred due to the delay in payment.

Nevertheless, the journal article of Azman Mohd Noor and Muhamad Nasir Haron (2016) is to be appreciated as they have made the initiative to point out this issue and discussed on the framework for determination of "Actual incurred cost" as they stated that there is no specific definition for the term *ta'widh fi'iliyah* or actual incurred cost. They stated that a number of Muslim scholars such as Sheikh Zaki Sha'ban and Muhammad Zaki Abd Al Bar opined that compensation must be equivalent to actual loss incurred and it is based on a Hadith of the Prophet ﷺ which is also referred to by the SAC BNM in their resolution. Furthermore, Atikullah Abdullah (2018: 39) mentioned that "Preventing oppression is an essential principle in maqasid shariah. Therefore, ta'widh is only allowed to compensate for the actual loss suffered by the creditor."





The argument can be further supported by the view of the majority of Muslim jurists whom have agreed that customers must borne the cost for documentation of the financing or loan, the debtor is considered responsible to bear the service charges and costs of loan that he receives. This is based on the Quranic verse (Quran, Al Baqarah: 282) “So let him write and let the one who has the obligation [i.e., the debtor] dictate”. Nonetheless, there is also issue on whether the service charges imposed is based on direct or indirect costs. This issue calls for a different view where AAOIFI and Fatwa of Shari’ah Committee of al-Rajhi Bank decided that only direct costs can be charged against the customer. Indirect charges such as the employees’ wages and the rent of the operating office will be considered as Riba’. While, Shari’ah Board for Dubai Islamic Bank permits both direct and indirect charges as the IFIs still have to bear all the costs and it will affect the financial institutions.

The concept of Ta’widh offers a vast discussion and its understanding is important in protecting transactions from Riba’. Even though late payment charge is allowed, industry players need to fully understand this concept before practising it or more conflicts will occur. From the decided cases as referred above, among the challenges faced during the application of LPC is calculating the amount of Ta’widh itself and determining the actual loss incurred for Ta’widh. Apart from that, IFIs may face shortage of resources to do the calculation and enforcement of Ta’widh and Gharamah, as well as low return compared to conventional financial institutions which can charge interest to their customers.

## RESEARCH METHODOLOGY

This study uses the doctrinal legal research in collecting secondary data which consist of primary and secondary sources of law. The primary source of law utilised in this research are reported case law and legislations that are obtained from the online databases. While, the secondary source of law used is the relevant journal article which the research found relatable to support its finding. The two main online databases used in this study are Lexis Advance Malaysia and CLJ Law which are also the preferred databases by the practitioners. In the effort of maximizing the results of search, key words used in both databases were, “Ta’widh”, “Ta’wid” and “Late Payment Charge”. For the purpose of observing the pattern of reported cases before and after the introduction of BNM Guideline 2012, the function of year filter was used and the result showed only one court case was reported before 2012 and the rest of the reported court cases are dated from 2012 and the most recent cases are of the year 2021. However, the most recent court case that was found in CLJ Law and reported in 2021 only mentioned on Ta’widh as the facts of the case and not a matter of dispute between the parties. In that case, Ta’widh was only mentioned because the Plaintiff in the case has claimed the balance of financing payable is included with compensation or Ta’widh, the matter was not further disputed by the parties.

In collecting information and further clarification while doing the analysis of the reported court cases, search engine such as Google and Google Scholar were also utilised as one of the methods for the collection of data. Both acquiring reported court cases from online databases and finding for relevant articles or news regarding Ta’widh from search engines were considered sufficient for the study as the objective of the study is to look for issues concerning Ta’widh in light of recent cases.

## CONCLUSION AND RECOMMENDATION

All in all, from the existing court cases concerning Ta’widh and Gharamah, it can be concluded that the number of disputes is not as many as expected by the study where there is an average of one court case reported every year. Nevertheless, close monitoring of these cases is still





needed as the amount involved in each of the case was huge and more importantly, the amount claimed for Ta'widh is allowed to be included in profit distributable to depositors and investors. Hence, this charge has to be carefully made in order to avoid any unwanted element of riba. This small number in reported cases related to Ta'widh and Gharamah then leads to the question of whether the implementation of Ta'widh and Gharamah by the IFIs in Malaysia is smooth sailing and effective or whether the IFIs and their customers have opted to alternative dispute resolutions such as arbitration and mediation. However, from a recent seminar in Islamic banking, Mr. Hizri Hasshan a legal practitioner who is actively involves with Islamic banking matters has mentioned that disputes on Islamic banking are still mainly filed in court rather than the other alternatives.

Other than that, after observing the amount of Ta'widh charged to the customers in the relevant court cases and the lack of discussions by the court on requirements that need to be fulfilled by the IFIs in charging Ta'widh such as charging only the actual incurred cost and to only charge on negligent defaulters, the study would like to suggest that a further study is needed in regards to the matter of Ta'widh, this paper recommends a study on the relationship between the miscalculation of Ta'widh by IFIs and its exposure to the risk of Riba'. It is important and interesting to see whether there is possibility that the ineffective charging of Ta'widh by IFIs will trap them into the prohibited element in Islamic law which is Riba'.

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