ACCEPTANCE OF CONVENTIONAL INSURANCE PRINCIPLES AS TAKAFUL BASIC PRINCIPLES: SHARIAH AND LEGAL ANALYSIS

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Abstract
Generally the concept of takaful is founded under the principles of mutual responsibility, mutual assistance and cooperation and mutual protection or guarantee. The foundation of takaful is not only of prohibition of riba, gharar and maysir but also it been built on the conventional insurance principles. The objective of this paper begins with the position of Takaful under Islamic Financial Services Act 2013. This paper also examines the basic principles of conventional insurance principles that can be applied in developing takaful contract. This paper also examine the sources of Shariah that allows an operator of takaful company to apply these principles. The methodology used is qualitative. It adopt library based and content analysis method. This paper concludes there are Shariah justification and distinction of adopting conventional insurance principles in takaful contract.

Keywords--- Takaful, Conventional Principles, Shariah Justification

INTRODUCTION
Takaful (Islamic Insurance) industry in Malaysia originated with the enactment of the Takaful Act 1984. Syarikat Takaful Malaysia was the first takaful operator in Malaysia and it began operations in 1985. To date, takaful market is considered as one of the fastest growing industry. In 2020, there are thirteen (13) institutions offering takaful products in Malaysian with 75% market penetration (Malaysianinsure, 2019). It stands as a complement to the Islamic banking sector (Bank Negara Malaysia, 2020). Nevertheless, further improvements especially in areas such as accounting, regulatory, jurisprudential and operation (Asyraf Wajdi Dasuki, 2011). Executive governmental functionaries need to play their role to further improve the system (Mohd Zakhiri, 2017) which have played an important part in putting Malaysia as the leader in the world of Islamic Finance.

OBSCURITY OF TAKAFUL LEGAL FRAMEWORK
From the legal framework point of view, there is a need for a comprehensive legal framework to be created to govern takaful operator and participants (Madzlan Mohamad Hussain, 2009) as the law that governs takaful industry is still based on conventional law. This can be seen in the case of Shamal Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd [2004] 1 Lyod’s Rep 1 26, whereby the Appeal court upheld English law rather than referring to Shariah law even though the intention of the maker of the legal documentation is to make Shariah laws as reference. Ironically, we can see the court still upheld the murabahah facility agreement is valid under English law even though it does not fulfil the requirement of fitq muamalat that in murabahah the seller has to declare the principal cost to the buyer.

Takaful Under Islamic Financial Services Act 2013
Generally, the concept of takaful grounded under the principle of mutual responsibility, mutual assistance and cooperation and mutual protection or guarantee. The takaful undertakings should comply with Shariah rules and principles (IFSB, 2009). Takaful products should not have element of riba, gharar or maysir (Mohd Daud, 2011).

The TA 1984 defines takaful as a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual assistance which provided for mutual financial aid assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose. Nevertheless, the IFSA 2013 defines takaful as an agreement based on mutual assistance for mutual benefits payable to the takaful participants or their beneficiaries on the occurrence of pre agreed events.

Article 102 of IFSB 2009, the takaful operator should put in place the appropriate processes to ensure that its investment portfolios are in compliance with Shariah rulings, including the process for purifying the returns from tainted/non-halal income. (IFSB, 2019)

Article 8.3, the senior management ensure the takaful polices: (a) Provide for the underlying Shariah principle of mutual assistance among takaful participants; (b) Clearly set out the contractual relationship between a licensed takaful operator and the pool of takaful participants; and (c) Clearly set out the contractual relationship between a licensed takaful operator and individual takaful participants, where relevant. (BNM, 2019).

Takaful Basic Principles from Shariah and Legal Perspective
In general, the incompatibility of conventional insurance with the Islamic tenet is a major concern for Muslim participating in insurance market (Safder Jaffer et. al., 2010). Hence, Takaful is introduced to overcome these problems and offers a Shariah compliant risk management mechanism. Instead of being another type of conventional insurance, Takaful is actually an alternative to conventional insurance. However, being an insurance, there are certain principle which is ingrained in all type insurance which is also applicable in takaful and the justification behind the application of these principles are can be derived from the Shariah. The following are the analysis of insurance principle being applied in takaful from legal and Shariah perspectives.

Policy is a contract
Similar to conventional insurance, the Shariah regards takaful as a contract which contains the elements of privity and mutuality. The privity which is inherent in conventional insurance contracts implies that one party is not bound by the promise of another party. However, under Shariah law, all elements of the contract must be present in order to validate the contract. (IFSB, 2013)
policy as a contract (‘aqad’) between the takaful operator and the takaful participants whereby there is offer and acceptance on the subject matter (ma’aqud ‘alaih). All takaful policy contain an agreement among participants to cooperate in order to help each other in the event of misfortune as well as an agreement between the participants and the takaful operator as the administrator of the participants’ fund. However, unlike conventional insurance where the policy is a bilateral contract between policy holder and insurance company where payment of premium given in consideration of payment of compensation in the event of defined loss, takaful policy is a unilateral contract. Technically, tabarru’ (contribution, gift, donation or charity) in takaful is a unilateral declaration of intent to give favour to the recipient without any specific consideration in return (Asyraf Wajdi Dasuki, 2011). The participants in the takaful scheme undertake to insure each other, where by if one of them face calamity, the others with help to lighten the burden via monetary contributions. Being a unilateral contract, the degree of certainty which is required to have in the takaful policy is not as high as the conventional policy. A certain degree of uncertainty is tolerable in takaful based on the maxim of al gharrar yataghayaru fi al tabarru’ at which according to Ibn Taimiyah tolerates a certain degree of gharrar(uncertainty) in unilateral contract even in non-financial contract.

On top of that, hibah which is a unilateral be applied in takaful. The practice of conditional hibah though do not allowed by many majority of scholars be accepted by Islamic Financial Services Act 2013.

**Takaful contribution**

In conventional insurance, premium is the payment made by the policy holder to buy the protection. It is the amount paid by the policy holder to the insurance company as consideration for the company’s willingness to accept the risk. In the case of *Borhanuddin bin Haji Jantara v American International Assurance Co Ltd.* [1987] 1 MLJ 22 deceased father submitted a claim under his daughter’s life insurance after deceased perished in an airplane crash. 2 days prior to the crash deceased had submitted a completed proposal form for life insurance together with the necessary payment of RM118 for premium. The insurer rejected the claim on the basis that there was no contract of insurance as there was no policy issued at the time of deceased demise. This was confirmed by the High Court. On appeal to the Supreme Court, it was held that a contract had been formed when the insurer received the first premium as the receipt of the premium amounted to acceptance. It was also stated by the Court that the deceased had done all that she could do on her part. In addition, there was evidence that a policy number had already been assigned to deceased’s application but there was a directive to the employee not to issue the policy.

Takaful myTerm, Takaful Malaysia stipulates the situation the commence and effective date of takaful,

12) *When will my coverage begin?*

“Your coverage will take effect upon our approval of your application and successful payment of the first contribution due via credit/ debit card. The effective date will be stated in your e-Certificate”.

**Protection and Cover Note**

Protection generally given by the insurer. There are basically two types of protections. There are indemnity protection and non-indemnity insurance. The indemnity protection refers to general insurance and non-indemnity insurance refers to life insurance. This is called as non-indemnity insurance because life cannot be replace and it cannot return to the status quo upon the death. Generally life insurance.

The issue is when is the contract is concluded? Whether the contract is concluded upon submission of proposal form and made payment or upon signing of the contract. In the case of *Borhanuddin bin Haji Jantara v American International Assurance Co Ltd.* [1987] 1 MLJ 22, The High Court held there was no contract because there was no acceptance by the insurer. The Appeal Court held there was an acceptance when the insurer receipt the payment.

In life insurance, there is immediate coverage upon submission of proposal form and payment be made. The question is how Islamic law perceived the premium and protection. Under Islamic law, the term premium is not be used. All the money are basically is a contribution paid by the participant and not by the policy holders. The amount is called contribution because it goes to the takaful fund through the takaful operator.

On the question of protection, the protection paid by the fund. The fund is not belong to takaful operator. It is totally separate legal entity.

Generally as mentioned before, takaful is basically unilateral contract. The contract is concluded when the takaful participant contribute to the fund and it does not requires the acceptance from the takaful operator. All the takaful and insurance benefits will be protected by Perbadanan Insurance Deposit Malaysia Berhad under Takaful & Insurance Benefits Protection Systems (TIPS) (PIDM, 2020)

**Subrogation**

Generally subrogation means a person will subrogate his right to take legal action to another party. By doing so, he or she will lose his right to the benefit from legal actions and its consequences. Under insurance practice, a policy holder agrees to a clause that he or she will subrogate his or her right to insurance company to take legal action against those who cause damage to the property or the interest being insured.

To illustrate this as an example. There is a disputes between Mr. A and Mr. B because Mr. B caused damages to Mr. A’s insured asset. Mr. A already signed the subrogation clause to C an insurance company. Mr. A claim insurance payment from the company. Under subrogation principle it is up to the company whether to sue Mr. B. Normally it is not because it it not worth it. In this case, Mr.A is no longer can sue Mr.B because he had subrogated his right and cannot sue the company. The question is should Mr.A still claim from Mr.B and obtained some compensation. Under the principle of subrogation the compensation money will go to the company as profit.

On the other hand, when the subrogation right has been singed, the Takaful operator could sue protection given to Mr.A comes from the fund or the money shall be paid back to Mr.A.

For example the principle of subrogation has been applied in Takaful Ikhlas Fire Takaful Certificate (Takaful Ikhlas) whereby the its stipulate:-

**Subrogation**

“The Company is entitled to undertake in the Takaful Participant’s name and on the Takaful Participant’s behalf; (a) the full conduct, control and settlement of any proceedings; (b) recover compensation or secure Indemnity from any third party in respect of anything covered by this Takaful Certificate. at the Company’s own expense and benefit”.

On the other hand, Public Liability Takaful Certificate Etiqa Takaful Berhad (Etiqa Takaful Berhad), its stipulates

“40. Waiver Of Subrogation Rights Clause”
“Notwithstanding anything contained herein to the contrary, it is hereby declared and agreed that in the event of a claim, the Company will not exercise their subrogation rights against any of the Participant parties. Subject otherwise to the terms, exclusions and conditions of the Certificate”.

It is interesting to note, that some takaful operator wants to exercise their right of subrogation and the other takaful operator waives it.

**Utmost good faith**

The duty of disclosure which is imposed on both the insurer and the insured. The question is what is to be disclosed. All the “material facts” must be disclosed. By right, both insurer and the insured must disclosed almost everything that is those facts which if not be disclosed shall affect the decisions of the insurer to insure the cost of the premium. Failure to disclose the material fact will reenter the contract null and void.

This principle is in line with the Shariah as evidently shown in the hadith narrated Hakim b. Hazimi; who reported that the Prophet as saying:

> “Both parties in a business transaction have the right to annul it so long as they have not separated; and if they speak the truth and make everything clear they will be blessed in their transaction; but if they tell a lie and conceal anything the blessing on their transaction will be blotted out”. (Sahih Muslim 1532)

The Shariah Advisory Council (SAC), Central Bank of Malaysia passed its resolution that the principle of utmost good faith in conventional insurance can be applied in takaful.

> “Resolution The SAC, in its 52nd meeting dated 2 August 2005, has resolved that the principle of utmost good faith may be applied in takaful industry. If there is any evidence to indicate fraud on part of the takaful participant, the takaful company is not required to refund the contribution in participants’ risk fund (tabarru’ fund) to the takaful participant. However, the amount in the participants’ investment fund shall be returned to the takaful participant since it is the right of the participant”. (Bank Negara Malaysia)

**Insurable Interest**

Under conventional insurance, it is a requirement that a prospective policy holder must show that he has in interest in property and life he wanted to insured. The law is not allow this individual to buy the insurance for property or life in which he has no interest in by naming himself as beneficiary otherwise, it would amount to gambling and gaming. The principle of insurable interest is not contradict with Shariah. The term use in Shariah is permissible takaful interest.

The SAC, in its 52nd meeting dated 2 August 2005 and 76th meeting on 9 June 2008, has resolved the following:

i. The concept of insurable interest does not contradict the Shariah and it may be applied in takaful (in takaful, terminologically it is referred to as “permissible takaful interest”)

ii. In general takaful, a person with legal and financial interests in a particular subject is deemed to have permissible takaful interest (Bank Negara Malaysia)

**Indemnity**

Under Section 152, Insurance Act 1952, it stipulates the exception to non-indemnity insurance. One person can pay the premium of life of another person and name himself as beneficiary, in the following circumstances (1) Spouse (b) Children (3) A person on whom you are dependent on.

Under the Takaful Act 1984, the Act never required the principle of insurable interest either in indemnity of indemnity insurance. This is because non indemnity insurance under takaful is based on mutual contribution. For example, MCA wanted to insure of Ahmad and name himself as beneficiary. Under Insurance Act 1966, MCA could not do so unless he has the insurable interest.

**CONCLUSION**

Takaful contract generally a unilateral contract based on the akad tabarru’. On top of the prohibition of riba, gharar and maysir, Takaful operator adopt conventional insurance principles in takaful contract. These conventional principles do not violate the Shariah and approved by Shariah Advisory Council of Central Bank of Malaysia.

**REFERENCE**


6. Islamic Financial Services Board (2009), Guiding Principles on Governance for Takaful (Islamic Insurance) undertakings. See also file:///C:/Users/User/Downloads/IFSB-8%20(December%202009)_En%20(1).pdf


**STATUTE**

1. Islamic Financial Services Act 2013

2. Insurance Act 1966

3. Takaful Act 1984
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CASE