Muzakarah
on Failure Resolution of Islamic Financial Institutions

Shariah Discourse 01
Balancing Contractual Sanctity and Systemic Stability: Shariah Insights

Dr Marjan Muhammad
Deputy President Research,
ISRA Institute, INCEIF University

PIDM
Perbadanan Insurans Deposit Malaysia
Protecting Your Insurance And Deposits In Malaysia

Disclaimer

The presentation and discussion at the Muzakarah are purely for Shariah discussion purposes and do not reflect any policy intention or future regulation by PIDM. Any statements, viewpoints or opinions expressed at the Muzakarah and in the presentation slides are those of the respective presenters and audience member only and PIDM assumes no responsibility or liability for such statements, viewpoints or opinions.

OBJECTIVES OF RESEARCH

Muzakarah
on Failure Resolution of Islamic Financial Institutions

01

To **evaluate the contractual requirements** for the Shariah concept(s) to be applied during resolution, including but not limited to legal capacity (ahliyyah) of failed Islamic banks and consent mechanisms.

02

To **assess the permissibility of overriding ownership and contractual rights** under *siyasah shar'iyyah* and *maslahah 'ammah.*

03

To **identify possible Shariah issues** arising from forced transfer, conversion, or modification in assets and liabilities of failed Islamic banks during the resolution process.

SCOPE OF PRESENTATION

Muzakarah
on Failure Resolution of Islamic Financial Institutions

1.

CONTEXT SETTING

What is the takyif fiqhi of a non-viability trigger (NVT) that justifies PIDM to take control and start the resolution process?

2.

LEGAL CAPACITY (AHLIYYAH)

Does a failed Islamic bank continue to have ahliyyah?

3.

CONTRACTUAL RIGHTS: SHARIAH PERSPECTIVES

Can contractual rights & obligations be transferred, modified, or terminated without consent? Can the resolution authority override them?

4.

SHARIAH ISSUES

Application to the forced transfer, modification and conversion of Islamic financial contracts

Discussion 1

CONTEXT SETTING

POWERS OF PIDM IN CASE OF NON-VIABILITY OF MEMBER INSTITUTION

Muzakarah on Failure Resolution of Islamic Financial Institutions

MALAYSIA DEPOSIT INSURANCE CORPORATION ACT 2011

99. (1) Where the Corporation has received a notification under section 98, it may exercise one or more of the following powers:

(c) **assume control** of the whole or part of the assets, liabilities, businesses and affairs of the member institution, **carry on the whole or part of its businesses** and **manage** the whole or part of its assets, liabilities and affairs including disposal of its assets or businesses or any part thereof, or appoint any person to do so on behalf of the Corporation (in this Part referred to as "the appointed person") and the terms and conditions of the appointed person including the Corporation's directions to the appointed person, shall be determined by the Corporation and shall be binding on the member institution concerned;

PIDM assumes statutory power over the failed Islamic bank by:

i. Taking control of the IFI's business and affairs
ii. Managing its assets and liabilities
iii. Exercising the IFI's management powers
iv. Effecting the transfer of assets and liabilities
v. Overseeing the resolution process

TRIGGER POINTS FOR RECOVERY AND RESOLUTION

PIDM steps in to handle a failed member institution when Bank Negara determines that it is no longer viable.

Normal operating state
Risks remain within the institution's risk appetite and financial capacity, supported by routine internal risk-management and contingency frameworks.

Early intervention by the institution
Stress exceeds risk appetite, but the institution remains capable of restoring itself through recovery actions.

Regulatory intervention stage
Once the institution is no longer viable and cannot recover on its own, PIDM steps in as the resolution authority to resolve the failing institution

PIDM RESOLUTION TRIGGER: NON-VIABILITY

If conditions worsen and the institution **can no longer recover on its own**, this may trigger a **non-viability**. This determination is **made by Bank Negara Malaysia**, based on factors such as capital, liquidity, profitability, business viability, the confidence of Bank Negara Malaysia over the management of the institution and extent of regulatory non-compliance.

Once this happens, the institution enters the **resolution phase** and **PIDM steps in as the resolution authority to resolve the failing institution**. PIDM activates the **Resolution Plan**, developed in advance and tailored to the institution. The plan outlines how the institution's failure will be managed in a prompt and orderly manner. This could include for example:

- Selling the institution (or parts of it) to another party;
- Restructuring the institution; or
- Winding down the institution, while ensuring depositors are protected and critical services continue.

The goal of resolution is to **protect deposits, insurance and takaful benefits** covered by PIDM, **minimise disruption and contagion**, and **preserve public confidence** and **financial stability**.

Source: PIDM Website (https://www.pidm.gov.my/key-references/resolution/about-resolution

TYPES OF FINANCIAL DISTRESS & DEBTOR CONDITIONS

Muzakarah on Failure Resolution of Islamic Financial Institutions

From a fiqh perspective, financial difficulty is not a single legal condition. The debtor must first be classified according to the nature and severity of the financial problem, as each condition actual financial distress, legal financial distress, lack of solvency, isar, iflas, or mumatalah produces different Shariah consequences in relation to respite (Inzar), enforcement and hajr

Condition	Distinguishing test / meaning	Shariah / legal consequence
al-Taaththur al-Mali التعثر المالي	Temporary inability to meet obligations when due because of insufficient liquidity, even where total assets may exceed liabilities.	The debtor may still own sufficient assets capable of satisfying the debts; therefore, actual financial distress does not by itself establish i`sar or iflas.
al-Taaththur al-Qanuni التعثر القانوني	Legal financial distress: inability to fulfil all obligations where the value of the assets is less than the obligations or liabilities.	The source states that this condition is close in meaning to i`sar and, more particularly, to iflas. Further fiqh characterisation is still required.
Adam al-Malaah عدم الملاءة	Failure to meet the required standard of solvency or creditworthiness, even though the person may still possess substantial assets.	Not equivalent to isar. A person lacking malaah may nevertheless still be capable of repaying a particular debt.
I'sar / Mu`sir المعسر /الإعسار	An incidental condition affecting a person whereby he becomes unable to meet his obligatory expenses and repay his debts.	Once i`sar is established, the debtor is granted respite (inzar) until ease, he is not imprisoned nor subjected to hajr merely because of i`sar.
Iflas / Muflis المفلس /الإفلاس	Insufficiency of the debtor's assets to repay his debts.	According to the juristic treatment discussed, the judge may impose hajr, restrict dispositions over the debtor's assets, and distribute those assets among creditors.
Mumatalah / Mumatil المماطل /المماطلة	Not genuine inability to pay: the debtor possesses sufficient assets to satisfy the due debt but deliberately delays or refuses payment.	May be subject to tazir / enforcement; the judge may compel payment and, where necessary, sell assets to discharge the debt.

MADHHAB PERSPECTIVES ON THE DEFINITION OF MUFLIS

Muzakarah on Failure Resolution of Islamic Financial Institutions

HANAFI

أن يحكم القاضي بتفليس الشخص الذي يكون عليه ديون تستغرق كل أمواله أو تزيد على أمواله

That the judge declares a person bankrupt where his debts absorb all of his assets or exceed his assets.

Ibn Abidin, *Hashiyat Ibn Abidin*, Dar al-Kutub al-Ilmiyyah, Beirut, 1994, vol. 5, p. 227..

MALIKI

الإفلاس في الشرع يطلق على معنيين: أحدهما أن يستغرق الدين مال المدين فلا يكون في ماله وفاء بديونه، والثاني أن لا يكون له مال معلوم أصلًا

Iflas in the Shariah is used in two meanings: first, where the debt encompasses the debtor's wealth such that his assets are insufficient to satisfy his debts; and second, where he has no known wealth at all

Ibn Rushd al-Hafid, Bidayat al-Mujtahid; al-Dasuqi, Hashiyat al-Dasuqi.

SHAFII

من عليه ديون حالة زائدة على ماله يحجر عليه بسؤال الغرماء، ولا حجر بالمؤجل

A person whose presently due debts exceed his wealth is subjected to hajr upon the request of the creditors; there is no hajr in respect of deferred debt.

Al-Khatib al-Shirbini, Shams al-Din Muhammad ibn Muhammad (d. 977H), *Mughni al-Muhtaj ila Marifat Maani Alfaz al-Minhaj*, vol. 3, p. 97..

HANBALI

منع الحاكم من عليه دين حال يعجز عنه من تصرفه في ماله الموجود

The judge's prevention of a person who owes a presently due debt that he is unable to satisfy from disposing of his existing property

Ibn Rushd al-Hafid, Abu al-Walid Muhammad ibn Ahmad ibn Rushd (d. 595H), *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Maktabat Ibn Taymiyyah, 1st ed., 1415H, vol. 2, p. 344.

MADHHAB PERSPECTIVES ON THE DEFINITION OF MU’SIR

المعسر :هو المدين الذي لا يملك فاضلاً عن حاجته

A muʿsir is a debtor who possesses no surplus wealth beyond his recognised necessary needs, with such needs determined according to customary standards (ʿurf).

HANAFI

من عدم المال أصلاً

One who has no wealth at all.

Ibn ʿAbidin, Radd al-Muhtar ʿala al-Durr al-Mukhtar, vol. 4, p. 318.

MALIKI

الذي ليس عنده ما يباع

One who does not possess anything that can be sold.

al-Dusuqi, Hashiyat al-Dusuqi, vol. 4, p. 231.

SHAFII

من ليس عنده فاضل عما يترك للمفلس

One who has no surplus beyond what is left for the muflis..

Iʿanat al-Talibin and al-Ramli’s Nihayat al-Muhtaj.

HANBALI

من لا يقدر على النفقة لا بماله ولا بكسبه

One who is unable to provide maintenance either from his property or from his earnings.

al-Mardawi, al-Insaf fi Masaʾil al-Khilaf, vol. 24, p. 299.

IIFA RESOLUTION NO. 186 (20/1): I`SAR AND IFLAS

Financial distress does not automatically constitute iflas, nor does non-payment automatically justify hajr; the debtor's condition must first be properly characterised.

FINANCIAL DISTRESS

↓

ASSESS THE DEBTOR'S FINANCIAL CONDITION

I'SAR — INSOLVENCY

DEFINITION

"An incidental condition affecting a person whereby he becomes unable to meet his obligatory expenses and repay his debts."

KEY CONSEQUENCE

– Granted respite until financial ease (inzar ila maysarah)

– Genuine insolvency does not automatically result in Hajr

IFLAS — BANKRUPTCY

DEFINITION

"Insufficiency of the debtor's assets to repay his debts."

KEY CONSEQUENCES

– Subject to hajr upon judicial declaration of bankruptcy

– Restricted from disposing of assets in ways that harm creditors

– Competent judge may sell assets and distribute proceeds among creditors

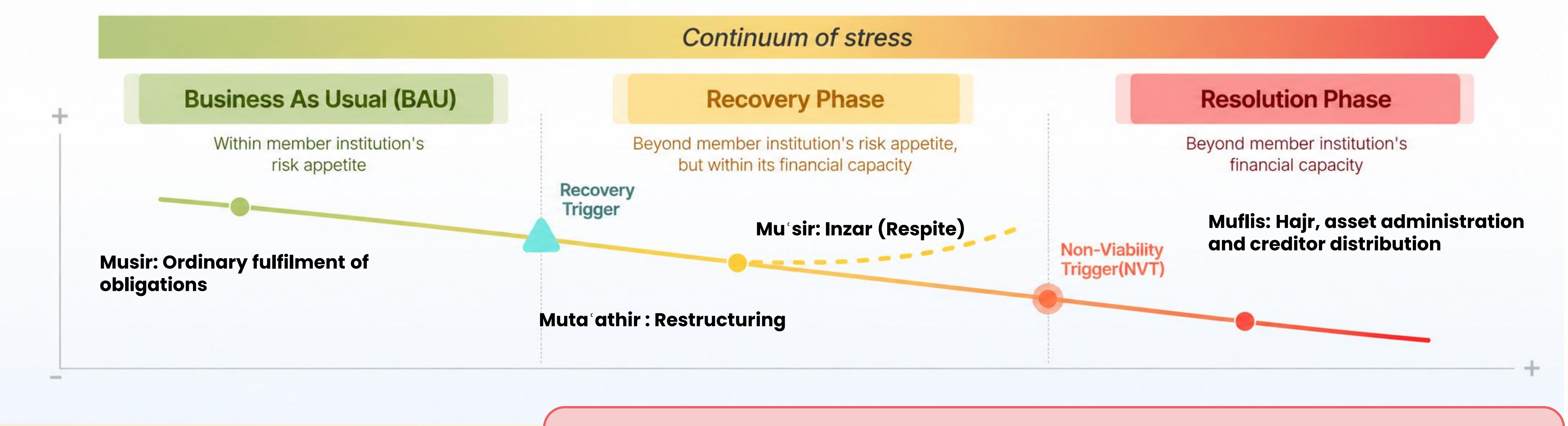
– A creditor may reclaim his specific property among the assets, subject to Shariah conditions

الإعسار قد يكون مسبوقًا بحالة اليسار وقد لا يكون مسبوقًا بها، بخلاف الإفلاس فإنه لا يتحقق إلا إذا كان مسبوقًا بحالة اليسار.

I'sar (insolvency) may or may not be preceded by a state of financial sufficiency, whereas iflas (bankruptcy) only occurs when it has been preceded by a state of financial sufficiency

TAKYIF FIQHI OF A NON-VIABLE BANK DURING RESOLUTION

The classification of a failed Islamic bank as mu`sir or muflis must first be established before determining the appropriate Shariah basis and scope of regulatory intervention by PIDM during resolution.



MUSIR
(Normal financial state)
Able to meet obligations; ordinary contractual rules continue.

Would financial distress result in classifying the institution as a Mu'sir?

Is the bank, that is in the recovery phase, considered as Muta'athir?

Is the non-viable bank accounted as Muflis?

Discussion 2

LEGAL CAPACITY (AHLIYYAH)

THE STATUS OF THE FAILED ISLAMIC BANK DURING RESOLUTION

Muzakarah on Failure Resolution of Islamic Financial Institutions

01 Does a failed IFI still retain its legal capacity (*ahliyyah*) during resolution when its authority to exercise legal acts is transferred to PIDM?

02 Does the failed Islamic bank continue to play any legal or Shariah role in effecting the transfer, or is the transfer implemented solely by PIDM pursuant to its statutory powers?

AHLIYYAH — LEGAL CAPACITY IN ISLAMIC JURISPRUDENCE

Muzakarah on Failure Resolution of Islamic Financial Institutions

Linguistically: fitness, competence, and entitlement.
Juristically: **"The capacity of a person to acquire rights, bear obligations, and undertake them through his own acts."**

Ahliyyat al-Wujub

Capacity to hold rights and bear obligations

صلاحية الإنسان لأن تثبت له حقوق وتجب عليه واجبات

"The capacity of a person for rights to be established in his favour and obligations to become binding upon him."

Ahliyyat al-wujub is attached to a person by virtue of existence throughout life and gives rise to the dhimmah the legal receptacle in which rights and obligations are established.

Ahliyyat al-Ada

Capacity to exercise rights through legally recognised acts

صلاحية المكلف لأن تعتبر أقواله وأفعاله

"The capacity of a legally accountable person for his words and acts to be legally recognised."

Ahliyyat al-ada applies to worship, transactions, legal obligations, and punishments, and is founded upon aql (intellect) and bulugh (maturity), which together form the basis of legal responsibility.

THREE LEVELS OF *AHLIYYAT AL-ADA*

NO CAPACITY — عديم أهلية الأداء

Examples:
Child before discernment; insane person.
Effect:
Their transactions and dispositions are generally not legally recognised.

INCOMPLETE CAPACITY — ناقص أهلية الأداء

Examples:
Discerning minor; person of deficient intellect (*matuh*).
Purely beneficial: **valid**
Purely harmful: **invalid**
Mixed benefit and harm: **suspended upon guardian approval**

COMPLETE CAPACITY — كامل أهلية الأداء

"Every person who has reached maturity while possessing intellect."
Effect:
acts are legally recognised;
rights and obligations arise from those acts;
the person becomes fully accountable.

ASSESSING THE CONTINUITY OF AHLIYYAH OF A FAILED ISLAMIC BANK

Muzakarah on Failure Resolution of Islamic Financial Institutions

Indicator	Classical Shariah Basis	Resolution under PIDM	Provision
1. Legal Personality/ Entity	Ahliyyah requires a legal entity that can hold rights and obligations	The failed IFI is **not** immediately dissolved upon the commencement of resolution. It continues to exist as a legal entity, although control over its business and affairs is assumed by PIDM under the PIDM Act.	Section 99 (1)(c) Section 101
2. Dhimmah	Dhimmah is the legal capacity to hold rights and obligations	The failed Islamic bank **continues** to have assets, liabilities and existing contractual relationships during the resolution process. PIDM administers and manages these assets and liabilities.	Section 99 (5) Section 99 (6) Second Schedule
3. Ahliyyah al-Wujub	The legal capacity to possess rights and bear obligations	Financing, deposits and other contractual rights and obligations **continue** even after resolution begins.	Section 103 (1)
4. Ahliyyah al-Ada’	Legal authority to enter into and manage legal transactions	**PIDM assumes control** over the business, assets, liabilities and affairs of the failed IFI, including the management and transfer of its assets and liabilities. The board of directors and management no longer exercise these powers during resolution.	Section 99 (1)(c) Section 101

HAJR – JURISTIC SCOPE AND EFFECT ON FINANCIAL DISPOSITION

Muzakarah on Failure Resolution of Islamic Financial Institutions

ويحجر على المدين في تصرفاته المالية حتى لا تضيع على الناس حقوقهم وأموالهم التي استدانها منهم

"A debtor may be restricted in his financial dispositions so that the rights and property of those from whom he borrowed are not lost."

Al-Jaziri, al-Fiqh ʿala al-Madhahib al-Arbaʿah, vol. 2, p. 333, "al-Hajr bi-Sabab al-Dayn," Dar al-Kutub al-ʿIlmiyyah, 2nd ed., 1424 AH/2003.

CLASSICAL JURISTIC APPROACHES TO HAJR

SHAFI'I, HANBALI, SOME MALIKI

Hajr is understood as preventing a person from exercising financial dispositions generally.

"المنع من التصرفات المالية"

MALIKI JURISTS

Hajr does not necessarily cover all property absolutely; it may restrict specific dispositions, such as dispositions exceeding one-third or donation of the whole property.

HANAFI JURISTS

Hajr is defined as preventing a specific person from a specific verbal/legal disposition due to a recognised cause.

"من التصرف القولي المخصوص ...هو منع مخصوص"

صَحَّ تَصَرُّفُهُ؛ لِأَنَّهُ أَهْلٌ لِلتَّصَرُّفِ، وَإِنَّمَا وُجِدَ فِي حَقِّهِ الْحَجْرُ، وَالْحَجْرُ إنَّمَا يَتَعَلَّقُ بِمَالِهِ لَا بِذِمَّتِهِ

His disposition is valid because he remains legally competent to transact. Although hajr has been imposed upon him, the hajr relates to his property and not to his dhimmah (legal liability/capacity for obligations).

Ibn Qudamah, al-Mughni, vol. 4, p. 330, "Fasl: al-Muflis idha Hujira ʿAlayh," Maktabat al-Qahirah, 1st ed., 1388–1389 AH/1968–1969.

PROPOSED POSITION ON THE AHLIYYAH OF A FAILED ISLAMIC BANK

Muzakarah on Failure Resolution of Islamic Financial Institutions

Proposed View: The failed Islamic bank retains its ahliyyah, but its power of tasarruf is legally restricted during the resolution process.

1. LEGAL ENTITY — REMAINS

The failed Islamic bank is **not immediately dissolved** when resolution commences. It continues to exist as a legal entity, although PIDM may assume control over its business and affairs.

2. DHIMMAH — REMAINS

The failed IFI continues to have **assets, liabilities, debts and contractual relationships**. PIDM administers these positions rather than automatically extinguishing them.

3. AHLIYYAT AL-WUJUB — REMAINS

Existing financing, deposits, liabilities and contractual rights **continue notwithstanding the commencement of resolution**.

4. AHLIYYAT AL-ADA' — RESTRICTED

The IFI's underlying capacity is **not necessarily extinguished**, but its **independent exercise of tasarruf is restricted**. PIDM assumes and exercises the management and transactional powers during control.

Discussion 3

CONTRACTUAL RIGHTS: TRANSFER, MODIFICATION, TERMINATION WITHOUT PRIOR CONSENT

GENERAL PRINCIPLE: PROTECTION OF OWNERSHIP AND CONTRACTUAL RIGHTS IN SHARIAH

Muzakarah on Failure Resolution of Islamic Financial Institutions

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ

"Do not consume one another's wealth unjustly, except through trade conducted by mutual consent."
(Surah al-Nisa: 29)

قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: «إِنَّمَا الْبَيْعُ عَنْ تَرَاضٍ»

"Sale is only valid when concluded by mutual consent". Ibn Majah, Hadith No. 2185

General Rule

Islamic law protects:
- Ownership rights (haqq al-milkiyyah)
- Contractual rights (huquq al-'aqd)
- Mutual consent (taradi)

Accordingly, the transfer, amendment, or termination of a contractual relationship generally requires the consent of the affected party, unless otherwise recognised by the Shariah.

Key Question

Can the contractual relationship between the customer and the failed bank be transferred to another Islamic bank without obtaining the customer's prior consent?

Exception

Can the exception be given on the basis of *maslahah 'ammah* and *siyasah shar'iyyah*?

Can the authority or judge override the general rule based this exception?

TRANSFER OF CONTRACTUAL RELATIONSHIP UNDER DIFFERENT SHARIAH CONTRACTS

Muzakarah
on Failure Resolution of Islamic Financial Institutions

Contract	Status after execution	Nature of remaining relationship	Transfer without counterparty's consent?
Murabahah/ Tawarruq	Sale completed	Debt (dayn) obligation	YES, with suitable Shariah concept, e.g. Hawalah provided that all existing contractual terms remain the same, no customer worse-off.
Ijarah	Lease continues	Ongoing contractual relationship	YES, most jurists permit sale/transfer of the leased asset without lessee's consent
Musharakah	Partnership continues	Ongoing fiduciary relationship	NO, substitution of a partner requires consent, particularly for shirkah mufawadah and shirkah al-milk
Mudarabah	Investment continues	Ongoing fiduciary relationship	NO, substitution of a managing partner (mudarib) requires consent
Wakalah	Agency continues	Ongoing personal relationship	NO, substitution of an agent requires consent, according to most scholars

JUDICIAL INTERVENTION IN PRIVATE RIGHTS

Muzakarah
on Failure Resolution of Islamic Financial Institutions

Is there any Sharīʿah basis for a Qadi (or public authority) to override private contractual rights?

قَولُ أبي يوسُفَ يَعقوبَ بنِ إبراهيمَ القاضي:

"ليس للإمامِ أن يُخرِجَ شَيئًا مِن يَدِ أحَدٍ إلَّا بحَقٍّ ثابِتٍ مَعروفٍ"

Classical Shariah Precedents

Hajr on the bankrupt
الحجر على المفلس

Sale of the bankrupt's assets
بيع مال المفلس

Judicial dissolution of contracts
فسخ العقد بحكم القاضي

Compulsory sale
بيع الجبر

Compulsory acquisition for public interest
نزع الملكية للمصلحة العامة

SHARIAH BASIS FOR REGULATORY INTERVENTION

Muzakarah on Failure Resolution of Islamic Financial Institutions

Can a competent authority intervene in the assets and affairs of a failed Islamic bank?

QUR'ANIC FOUNDATION

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

"Indeed, Allah commands you to render trusts to those entitled to them, and when you judge between people, to judge with justice."

— Qur'an 4:58

ACTION FROM PROPHET MUHAMMAD

أن رسول الله صلى الله عليه وسلم حجر على معاذ ماله وباعه في دين كان عليه

"The Messenger of Allah (peace be upon him) placed Muadh's property under hajr and sold it to settle his debt."

— Al-Daraqutni, Sunan, vol. 5, p. 413, hadith no. 4555

KEY FINDING

- Shariah recognises authoritative intervention where creditor rights require protection.
- Private ownership is therefore not absolutely immune from compulsory intervention.
- Intervention, however, remains subject to the relevant Shariah conditions.

RESOLUTION IMPLICATION

PIDM's intervention may be evaluated against classical precedents permitting competent authority to restrict or dispose of property to protect affected rights.

SIYASAH SHARIYYAH AND RESOLUTION AUTHORITY

Muzakarah
on Failure Resolution of Islamic Financial Institutions

Siyasah shariyyah enables competent authority to adopt measures necessary to secure public welfare and prevent harm.

CLASSICAL AUTHORITY — JUDICIAL SALE

وبيع القاضي مال المفلس بشروطه

"The judge's sale of the property of the muflis, subject to its prescribed conditions."

Treated as a transaction whose implementation may become obligatory.

— al-Shirbini, Mughni al-Muhtaj[1]

CLASSIFICATION OF HAJR

الحجر أربعة أقسام ...الثالث لا يثبت إلا بحاكم ... وهو حجر المفلس

"Hajr is divided into four categories … the third is not established except by a judge … namely, the hajr of the muflis."

— al-Suyuti, al-Ashbah wa al-Nazair[2]

KEY FINDING

Shariah recognises that a competent public authority may interfere with otherwise private financial dispositions where a legally recognised justification exists.

RESOLUTION IMPLICATION

This provides a possible classical foundation for analysing statutory intervention by PIDM, although modern resolution should not automatically be equated with classical hajr al-muflis.

HAJAH AND DARURAH IN REGULATORY INTERVENTION

Muzakarah on Failure Resolution of Islamic Financial Institutions

Resolution measures may be justified on the basis of **public need** or, in more extreme cases, **necessity**, subject to Shariah limits of necessity, proportionality and public interest.

> "The application of hajah and darurah arises during unfavourable circumstances or distress situations facing an Islamic financial institution (IFI) to prevent harm (mafsadah) and ultimately attain benefit (maslahah) of effective financial intermediation."
>
> *BNM Hajah and Darurah Policy Document (2024)*

HAJAH

الحاجة العامة تُنزَّل منزلة الضرورة

"Public need may be treated as necessity."

Possible application to resolution

- preserving confidence in the financial system
- ensuring continuity of essential banking functions
- protecting depositors and creditors
- preventing wider disruption and contagion

DARURAH

الضرورات تبيح المحظورات

"Necessities permit what is otherwise restricted."

Possible application to resolution

- emergency transfer of assets/liabilities
- temporary override of normal contractual pathways
- urgent restructuring to prevent collapse
- exceptional measures to contain systemic harm

MASLAHAH AMMAH AND PUBLIC INTEREST

تَصَرُّفُ الْإِمَامِ عَلَى الرَّعِيَّةِ مَنُوطٌ بِالْمَصْلَحَةِ

"The ruler's action concerning the people is contingent upon maslahah."

المصالح العامة مقدمة على المصالح الخاصة

"Public interests take precedence over private interests."

درء المفاسد مقدم على جلب المصالح

"Preventing harms takes precedence over attaining benefits."

APPLICATION

- PROTECT DEPOSITORS
- PROTECT CREDITORS
- PRESERVE CRITICAL BANKING FUNCTIONS
- PREVENT SYSTEMIC HARM
- AVOID DISORDERLY FAILURE

CRITICAL LIMITATION

Maslahah does not automatically cancel contractual or ownership rights. Regulatory intervention must still comply with substantive Shariah parameters.

RESOLUTION IMPLICATION

The question is not simply whether public interest exists, but whether the intervention is necessary, proportionate and directed towards a recognised maslahah.

FIQH CHARACTERISATION OF FORCED TRANSFER: NO CONSENT REQUIRED

Muzakarah
on Failure Resolution of Islamic Financial Institutions

قال ابن تيميه :للحاكم أنْ يُجبر المدين على بيع العرَض في وفاء دينه؛ لأنَّه حق واجب، وما لا يتم الواجب إلا به، فهو واجب

فالإكراه بحق لا يمنع انعقاد البيع؛ إقامةً لرضا الشارع مقام رضا المكرَه، والقاعدة:"**الإكراه الحلال لا يفتقر إلى الرضا**"

BAY' AL-JABRI

للحاكم أن يُجبر المدين على بيع العرَض في وفاء دينه

Judicial sale to satisfy debt. Strongest analogy for PIDM vesting / asset disposal.

INTIZA' AL-MILKIYYAH

لا يجوز نزع ملكية العقار للمصلحة العامة إلا بمراعاة الضوابط والشروط الشرعية

Private property may not be compulsorily acquired for public interest except in accordance with Shariah conditions and safeguards

'AQD AL-IZ'AN

انفراد الطرف الموجب بوضع تفاصيل العقد وشروطه، دون أن يكون للطرف الآخر حقٌّ في مناقشتها أو تعديلها

Predetermined contract with no negotiation. Valid if fair; oppressive terms may justify state intervention. Relevant to constrained consent, but not identical to forced transfer..

BAY' AL-MUDTARR

يُضطر المرء إلى بيع الشيء لحاجته إلى المال... فيبيع بالنقص للضرورة

Valid sale, but buyer should not exploit distress. Relevant to fire-sale / distressed disposal.

BAY' AL-MUKRAH BI HAQQ

إن كان الإكراه على البيع بحق صح؛ لأنه قول حُمل عليه بحق فصح

Valid where coercion is based on right. Relevant to court / regulatory transfer.

BAY' AL-MUKRAH BI GHAYR HAQQ

بيع وشراء المكره بغير حق لغو... والعقد باطل

Invalid / non-binding where coercion is unjust. Relevant limit: no arbitrary forced transfer.

PROPOSED DAWABIT FOR OVERRIDING CONTRACTUAL RIGHTS

Muzakarah
on Failure Resolution of Islamic Financial Institutions

Shariah recognises that a Qadi or regulatory authority may intervene in private contractual rights where justified by a recognised public interest. Nevertheless, such intervention is subject to specific parameters to ensure justice, fairness and the protection of contractual rights.

Parameter	Basis	Application to Bank Resolution
1. Recognised Public Interest (المصلحة العامة المعتبرة)	تصرف الإمام على الرعية منوط بالمصلحة	The intervention must serve a genuine public interest, such as preserving financial stability and protecting depositors.
2. Necessity or Public Need (الضرورة أو الحاجة العامة)	الضرورات تبيح المحظورات/ الحاجة العامة تنزل منزلة الضرورة	Intervention is permitted only where genuinely necessary and no effective alternative exists.
3. No Unjust Harm (عدم الإضرار بالأطراف)	لا ضرر ولا ضرار	The transfer must not unjustly prejudice either contracting party or place the customer in a worse contractual position.
4. Preservation of Sharīʿah Compliance (استمرار الامتثال الشرعي)	العقود تبقى على صحتها ما أمكن	The transferred portfolio must remain Sharīʿah-compliant and the essential elements of the contract should be preserved.
5. Legal Certainty and Protection of Rights (حفظ الحقوق وتحقيق اليقين القانوني)	الحقوق مصونة والعقود معتبرة	Rights and obligations must remain clear, enforceable and legally certain throughout the resolution process.

Discussion 4

SHARIAH ISSUES

POSSIBLE SHARIAH ISSUES

Muzakarah on Failure Resolution of Islamic Financial Institutions

Possible Shariah issues arising from forced transfer, conversion, or modification in assets and liabilities of failed Islamic banks during the resolution process.

Shariah Issues	Remarks
• Can the existing Islamic financial product based on a particular Shariah contract be converted into another Shariah contract during the resolution process? For example, can a home financing facility based on Musharakah Mutanaqisah be converted into a Tawarruq upon its transfer to an acquiring Islamic bank?	• If the acquiring bank cannot maintain the existing Musharakah Mutanaqisah structure, *iqalah* may be considered to terminate the existing arrangement before a new Tawarruq financing is established, provided that the relevant Shariah requirements and conditions are satisfied. A letter should be issued to the customers.

POSSIBLE SHARIAH ISSUES

Muzakarah on Failure Resolution of Islamic Financial Institutions

Shariah Issues	Remarks
• Can contractual terms such as the selling price, profit rate, tenure, instalments or security be modified without fresh consent from the customer?	• If modification is significant—related to the main pillars of the Shariah contract—the acquiring bank needs to issue a letter specifying the changes in the contractual terms (can be in form of formula). An opt-out approach (deemed consent) can be considered in cases involving mass customers and they are not materially worse-off.
• If the transfer from the failed Islamic bank to an acquiring bank is done on a stock and barrel basis, can the latter terminate certain assets (e.g., non-performing financing portfolios) unilaterally or by way of deemed consent?	• Depending on the type of a contract and its stage during the resolution. For example: in Mudarabah, parties can terminate the contract unilaterally except (i) the mudarib has commenced the work, (ii) the parties enter into the contract for a specified time, (iii) the parties agree not to terminate the contract within a specified time.

CONCLUSION

GENERAL RULE

- Contractual rights rest on mutual consent.
- A party cannot be compelled into a new contract, or material changes to one, without consent.

SHARIAH EXCEPTION

- Shariah permits limited judicial or statutory intervention in exceptional cases.
- It must be exercised by a competent authority (Qadi or regulator).
- It must serve a recognised public interest (maslahah ʿammah) within Shariah parameters.

APPLICATION TO BANK RESOLUTION

- Fresh customer consent is not required where the transfer falls within these recognised Shariah exceptions.

Subject to the following conditions:

1
No new contract is created.

2
Essential contractual rights and obligations remain unchanged.

3
Shariah structure remains valid and compliant.

4
Customer is not materially worse off.

Thank You