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

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

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

**Resolution**

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

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i. *Ta`widh* may be charged on late payment of financial obligations resulted from exchange contracts (such as sale and lease) and *qard*;

ii. *Ta`widh* may only be imposed after the settlement date of the financing became due as agreed between both contracting parties;

iii. Islamic financial institution may recognise *ta`widh* as income on the basis that it is charged as compensation for actual loss suffered by the institution; and

iv. *Gharamah* shall not be recognised as income. Instead, it has to be channeled to certain charitable bodies.

**Basis of the Ruling**

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

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

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

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

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

> لا ضرار ولا ضرار

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

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

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

iv. Fiqh maxim:

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الضرر يزال
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“Whatever harm should be removed.”\(^\text{144}\)

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

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\(^\text{143}\) Majmu‘ah Dallah Barakah, Qararat wa Tawsiyat Nadawat al-Barakah, 1985, 3rd Convention, resolution no. 3/2.