



Perbadanan Insurans Deposit Malaysia
Protecting Your Insurance And Deposits In Malaysia

**NOTE OF
PERBADANAN INSURANS DEPOSIT MALAYSIA ON
ISLAMIC DEPOSIT INSURANCE**

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LEGAL AUTHORITY

1. This Note relates to the operations of Islamic deposit insurance system in Malaysia and the relationship between Perbadanan Insurans Deposit Malaysia (PIDM) and its Islamic member institutions.
2. This Note is issued by PIDM in exercise of the powers conferred by Subsection 100(1)(b) of the Malaysia Deposit Insurance Corporation Act 2005 (the Act).

INTERPRETATION

3. In this Note, an “Islamic member institution” means a member institution under the Act which is either one of the following:
 - (a) an Islamic bank licensed under the Islamic Banking Act 1983; or
 - (b) a licensed institution carrying on Islamic banking business or Islamic financial business under section 124 of the Banking and Financial Institutions Act 1989.

BACKGROUND ON THE ISLAMIC DEPOSIT INSURANCE

4. Malaysia implemented a dual banking system where the Islamic banking system operates alongside the conventional banking system. With the significant development of the Islamic banking system, the role of Islamic deposit insurance in preserving and promoting the competitiveness and stability of the Islamic banking system becomes significant. As such, Malaysia introduced the Islamic and conventional deposit insurance systems in September 2005 following the enactment of the Act. Islamic deposit insurance provides protection to depositors against loss of insured Islamic deposits placed with Islamic member institutions (IMIs) in the unlikely event that an IMI is unable to meet its financial obligations. It operates separately but in parallel with the conventional system and both systems are administered by PIDM.

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CONTRACTUAL RELATIONSHIP BETWEEN IMI AND PIDM

5. In implementing the Islamic deposit insurance system, PIDM developed an approach and mechanism of the Islamic deposit insurance operations that meets Shariah requirements. Extensive research was conducted and presented to the Shariah Advisory Council (SAC) of Bank Negara Malaysia. The SAC agreed that kafalah bil ujr (guarantee with fee)¹ is an acceptable and practicable Shariah arrangement that provides the foundation of the Islamic deposit insurance system in Malaysia.
6. Kafalah is a contractual guarantee given by a guarantor to assume the responsibilities and obligations of the party being guaranteed should claims arise. As consideration for the guarantee, a fee is paid by the guaranteed party to the guarantor.
7. Under the Islamic deposit insurance in Malaysia, PIDM adopts the kafalah bil ujr arrangement to create a relationship between the IMI as the guaranteed party and PIDM as the guarantor. As consideration for the guarantee, the IMI pays a fee to PIDM in the form of annual premiums and in the event the IMI fails, PIDM will assume the obligation of making reimbursement to the insured depositors.

OPERATIONS OF ISLAMIC DEPOSIT INSURANCE SYSTEM IN MALAYSIA

8. All IMIs pay annual premiums to PIDM in respect of the insured Islamic deposits placed with them. The premiums received by PIDM from the IMIs are maintained in the Islamic Deposit Insurance Fund (the "IDIF") and invested in accordance with the Shariah principles. All expenditures incurred in Shariah-compliant activities will be paid from the IDIF. If such expenditures cannot be specifically attributed to either the IDIF or the Conventional Deposit Insurance Fund, the expenditures will be apportioned to the respective funds based on the amount of Islamic and conventional premiums collected in the assessment year prior to the year in which such expenditures are made.
9. In the unlikely event of a failure of an IMI, PIDM will utilise the IDIF to fund such failure and protect Islamic deposits including, if necessary, to make appropriate reimbursements to the insured depositors of the failed IMI.

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¹ Appendix 1.

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Appendix 1

Kafalah

Definition

Kafalah literally means guarantee. It is defined as a contract which combines one's liability with another person's liability. It is a contractual guarantee given by the guarantor to assume the responsibilities and obligations of the party being guaranteed on any arising claims.

Legal status of Kafalah

The permissibility of *kafalah* can be derived from provisions of Al-Quran, for instance, in the following verse Allah SWT says:

Meaning: Some of the ministers reply: "We have missed the royal bowl and for him who produces it is a camel load, I will be bound by it". (Surah Yusuf: Verse 72)

Another proof that indicates the permissibility of *kafalah* is the following hadith:-

Meaning: "Narrated from Salamah bin al-Akwa', he says: "Once we were with the Prophet PBUH, then a group of people came with a funeral procession and said: O Prophet, please conduct the funeral rites for this corpse, He asked: Has he left anything? They replied: None. Then he asked: Has he left any debt? They replied: Yes, three dinar, then the Prophet PBUH said: You should pray for him. Then Abu Qatadah said: O Prophet, please pray for him, I bear the liability of the debt, then the Prophet PBUH pray for the corpse. In another narration, it is said "I will guarantee for the settlement of the debt". (Al-Bukhari, Al-Nasai, Ibn Majah and Al-Baihaqi)

Types of Kafalah

In general, *kafalah* contract may be classified into two categories:

- 1) *Kafalah bi al-mal*, it is a guarantee for property or finance; and
- 2) *Kafalah bi al-nafs*, it is a guarantee for one's self.

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Kafalah bi al-mal may be divided into three main categories as follows:

- 1) *Kafalah bi al-dayn*, it is a guarantee for a debt owned by a party. It is meant to guarantee for the settlement of the debt by the guarantor should the guaranteed party is in default;
- 2) *Kafalah bi al-`ayn* or *kafalah bi al-taslim*, it is a guarantee for a tangible property or for the delivery of an object of a contract. In a contract of sale, for instance, a guarantor may need to guarantee for the delivery of the object of the contract to the purchaser. If the seller fails to perform his contractual obligation as stipulated in the terms of the agreement, the guarantor is liable to furnish the delivery; and
- 3) *Kafalah bi al-darak*, it is a guarantee for a property that is free from any encumbrance or claim. This guarantee is meant for guaranteeing an object of a contract is free from any claim that could hinder the transfer of ownership of the property in a particular contract. If there is any claim against the property, the guarantor is liable to bear the loss suffered by the beneficiary.

Legal rule on *ujrah* in *kafalah* contract

A number of the classical scholars are of the view that charging an *ujrah* or fee for a guarantee is not allowed. This view is based on the argument that *kafalah* contract is classified among the *uqud al-tabarru'at* which is voluntary in nature. As such, it is not allowed to charge a fee for the guarantee.

Views that allow fee in *kafalah* contract

Among the views that allow fee in *kafalah* contract are as follows:

Prof. Dr. Wahbah al-Zuhaili views that charging fee for *kafalah* is permissible. According to the original rule, it is advisable to offer guarantee free of charge since *kafalah* falls under the category of *aqd al-tabarru'*. However, due to *maslahah* and needs of the community, charging fee should be allowed based on the needs of the people.

Syeikh Ahmed Ali Adalla expressed his opinion in his presentation to the OIC Fiqh Academy that charging fee is permissible. He acknowledged the original rule of *kafalah* is *tabarru'*, but if the contract has been stipulated with a charge of fee, the stipulation must be regarded as a valid and enforceable condition. He also argued that a contract of *kafalah* is a kind of *Istithaq* not a kind of *qardh*. Thus, taking fee for a guarantee service does not fall under the category of forbidden practice, that is, since a contract of *kafalah* is different from a contract of *qardh*.

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He has supported his view with an application of *qiyas* on the permissibility of *akhz al-ajr`ala al-jah* (taking a fee for using one's good reputation) and *akhz al-ju`l`ala ruqyah min al-Quran* (taking a fee for a spell from the verses of al-Quran). Some of the classical scholars have allowed these two factors for charging a fee, thus, the same rule may be applicable to a fee charged for providing a guarantee since it has the same nature of work or service with the above permitted situations.

Based on the views of the scholars as mentioned above, a charge of fee for a contract of *kafalah* is not a practice which is contrary to the principles of Shariah. This is based on the fact that many of those contracts which are originally of *tabarru`* nature are no longer relevant at present. For instance, a *wakalah* contract was originally being offered free of charge but not it becomes one of the sources of income for Muslims. There are many other examples that indicate the permissibility of charging a fee in a *tabarru`* contract which is previously forbidden. Now, the scholars recognise the need to allow it based on the current needs of the community.

Source: Bank Negara Malaysia website (pp 76-81,
http://www.bnm.gov.my/microsites/financial/pdf/resolutions/14_basis_of_rulings.pdf)