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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 *Takafu*l 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

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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 (15) institutions offering *takaful* products in Malaysian with 75% market penetration (Malaysianreserve, 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 *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd* [2004] 1 Lyod's Rep 1 28, 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 *fiqh 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 *takafu*l 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. all., 2010). Hence, Takaful is introduced to overcome these problems and offers a *Syariah* 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* 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 gharar yataghaiyaru fi al tabarru at* which according to *Ibn Taimiyyah* tolerates a certain degree of *gharar*(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.

*Takafu*l 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 the 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 Benefit Protections System (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 be 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 (Etika 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 renter 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, Mr.A wanted to insure of Ahmad and name himself as beneficiary. Under Insurance Act 1966, Mr.A 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.

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