



COVID-19 PANDEMIC: RESCHEDULING OR RESTRUCTURING OF FINANCING/LOAN FACILITIES WITH BANKING AND FINANCIAL INSTITUTIONS

Introduction

The current global economic continues to reel from uncertainties over the worsening coronavirus (COVID-19) outbreak. Amidst severity of COVID-19 pandemic in Malaysia, many banking and financial institutions in Malaysia have expanded assistance for their customers to help them ride out the adverse economic effect. The assistance is necessary as many businesses are severely affected especially after the Government of Malaysia (“**Government**”) has imposed the Movement Control Order (“**MCO**”) starting from 18 March 2020 until 31 March 2020 (subject to any further extension period by the Government).

Why the Need for Rescheduling or Restructuring

According to the Ministry of Finance, various special assistance, financing/loan facilities, restructuring facilities and a six months moratorium on businesses, small and medium enterprises (SMEs) and individuals have been provided. The assistance provided would be able to maintain business operations of SMEs, protect their jobs and encourage domestic investment (The Star, 20 March 2020).

From the banks’ perspective, the rescheduling or restructuring can help the banks to reduce non-performing facility portfolios, introduce immediate write-back of specific provision, and maximize credit recovery exercise as well.

As for the customers, rescheduling or restructuring can help them to ease their cash flow, allow continuity in their businesses and perhaps, avoid any legal action.

Moratorium

Moratorium refers to a deferment of payment installment by customers to banks, without any charges or penalty. Moratorium is part of the initiatives that have been introduced by banking institutions to offer relief to customers due to COVID-19.

In reference to the Credit Risk policy document issued by Bank Negara Malaysia (“**BNM**”) on 27 September 2019 (“**Policy Document**”), Paragraph 3 of Appendix 1 of the Policy Document clearly states that due to specific and exceptional circumstances (which may include COVID-19), the rescheduling and restructuring exercise may involve the granting of a moratorium on financing/loan repayments. BNM requires clear parameters to be established by banking institutions for the moratorium on financing/loan repayments.

Paragraph 4 of Appendix 1 of the Policy Document further states that when moratorium on financing/loan repayments is granted, the period of moratorium shall not be more than 6 months from the date of the customers’ application for the moratorium.

Overview of Rescheduling or Restructuring Exercises

1. Rescheduling

Rescheduling exercise refers to modification of financing/loan repayment terms whereby the principal terms and conditions of the financing/loan contract are not changed significantly. Rescheduling exercise normally only involves extending or lengthening the financing/loan tenure and revision of payment installments.

2. Restructuring

Restructuring exercise refers to modification of principal terms and conditions of the financing/loan, which may include change in the type or structure of the financing/loan or other significant change to its terms. Restructuring exercise may involve restructuring or conversion of the type or nature of the financing/loan such as overdraft to term financing/loan or from revolving financing/loan into non-revolving financing/loan. This exercise is to enable the customers to improve their cashflow and overcome financial difficulties.

Conventional Loan Facilities vs Islamic Financing Facilities

The process of rescheduling and restructuring of the conventional loan facilities may differ from Islamic financing facilities. BNM prescribes in the Policy Document for the banking institutions to ensure compliance with Shariah principles in respect of the rescheduling and restructuring of Islamic financing facilities.

1. Conventional Loan Facilities

Upon approval for the rescheduling or the restructuring exercise, the bank will normally issue a supplemental letter of offer or letter of changes to notify the borrower on the terms and conditions of the exercise.

Typically and if so required, a supplemental loan/facility agreement incorporating new repayment terms or new terms and conditions will be executed between the bank and the customer. Apart from the terms as amended and revised in the new supplemental loan/facility agreement, all other existing terms and conditions in the existing loan/facility agreement shall remain intact and valid.

The parties may also execute a supplemental agreement for each and every existing security documents (if so required) to reflect the new terms and conditions in respect of the rescheduling or the restructuring exercise while the other existing terms in the security documents shall remain valid and enforceable as continuing security for the payment of indebtedness under the loan facility.

2. Islamic Financing Facilities

Similarly, upon approval for the rescheduling or the restructuring exercise, the Islamic bank will also issue a supplemental letter of offer or letter of changes to notify the customer on the terms and conditions of the exercise.

According to the resolution of Shariah Advisory Council (“**SAC**”) of BNM, a new legal document to capture every variation of terms and conditions is required in rescheduling or restructuring of Islamic financing facility. This is due to the fact that Islamic finance emphasizes on mutual consent of contracting parties.

In restructuring a sale-based financing which involves sale agreement, the original sale must firstly be terminated (*fasakh*) before concluding the new agreement. To avoid the issue of double payment of stamp duty on the financing agreements, the SAC of BNM allows for the new agreement to cross refer to the original agreement provided that it is done after termination of the original agreement (26th meeting of SAC of BNM dated 26 June 2002).

Based on the above and the prevailing practice, for restructuring of a sale-based financing, a supplementary facility agreement will be executed between the bank and the customer and the parties will also execute new ‘aqad documents based on the applicable Shariah contract for Shariah-compliant purposes and to facilitate the restructuring exercise.

In respect of extension of financing period, the SAC of BNM has resolved that based on mutual agreement, the financing period may be extended without the need for a new contract, provided, *inter alia*, that the sale price imposed on the customer does not exceed the original sale price (32nd meeting of SAC of BNM dated 27 February 2003).

In respect of the security documents, similar to conventional loan, if so required, the parties will also execute a supplemental agreement for each existing security document to reflect the rescheduling or the restructuring exercise. The existing security documents shall remain valid and enforceable as continuing security for the payment of indebtedness under the Islamic financing facility.

Other Issues To Be Considered

1. Stamp Duty

For the rescheduling or restructuring of an Islamic financing facility, P.U.(A) 81 of the Stamp Duty (Remission) Order 2011 provides that the stamp duty on the instrument is remitted to the extent of the duty that shall be payable on the balance of the principal amount of the existing Islamic financing facility.

Apart from the above, based on item 22(2) of the First Schedule of the Stamps Act 1949, a nominal stamp duty not to exceed RM10 will be charged for the creation of the additional or supplementary agreement(s) where the principal instrument (i.e. the existing facility agreement) is duly stamped.

However, the actual stamp duty amount may be subject to the adjudication process and final determination by Lembaga Hasil Dalam Negeri (LHDN).

2. Registration at the Relevant Registries

If the parties are so required to execute supplemental agreement for each and every existing security documents, there will be no requirement for the registration of supplemental agreement for such security documents, including the registration of charge at the Companies Commission Malaysia, land registry and filing of power of attorney clause at High Court (where applicable) since the existing security documents are still valid and enforceable as continuing security for the financing/loan.

However, if the bank requires for the creation of a new or additional security by the customer or security party, a new security document will be executed between the parties and all requirements for the registration at the relevant registries need to be registered and perfected.

3. Consent from guarantor or third party security provider

Restructuring or rescheduling exercise may result in variation to the existing terms of the loan/financing facilities. Hence, the bank and/or the customer should obtain consent and/or acknowledgment from the guarantor or any third party security provider on any variation terms imposed by the bank in accordance with Section 86 (Discharge of Surety by Variance in Terms of Contract) of the Contracts Act 1950.

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OUR SERVICES

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