

THE 251ST SHARIAH ADVISORY COUNCIL OF THE SECURITIES COMMISSION MALAYSIA MEETING (13 DECEMBER 2021)

RESTRUCTURING OF SUKUK MUSHARAKAH: EXISTING SUKUK MUSHARAKAH AS CAPITAL CONTRIBUTION IN NEW SUKUK MUSHARAKAH

INTRODUCTION

There was an industry proposal on the restructuring of sukuk *musharakah* by issuing a new sukuk *musharakah*. In such proposal, the existing sukuk *musharakah* was terminated through constructive liquidation¹ and the existing sukuk *musharakah* was used as the capital contribution in-kind for the new sukuk *musharakah*.

Among the Shariah issues discussed in such proposal on restructuring of sukuk *musharakah* were as follows:

- (i) Whether the existing sukuk *musharakah* may be used as capital contribution in the new sukuk *musharakah*?; and
- (ii) Whether *qalb al-dayn*² arises in the situation where the existing sukuk *musharakah* which is terminated through constructive liquidation is converted into the new sukuk *musharakah*?

¹ Constructive liquidation refers to the actual valuation of the *musharakah* venture to be terminated on a specified date. From Shariah perspective, it is viewed in the context of *tandhidh hukmi* (constructive liquidation).

² *Qalb al-dayn* is referring to the conversion of an existing debt into a new debt.



RESOLUTION

The Shariah Advisory Council of the Securities Commission Malaysia (SAC) had, in its 251st meeting held on 13 December 2021 resolved on the issue of restructuring of sukuk *musharakah* as follows:

(1) Existing sukuk *musharakah* as capital contribution in the new sukuk *musharakah*

The existing sukuk *musharakah* which represents the identified assets under the existing *musharakah* venture may be used as capital contribution in-kind to form a new *musharakah* venture in the new sukuk *musharakah* subject to the following conditions:

- (i) The identified assets under the existing *musharakah* venture shall be assessed in monetary value; and
- (ii) The existing *musharakah* venture is terminated through constructive liquidation.

(2) *Qalb al-dayn* in the situation where the existing sukuk *musharakah* which is terminated through constructive liquidation is converted into the new sukuk *musharakah*

In the restructuring of sukuk *musharakah*, the issue of *qalb al-dayn* does not arise since it does not involve the conversion of an existing debt into a new debt. In such circumstance, the conversion that takes place only involves contribution of asset from the *musharakah* venture in the existing sukuk *musharakah* which is terminated through constructive liquidation into the *musharakah* venture in the new sukuk *musharakah*.



SHARIAH JUSTIFICATION

Shariah justifications for the SAC resolution above are as follows:

(1) Existing sukuk *musharakah* as capital contribution in-kind in the new sukuk *musharakah*

The SAC resolution in relation to this issue is based on and in line with the Islamic scholars' views as follows:


- (i) It is not required that a termination of contract (*faskh al-`aqd*) must be done through *tandhidh haqiqi*³ only. Termination of contract through *tandhidh hukmi* is also permissible if the item or the asset is assessed based on monetary value (*qimah al-naqd*) by expert valuer.⁴
- (ii) There is no Shariah impediment to perform *tandhidh hukmi*⁵ in order to determine or to distribute the *musharakah* profit in general.⁶ This is based on the hadith by Rasulullah ﷺ which permit the valuation of an item as follows:

³ *Tandhidh haqiqi/fi`li* is a conversion of an item into cash through the process of actual sale and purchase and which generate consideration in the form of cash or its equivalent. Hussien Hussien Syahatah, *al-Ahkam al-Fiqhiyyah wa al-Asas al-Muhasabiyyah Li al-Tandhidh al-Hukmi fi al-Mu`amalat al-Maliyyah al-Mu`asirah*, *Majma` al-Fiqh al-Islami, Rabitah al-`Alami al-Islami, daurah 16*, 5-10 January 2002 in Makkah al-Mukarramah, p. 23.

⁴ *Ibid.*, p. 29.

⁵ *Tandhidh hukmi* is a valuation of an asset or an item to obtain its expected monetary value (*al-qimah al-naqdiyyah*) if it is sold during the valuation of such asset or item. Abd al-Sattar Abu Ghuddah, *al-Tandhidh al-Hukmi fi al-Mu`amalat al-Maliyyah al-Mu`asirah*, *Majma` al-Fiqh al-Islami, Rabitah al-`Alami al-Islami, daurah 16*, 5-10 January 2002 in Makkah al-Mukarramah, p. 158.

⁶ *Majma` al-Fiqh al-Islami*, 92nd resolution (4/16), *al-Tandhidh al-Hukmi, daurah 16*, 5-10 January 2002 in Makkah al-Mukarramah, Abdullah al-Tayyar, *al-Fiqh al-Muyassar*, Madar al-Watan, Makkah, 2011, vol. 10, p. 76.



"مَنْ أَعْتَقَ شِرْكَاءَ لَهُ فِي مَمْلُوكٍ، فَعَلَيْهِ عِنْفُهُ كُلُّهُ إِنْ كَانَ لَهُ مَالٌ يَبْلُغُ ثَمَنَهُ، فَإِنْ لَمْ يَكُنْ لَهُ مَالٌ يُقَوِّمُ عَلَيْهِ قِيَمَةَ عَدْلٍ، فَأَعْتَقَ مِنْهُ مَا أَعْتَقَ"⁷

Meaning: "Whoever manumits his share of a jointly possessed slave, then it is essential for him to get that slave manumitted completely as long as he has the money to do so. If he has not sufficient money to pay the price of the other shares (after the price of the slave is fairly valued), the manumitter manumits the slave partially in proportion to his share."


(Hadith narrated by al-Bukhari)

- (iii) In the situation of *tandhidh hukmi*, the existing partnership is considered as terminated and the contracting parties in such partnership has entered into a new partnership where assets which are not sold through *tandhidh haqiqi* are valued through *tandhidh hukmi*. Such asset may be used as a *musharakah* capital contribution in-kind in the new partnership.⁸
- (iv) It is not required for a capital contribution in a *musharakah* by *musharik* (partner) to be in the form of cash only. The capital contribution in-kind is also permissible. However, the capital contribution in-kind must be valued based on the market price⁹ or mutually agreed price.

⁷ Al-Bukhari, *Sahih al-Bukhari*, hadis No. 2387, Tahqiq Syeikh Mustafa Bugha, Dar ibn Kathir, Dimasyq, vol. 2, p. 892.

⁸ AAOIFI, *al-Ma`ayir al-Syar`iyyah, al-Mi`yar al-Syar`i*, No. 12, *Musharakah*, 3/1/6/3, p. 334-335.

⁹ Imam Malik's view from Maliki school of thought (*mazhab*) and some Islamic scholars from Hanbali's *mazhab*, please refer; al-Dusuki, *al-Syarh al-Kabir li al-Syarh al-Dardir wa Hasyiyah al-Dusuki*, Dar al-Fikr, n.d., vol. 3, p. 349, Ibn Qudamah, *al-Mughni*, Maktabah al-Qaherah, 1968, vol. 5, p. 13, Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuh*, Dar al-Fikr, Dimasyq, 1997, vol. 5, p. 3893.



(v) Capital contribution provided by *musharik* into a *musharakah* venture must be readily available, identifiable and accessible at the time of execution of the *musharakah* contract. Therefore, debt is not permissible to be used as capital contribution in the *musharakah*.¹⁰

(2) *Qalb al-dayn* does not arise in the situation where the existing sukuk *musharakah* which is terminated through constructive liquidation is converted into the new sukuk *musharakah*

The issue of *qalb al-dayn* does not arise in the situation as highlighted above. This is because the existing sukuk *musharakah* is not categorized as debt. By virtue of the termination of the existing *musharakah* venture through *tandhidh hukmi*, the asset of the existing sukuk *musharakah* is used as *musharakah* capital in the new sukuk *musharakah*.

Sukuk *musharakah* basically refers to certificates of equal value evidencing the certificate holder's undivided ownership in the *musharakah* venture. Therefore, such sukuk is not considered as an indebtedness.

¹⁰ Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuh*, op.cit., p. 3890-3893.