KOLEJ UNIVERSITI ISLAM ANTARABANGSA SELANGOR
الكلية الجامعية الإسلامية العالمية بسلانجور
INTERNATIONAL ISLAMIC UNIVERSITY COLLEGE SELANGOR

FWD takaful

Khairul Anuar Ahmad
Mohd Rofaizal Ibhraim
Nik Abdul Rahim Nik Abdul Ghani
Ahmad Zaki Salleh
Mohamad Zaharuddin Zakaria

SELECTED SHARIAH CASE STUDIES

on Takaful Business and Operation in Malaysia

SELECTED SHARIAH CASE STUDIES ON TAKAFUL BUSINESS AND OPERATION IN MALAYSIA

Khairul Anuar Ahmad
Mohd Rofaizal Ibhraim
Nik Abdul Rahim Nik Abdul Ghani
Ahmad Zaki Salleh
Mohamad Zaharuddin Zakaria

e ISBN: 978-629-7518-15-2

Published in Malaysia by
PENERBIT KUIS
D/A PUSAT PENGURUSAN PENYELIDIKAN & INOVASI (RIMC)
KOLEJ UNIVERSITI ISLAM ANTARABANGSA SELANGOR (KUIS)
BANDAR SERI PUTRA, 43000 KAJANG, SELANGOR
penerbit@kuis.edu.my
03-8911 7000 Ext: 3215/3213/1482/1481

SPECIAL MESSAGE

In the name of Allah, the Most Compassionate, the Most Merciful

As a provider in the takaful industry, we are thrilled to introduce this e-book to the shariah and takaful fraternity. We firmly believe that this publication can play a significant role in the development and capacity building of the takaful industry in line with our vision of changing the way people feel about takaful.

This e-book provides valuable insights for individuals in the takaful industry, including shariah committee members, shariah officers, researchers, takaful practitioners, universities lecturers and students, to gain a deeper understanding of the shariah issues related to takaful operations and business.

The practical case studies and the comprehensive overview of the industry presented in the e-book make it an excellent reference for takaful operators' shariah committee and officers to resolve issues related to takaful. Researchers can benefit from this e-book as it provides valuable data sources for their research, specifically related to case studies. In universities, lecturers and students can also use the sample case studies as discussion points to deepen their knowledge of the subject matter.

We would like to express our appreciation to Universiti Islam Selangor (UIS) for collaborating with us and congratulate the research team led by Dr. Khairul Anuar Ahmad on the successful completion of the e-book. The efforts of the research team are commendable, and this e-book is a testament to their dedication and hard work.

It is our hope that this e-book serves as the starting point for more collaboration between researchers and practitioners within the takaful industry. We believe that such collaborations can contribute to the growth and development of the takaful industry, and we are confident that it will be a valuable resource for all readers.

Thank you.

Salim Majid Zain
Chief Executive Officer
FWD Takaful Berhad

FOREWORD

In the name of Allah, the Most Compassionate, the Most Merciful.

Praise be to Allah, Lord of the worlds, and blessings and peace be upon the Messenger of Allah, his family, and all his companions.

It is my great pleasure to lend my support to this e-book, which represents the culmination of months of hard work and dedication. In a world where so much information is readily available at our fingertips, this e-book is evidence to that fact. It offers a unique and deeply personal perspective on a topic that is of great importance to us all, and I am honored to have been asked to write this foreword. On that note, I would like to thank Dr. Khairul Anuar Ahmad and his research team for their relentless effort in making this project a successful one.

As we are all aware, the growth of Islamic finance particularly takaful has been nothing short of phenomenal in recent years, with industry rapidly gaining traction across the globe. As more and more players enter the industry, the need for specialised knowledge and comprehensive resources has become increasingly evident. As such, this book serves as a valuable addition to the field, providing readers with insights and analyses. Further to that, I believe that this e-book will also have some impact on the takaful industry in Malaysia in improving the shariah aspects and its operations. Apart from ensuring shariah compliance in business, operations, activities and affairs, the takaful industry should also give special value to the aspect of fairness and benevolence (al-ʿadl wa al-iḥsān) as revealed by shariah. These aspects should be translated into the offering of takaful products and services that would satisfy and benefit the ummah, especially the poor and needy. As far as this e-book is concerned, the essence of al-ʿadl wa al-iḥsān is evident in the discussions and deliberations throughout all chapters.

Written by authors with both academic and practical exposure, this e-book provides insightful overview of the key concepts, practices, and sharīʿah and operational issues in takaful. It covers an array of topics which focus on selected subjects surrounding takaful industry in Malaysia. After a quick look at the topics, I would say that the authors have studied on the question of takaful contract in which they have analysed the detailed attributes and issues of it. This could help the readers in understanding more about takaful contract and eventually convince the public about the clarity of the contract from shariah point of view.

On behalf of Universiti Islam Selangor (UIS), I would like to take this opportunity to record my deepest gratitude to FWD Takaful Berhad. Jazākumullāh khayran kathīran for your willingness to sponsor the research grant, without which the publication of this e-book will not become a reality. I believe this is the first research grant received by UIS from the industry and I really look forward to any sort of academia-industry collaboration in the future. As we all know, UIS has played a part in fulfilling the Islamic finance agenda in Malaysia by offering academic programs and researches in the related fields at undergraduate and postgraduate levels. In light of that, I hope this research collaboration would add value to the role of UIS in Islamic finance.

Last but not least, I would also like to thank and congratulate the authors for the job well done. They have poured their hearts and souls into the page you are about to read and I am confident that you will find their insights and perspectives both enlightening and inspiring.

I encourage you to dive into these pages with an open mind and willingness to learn. Whether you are a seasoned expert in the field or simply someone who is curious about the subject matter, I am confident that you will find this e-book to be a valuable addition to your library of knowledge.

Thank you for giving me the opportunity to share my thought in this exciting project and wassalām.

Assoc. Prof. Dato' Dr. Mohd Farid Ravi bin Abdullah
Rector
Universiti Islam Selangor (UIS)

PREFACE

In the Name of Allah, the Most Gracious, the Most Merciful

All praise be to Allah (SWT) for His abundant grace that the publication of this e-book can be realized. Blessings and salaam upon the Prophet Muḥammad (PBUH) and his family members and companions RA.

This e-book is titled Selected *Sharīʿah* Case Studies on Takaful Business and Operation in Malaysia. As the name implies, it seeks to shed light on the *sharīʿah* and operational issues by describing selected case studies which might not have been noted by industry players. To be sure, this e-book is aimed at a wider readership including industry and non-industry players as Islamic finance has much to offer to all, regardless of religious orientation or background.

The e-book is divided into ten chapters, which cover *sharīʿah* case studies in reference to the takaful business and operations in Malaysia. Each chapter is structured in a uniform manner, with sections for introduction, concept, application, *sharīʿah* and operational issues, and conclusion. The writing style is designed to make it easy for readers to distinguish between different sections of a topic.

In the first chapter, Khairul Anuar examines the concept of Absolute Assignment in the Takaful Industry. By definition, absolute assignment is the passing of title in the insurance policy absolutely to the assignee through which the assignor that is the policyholder retains no interest in the policy. The application of absolute assignment in conventional insurance offers numerous benefits to policyholders, which has not been the case in takaful so far.

Based on the findings, almost all takaful operators apply absolute assignment with a few of them practice additional types of assignment namely partial assignment and collateral assignment. As suggested in the previous study, there are two types of *fiqh* adaptation for absolute assignment, namely *hibah* and *kafālah*. However, the majority of the takaful operators opine that there is no specific *fiqh* adaptation which could best fit the definition of absolute assignment as currently practiced by the industry. In addition, the author has identified a number of issues with regard to this topic among others lapse and surrender in absolute assignment, predeceased issue, absolute assignment as medium of debt payment and operational issues.

The second chapter by the same author covers the Application of Khiyār in the Free Look Period. The practice of *khiyār* in commercial transactions, and especially in the Islamic banking industry, takes place on several occasions, as stated in regulatory documents. It is difficult to find a specific mention of the term *khiyār* in the practices of the takaful industry, which has motivated this research on the topic.

There are differences between the theoretical concept of *khiyār* and actual practice. The cancellation of takaful certificate during the free look period has a closer resemblance with *khiyār al-sharṭ* than other types of *khiyār*. On the one hand, the majority of takaful operators reserve their opinions in justifying certificate cancellation during free-look period as a kind of *khiyār al-sharṭ*, since they take it for granted from a provision under Schedule 8 of Islamic Financial Services Act (2013). On the other hand, some takaful operators are of the view that cancellation of certificate during the free look period resembles *khiyār al-sharṭ*, while the minority takes the middle ground in the sense that it has the spirit of *khiyār* but not entirely a *khiyār*. Study on this topic has drawn out some issues specifically application of *khiyār al-sharṭ* to gratuitous contracts, the rights and obligations in the event of certificate cancellation, the legal status of takaful contract during the free look period, and operational issues.

Mohd Rofaizal writes about Contribution from Non-Halal Occupation and Income in Takaful in the third chapter. The issue in question is about grey areas known as *al-shubuhāt* or doubtful matters. In takaful business, the issue of receiving a non-halal contribution occurs from a participant who earns non-halal income. Can this be considered as helping in committing sin, while realizing that Islam is a flexible (*murūnah*) religion that always considers the interest (*maṣlaḥah*) of the peoples? What *ijtihād* is used by takaful operators to accept the contributions from participants who earn their income from non-halal or doubtful sources? There are several *ijtihād* and opinions by *sharīʿah* scholars to answer these questions. Basically, any income obtained from illegal sources cannot be used for any benefit by the recipient, even in the name of *ṣadaqah*, *hibah*, or *hadiyyah* if it is clearly known to the receiving party and should be channeled to charity as a mean of purification. Regarding its application, there are two scenarios which lead to different rulings; firstly, receipt of non-halal contributions from individual participants, and secondly, receipt of non-halal contributions from group participants. In the former, it is acceptable on the grounds of *ḥusn al-ẓann* without any need to know the source of income. As for the latter, it is not acceptable to receive the contribution, but in the case of mixed activities, it is acceptable to receive the same if the halal activities do not exceed thirty percent.

The fourth chapter is about Distribution of Takaful Products by Dual Agency from *Sharīʿah* Perspective. Dual agency commonly occurs in takaful and insurance when the same person appointed as an agent representing both takaful and insurance company to market and distribute their products. Several issues have been raised about dual agency. However, the issue does not reflect the takaful operator's *sharīʿah* business. The first issue is the main concern i.e., the permissibility of dual agency practices. Rofaizal is of the opinion that it can be justified as a *maṣlaḥah*. The second issue concerns reputational risk due to bad service, inappropriate appearance of an agent, and insufficient knowledge by agent about *sharīʿah* contracts and so on.

Nik Abdul Rahim discussed Takaful Coverage of Suicide in chapter five. As we know, takaful is a scheme of mutual assistance based on the concept of *taʿāwun* and *tabarruʿ*. If a participant holds a takaful certificate, any events that occurred as per stipulated in its terms and conditions, the participant including family members are entitled to indemnity and the takaful benefits. Most family takaful, including life insurance, exclude death due to suicide from such events which qualify participants to make a claim.

Takaful operators include an exclusion clause in the takaful certificate to reject coverage in the event of death due to suicide within a certain period, such as 1 or 2 years after the effective date. This leads to the failure of legal heirs to receive any indemnity if the takaful participant commits suicide.

From *sharīʿah* point of view, suicide is one of the major sins likewise under the Malaysia Criminal Act under Section 309 of the Penal Code it is a crime. Insurance and takaful companies provide suicide clauses in order to prevent policy owners or takaful participants from getting financial incentives due to suicide. Insurance companies and takaful operators will usually not pay compensation or death benefits if the covered person dies due to suicide within the first two (2) years of coverage. In the early stages, suicide was covered through the concept of *taʿāwun*, but later it was not covered because of non-complicity. Eventually, suicide was not covered in the first year of takaful certificate due to the argument of moral hazard. The period of exclusion is set between one and two years of suicidal death after the participant has subscribed to a product. All takaful operators do not take the factor of suicide into account whether it occurs in a sane or insane state. Notwithstanding that, Nik Abdul Rahim identified some issues concerning the takaful coverage for suicide, among others, stipulating suicide clause and the nature of *taʿāwun*, insertion of suicide clauses, and suicide and mental issues.

On the topic of *Sharīʿah* Revisit of Takaful Benefits for Badal *Ḥajj* in chapter six, most takaful operators offer *badal ḥajj* as one of the benefits in particular products. The practices of Malaysian takaful operators are quite different from several aspects such as the number of benefits offered. There is a difference in the aspect of the event in terms of claimable benefits as to whether it is eligible only due to death, or also total permanent disability (TPD).

According to *sharīʿah*, *istiṭāʿah* is a crucial requirement of *ḥajj*. *Istiṭāʿah* by others means performing *ḥajj* by adopting the concept of *istinābah* (authorization). However, *istinābah* is not allowed for a physically capable person according to the jurists in their deliberation on its permissibility. Based on the data, there are several distinctions in *badal ḥajj* benefit among Malaysian takaful operators, a few of which pays the *badal ḥajj* benefit only due to the event of death while some others also include total permanent disability as one of the events. Apart from that, there are some takaful operators that pay on behalf of participants directly to any bodies or *badal ḥajj* service providers, after which this company will appoint eligible individuals to perform *badal ḥajj*. In this case, the nominee only receives related documents to verify that the pilgrimage has been completely performed. In another practice, the family of the deceased or incapable person has to appoint a person to perform *badal ḥajj* and the benefit will be payable to the authorized person. Nik Abdul Rahim raises some issues concerning takaful benefits for *badal ḥajj*, including *fiqh* adaption, types of eligible total and permanent disability to perform *badal ḥajj*, and the issue of *wakālah* by the takaful operator.

Mohamad Zaharudin investigates the Practice of Interim Coverage in the Takaful Industry in chapter seven. Interim coverage refers to coverage provided by a certificate between the date applied for by the proposed certificate holder and the certificate effective date, as approved by the underwriting and enrollment conditions applicable to that certificate. The interim cover will be given to the prospect or applicant during the process of underwriting period when the applicant needs to undergo the process of underwriting to ensure the eligibility of the applicant to comply with takaful operator's conditions. However, there are some takaful operators which do not provide interim cover, because the contract between the applicant and the company has not yet established so the latter is not responsible to cover the applicant's risk prior approval from the underwriter. Interim coverage at some takaful operators is embedded in MRTT product whereby the client will be given interim coverage once he gets the letter of acceptance (LOA) for his financing application. There are three types of underwriting process as practiced by takaful operators, namely full underwriting, simplified underwriting, and guaranteed issuance offer (GIO). During the process of underwriting, the takaful operator will only cover the risk that is associated with accidental death, but not other risks. Thus, no claim is payable for natural death, injuries, or medical claims. Although the value of the policy might be maximum, the company will put a limit for interim cover. In other words, the participant may not get a full amount of coverage. The compensation will be paid based on a specific formula determined by takaful operators. In addition, Mohamad Zaharudin identified several issues regarding interim coverage among others the contractual status of applicants during the underwriting period and the status of contribution payment upon rejection after the death of the applicant.

In chapter eight, Mohamad Zaharudin discusses the Contract of Reinstatement from the *Sharīʿah* Point of View. The Takaful Act 1984 defines the meaning of takaful as "a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose". The definition clearly stated that the main principle of a takaful scheme is a mutual consent among the participants to contribute to the fund. Although the contract takes a form of *ṣadaqah* or *tabarruʿ* from the beginning, the nature of *tabarruʿ* changes from the contract of *ghayr lāzim* into a *lāzim* contract due to the binding agreement among the participants or *iltizām* or promise of everyone to contribute to the fund. A promise to do something by a person will make it obligatory and binding upon him if its non-fulfillment adversely affects other parties. Mohamad Zaharudin singled issues such as the repayment of lapsed contribution and protection during lapsed time.

Ahmad Zaki discusses the Discounted Contribution from the *Sharīʿah* Perspective in chapter nine. In the context of takaful, a discount means a reduction given to the participant on the payment of the original contribution fee. Therefore, instead of paying a contribution in full, discounting is a common practice in business strategies to retain customers and to obtain or increase sales revenue. From the *sharīʿah* perspective, the practice of giving discounts on the price of goods generally does not violate any of the principles outlined in *muʿāmalāt*. This is based on the principle of agreement between two contracting parties (*al-tarāḍī*).

As far as takaful is concerned, *hibah* has been adapted as an additional concept of takaful products and is practiced by most takaful operators. In relation to the discounting practice, under this approach (*hibah*), the takaful operator will compensate the discounted portion of the contribution payment to the takaful fund. This is to cover the loss that the takaful fund due to discounts. This approach (waiving of the *wakālah* fee) is also a straightforward process where the takaful operator agrees to waive all or a portion of the *wakālah* fee from the participant. Payment by the participant will be contributed to the *tabarruʿ* fund after the deduction of *wakālah* fee and other related funds. In this approach, no loss to the *tabarruʿ* fund is realized from the discounting practice as the final drip to the *tabarruʿ* fund is done after the deduction of the *wakālah* fee. Although giving discounts is permissible in general and from the *sharīʿah* perspective, the practice may trigger some operational issues which may lead to *sharīʿah* concerns if the matter is not managed carefully. Two issues in relation to the practice are the reduction of takaful fund amount and fairness to the takaful fund.

In the last chapter, Ahmad Zaki discusses the Practice of No Lapse Facility in the Takaful Industry. No Lapse Provision (NLP) is defined as a commitment by the takaful operator to keep a takaful certificate in force even when the cash values in the certificate drop to zero or less than zero, and the certificate is no longer able to meet the *tabarruʿ* deduction and other charges imposed by the takaful operator. However, under some circumstances as determined by the takaful operator at the product development stage, even though the takaful contribution is consistently being paid by the participants, the takaful contribution may be insufficient to cover the required *tabarruʿ* deduction and other charges during the initial certificate years, which may lead to the lapsation of the certificate.

Notwithstanding the above, within the specified and predetermined NLP period, the certificate shall not lapse even if there are insufficient amounts in the participant's account(s) under the certificate, subject to certain terms and conditions. This practice may trigger the issue of the impact of insufficient amount contributed to a takaful fund due to impairment. Another issue identified by Ahmad Zaki is the debt owed by the participants, as the status of NLP determines whether it is confirmed or not. Although the practice of NLP may be considered as complying with the *sharīʿah* principles, a detailed operational guideline should be established in order to manage potential *sharīʿah* and operational issues in the implementation of NLP.

The summary above is intended to provide readers an early overview of the discussions in this e-book. With that, the authors would like to express their deepest gratitude to the research collaborators namely FWD Takaful Berhad and Universiti Islam Selangor (UIS) who have entrusted the authors in conducting this research. Without their strong support, this research project would not be possible.

On the same note, we would like to offer special thanks to the Center for Innovation and Research Management (RMIC UIS) that facilitates a lot of technical operations of the research. Not to forget, our thanks also go to the Faculty of Syariah and Law (FSU UIS) for the relentless support as well as the industry players who willingly gave their time for the interview and significantly contributed to the data collection.

Last but not least, may this humble e-book be accepted by Allah (SWT) as part of our good deeds and *a'mal jāriah.*

Wassalam.

Dr. Khairul Anuar Ahmad
Project Leader

CONTRIBUTORS

Khairul Anuar Ahmad is Senior Lecturer, Faculty of Syariah and Law, Universiti Islam Selangor (UIS), Selangor.

Mohd Rofaizal Ibhraim is Lecturer, Faculty of Syariah and Law, Universiti Islam Selangor (UIS), Selangor.

Nik Abdul Rahim Nik Abdul Ghani is Senior Lecturer, Research Centre for Syariah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia (UKM), Selangor.

Ahmad Zaki Salleh is Associate Professor, Faculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM), Negeri Sembilan.

Mohamad Zaharuddin Zakaria is Associate Professor, Faculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM), Negeri Sembilan.

RESEARCH ASSISTANTS

Amirul Amri Jaa'far

Muhammad Amin Al-Azmi

LIST OF FIGURES

LIST OF TABLES

ABBREVIATIONS

AAOIFI	Accounting and Auditing Organization for Islamic Financial Institutions
BNM	Bank Negara Malaysia
CI	Critical Illness
GIO	Guaranteed Issuance Offer
GTT	Group Term Takaful
IFSA	Islamic Financial Services Act
ILT	Investment-Linked Takaful
ISA	Investment Saving Account
IUA	Investment Unit Account
LOA	Letter of Acceptance

MRTT	Mortgage Reducing Term Takaful
MUI	Majelis Ulama Indonesia
PIA	Participant Investment Account
PIF	Participant Investment Fund
PPD	Partial Permanent Disability
PRF	Participant Risk Fund
SAC	Shariah Advisory Council
TO	Takaful Operator
TPD	Total Permanent Disability
WHO	World Health Organization

CONTENTS

01

ABSOLUTE ASSIGNMENT IN THE TAKAFUL INDUSTRY

KHAIRUL ANUAR AHMAD

INTRODUCTION

Little has thus far been revealed about absolute assignment and its implementation in Malaysia's takaful industry. Despite being regulated under the Islamic Financial Services Act (2013), none of it is covered under the repealed Takaful Act 1984. However, the practice of absolute assignment is nothing new in conventional insurance. By passing the title in the insurance policy absolutely to the assignee, the assignor, that is the policyholder, retains no interest in the policy. The assignee is now the absolute owner of the policy and he or she may use it as he or she likes such as transferring his or her interest to another person or surrender the policy. In the context of customer-bank relationship, this practice will benefit both the assignor and the assignee in the sense that the customer's obligations may be released by assigning the insurance policy to the bank. In this case, the bank can use the insurance policy to deal with credit risk by utilizing the insurance proceeds to cover customer's obligations.

The application of absolute assignment in insurance offers numerous benefits to policyholders, especially in times of financial difficulty. The policyholders and bank customers have a safety net to avoid themselves from being declared insolvent by the bank. At the same time, absolute assignment helps the bank to manage its credit risk. Both parties engaging in conventional insurance and banking can reap the benefit of absolute assignment. Whilst conventional finance can enjoy some benefits from this practice, Islamic finance may have to level the playing field to do the same. Since *sharīʿah* compliance is the core concern of Islamic financial institutions, the practice of absolute assignment should go through *sharīʿah* deliberations and justifications to make it acceptable from *sharīʿah* point of view. As such, this paper attempts to analyze and deliberate the practice of absolute assignment in the context of the takaful industry in Malaysia.

The Concept of Absolute Assignment

From a conventional insurance point of view, absolute assignment refers to a policyholder transferring his or her ownership of a policy to another party. The transfer means that all of the coverage within that policy will now go to the newly named party. The transferor or the assignor does this for a number of reasons among others as a compassionate gift to the assignee, to settle a loan, and so on. Even if the policyholder or the assignor has now given up his rights to all of the claims and privileges, he is still responsible to ensure the policy is in force uninterruptedly. The blame will be put on him in the case of failure to pay the insurance premium, even when the assignee has already been stipulated to pay the same (Insuranceopedia, 2022).

As far as law is concerned, there are a number of places in Islamic Financial Services Act (2013) in which the term ‘assignment’ is mentioned, specifically under clauses 4.1 (a) and 4.1 (b), 5.1, and 7 (1) and 7 (2). Clause 4.1 (a) and 4.1 (b) pertains to the capacity of minor to enter into contract of takaful in which a minor between age ten to sixteen or has attained the age of sixteen may assign or take an assignment of family takaful certificate with a written consent from a parent or guardian. Clause 5.1 indicates the equivalent rank between assigned and unassigned/standard family takaful certificate, in which the takaful benefit should be paid without deduction for both types of certificates. Clause 7. (1) and 7. (2) cover the rank of beneficiaries, as the takaful benefit will be paid first to the takaful certificate assignee prior to the nominee. In the case that all takaful beneficiaries are assignees, the assignee who has given on the earliest date a written notification of the security or assignment to the licensed takaful operator will be prioritized over other assignees. Together with the mention of assignment in Clause 7 (1) and 7 (2), there is the statement about pledge in which the takaful certificate can be made a security for any financial obligation (with individual creditor or financial institution). Under the ambit of these clauses, impliedly the takaful benefit can be nominated, assigned, or made a pledge. The legal aspects of absolute assignment in this act is briefly covered.

According to the previous literature about absolute assignment from *fiqh* perspective, Ahmad Basri & Ahmad Fadhil Hamdi (2015) have suggested that there are two types of *fiqh* adaptation for absolute assignment, namely *hibah* and *kafālah*, in which the former involves assignment between individuals and the latter involves assignment between institutions or financiers.

Consistently, the interview data collected from industry players shows viewpoints in terms of the idea about absolute assignment from *sharīʿah* perspective. Table 1.1 below shows how practitioners look at the absolute assignment from the *sharīʿah* perspective:

Table 1.1: The Fiqh Adaptation of Absolute Assignment

TOs	Fiqh Adaptation		
	Individual	Institution	No clear fiqh adaptation
	Hibah	*Kafālah*	
TO1			√
TO2			√
TO3			√
TO4			√
TO5	√	√	
TO6	√		
TO7	√		

Source: Interview data

Different takaful operators shared different views with regard to *fiqh* justification for absolute assignment. Different *muʿāmalāt* concepts or contracts were pointed out by some of them. However, the majority opine that there is no specific *fiqh* adaptation which could fit the definition of absolute assignment, as currently practiced by the industry. In light of the fact that takaful operators employ absolute assignment based on the provisions of IFSA 2013, it can be implied that the application of absolute assignment has been taken for granted without much discussion regarding its *fiqh* adaptation.

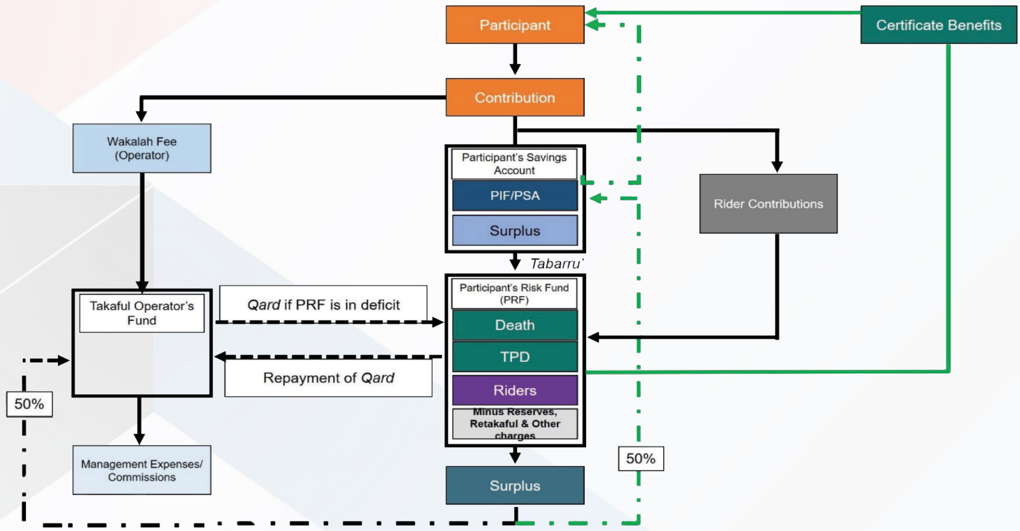
At a glance, we may endorse that the act of assignment is a kind of gift (Ar. *hibah*). Nevertheless, to validly assume assignment as a *hibah* from an insurance perspective might not be totally correct. Azman (2009) cited a court case about the validity of assignment to be considered as a gift. In Sadiq Ali v Zahida Begam, a husband assigned policies of insurance to his wife, but it was contended that the assignment amounted to a gift, making it invalid under the Muslim law. The validity of the assignment was attacked on two grounds, namely that it was a gift in *futuro* and a contingent gift. The High Court (Thom C.J. and Ganga Nath J.) in the course of its judgment said, "It is essential for the validity of a gift that there should be: (1) a declaration of the gift by the donor; (2) an acceptance of the gift, express or implied, by or on behalf of the donee; and (3) delivery of possession of the subject of the gift by the donor to the donee. Where a person has assigned his right to receive money under insurance policies and the assignee has stated on oath that the policies were handed over to her and she accepted them, the gift is complete as soon as these conditions were complied with. The mere fact that the money was to be realized in future is not enough to make it a gift in *futuro*. Valid gifts can be made of actionable claims." Based on the case judgement, to draw a parallel between assignment and *hibah* might be problematic because for a *hibah* to be valid, it must be physically possessed by the donee. Nevertheless, Azman, (2009) concluded that this judgement is in line with the resolution of Dallah Barakah *Sharī῾ah* Advisor and Bank Negara Malaysia in allowing takaful benefits to be given as *hibah*. Impliedly, this could mean that nomination and assignment can be considered as *hibah* as well, as takaful benefits are embedded in them.

Absolute Assignment in the Takaful Industry

Takaful refers to an arrangement based on mutual assistance, under which takaful participants agree to contribute to a common fund that provides mutual financial benefits which become payable to the takaful participants or their beneficiaries on the occurrence of pre-agreed events (Islamic Financial Services Act, 2013). Despite the definition only mentioning a relationship between takaful participants and a common fund, in practice there is another relationship between the takaful participants and takaful operators. In summary, there are two types of relationship. The first of which is between the takaful participants and the common fund, while the second is between the takaful participants and the takaful operator. In the former, by committing to donate (*iltizām bi al-tabarru‘*) into a *tabarru‘* fund (also known as risk fund or participant risk fund - PRF), all participants establish a contractual relationship with the fund on the basis of *tabarru‘*, literally ‘gratuitous donation’, whilst in the latter, the participants appoint a takaful operator as their agent (*wakīl*) to manage the risk or *tabarru‘* fund with chargeable fees (*wakālah bi al-ujrah*). According to *fiqh al-mu‘āmalāt*, *tabarru‘* technically refers to a kind of contract in which the donor gives the donee something without expecting any consideration. Specifically, *hibah*, *hadiyyah*, *waqf*, *ṣadaqah* and the like fall under the purview of *tabarru‘*.

This risk fund is utilized to indemnify any misfortune that befalls the participants and any surplus arising from this fund will be shared between the participants and the takaful operator on the basis of reward (*ju‘ālah*). Depending on the model, a takaful operator may offer investment opportunity to the participants by establishing another fund which is linked to investment. This fund is also known as investment fund or participant investment fund (PIF). In this context, the relationship between the participants and the takaful operator might be on the basis of either capital provider-entrepreneur (*muḍārabah*) relationship or principal-investment agent (*wakālah bi al-istithmār*) relationship. There are three types of benefit payable to the takaful participants i.e., sum covered, distributable surplus, and the available investment principal and return, as represented by green straight and dotted lines in Diagram 1.1 below:

Figure 1.1: Takaful Structure (Wakālah Model)



Source: Author

According to the Islamic Financial Services Act (2013), takaful benefits include any benefit, whether pecuniary or not, which is payable under a takaful certificate. Based on this definition, takaful benefits comprise all types of benefit payable to the participants, and may take the form of monetary or non-monetary benefits. This means that takaful benefits may include sum covered, distributable surplus and total investment income or account value of PIF. However, Ahmad Basri & Ahmad Fadhil Hamdi (2015) raised the concern that some takaful operators do not regard the balance in PIF as part of takaful benefits, considering them to belong to the participant and thus not payable to the nominees. These takaful operators regarded the PIF as part of the estate of the person covered; therefore it has to be distributed to the heirs of the person covered according to Muslim's law of inheritance and distribution law for non-Muslims. On top of that, some other opinions have considered PIF as not a kind of takaful benefit due to there is no clear benefit, whether pecuniary or not, payable under the takaful certificate that belongs to the participant. This is because of the nature of PIF itself, as it is segregated from PRF in reference to Item 50, Segregation of Funds in the SAC BNM Rulings 2nd Edition, page 76:

> "The SAC BNM in its 62nd Meeting on 4th October 2006 had resolved it is permissible to segregate the Takaful Fund into Participant Investment Fund which is owned by participant and Risk Fund is for mutual indemnity to the takaful participants as mutual help and joint guarantees should any fellow suffers a defined loss."

Impliedly, the resolution above can be understood as takaful benefits only covering PRF, whereas PIF does not fall under the ambit of takaful benefits, on the grounds that both funds are segregated and different from each other. Nevertheless, this issue might not be relevant to some other takaful operators in the context of absolute assignment. According to them, as indicated in Table 2 above, when absolute assignment is executed, the takaful benefits are transferred to the assignee entirely as is the case in beneficiary under nomination. Therefore, the issue of distributing part of the benefits namely PIF to the heirs should not arise, and ultimately the benefits are transferred to the assignee in full.

In the same light, Ahmad Basri & Ahmad Fadhil Hamdi (2015) deliberated ways in which certain takaful benefits are payable depending on the death or life status of the covered person. On the one hand, should the covered person alive, he or she is entitled to the takaful benefits either in the case of partial permanent disability (PPD) or total permanent disability (TPD), or during the maturity of takaful certificate. In addition, he or she may also assign the takaful benefits to another party for whatever reasons.

On the other hand, in the case of death of the covered person, he or she may nominate a next of kin either to be a beneficiary or an executor. This is consistent with Schedule 10 Islamic Financial Services Act (2013), which states that a takaful participant who has reached the age of sixteen may nominate an individual to receive takaful benefits payable upon his/her death under the takaful certificate, either as an executor or as a beneficiary under a conditional *hibah*. According to the 34$^{th.}$ SAC BNM meeting dated 21 April 2003, conditional *hibah* will not transform the status of *hibah* into bequest. Thus, it will transfer the rights of takaful benefit to the nominee provided that the covered person intended the nominee to be a beneficiary (BNM, 2010). However, if the covered person named the nominee as an executor, the takaful benefits become bequeathable; therefore, conditional *hibah* is not applicable in this case.

Back to the issue of alive covered person, he or she may receive the takaful benefit either as an adverse result of misfortunes or during maturity or assign it to another party. As far as the latter is concerned, the assignment can take the form of conditional assignment or absolute assignment. Conditional assignment means the transfer of rights from the assignor/covered person to the assignee subject to certain terms and conditions. If the conditions are fulfilled by the assignor, the policy will get transferred back to him as the original owner of the certificate (MyInsuranceClub.Com, 2022b). Absolute assignment means complete transfer of rights from the assignor to the assignee. In other words, absolute assignment refers to completely transferring full and sole rights of the policy from the assignor to the assignee, without any further terms and conditions. The process of assignment is complete only when the original policy has been endorsed, or a fresh policy has been issued in favor of the assignee (MyInsuranceClub.Com, 2022a). Based on the above definitions, Ahmad Basri & Ahmad Fadhil

Hamdi (2015) correctly observed that the only difference between the two is that conditional assignment is contingent upon pre-agreed terms and conditions, while absolute assignment is an outright transfer, effectively implemented and not contingent upon anything at all.

Generally, the practice of insurance policy or takaful certificate assignment takes place only for life policies and family certificate. In family takaful, the certificate holder/assignor can normally assign the rights over takaful benefits to a 'person' to whom he/she wishes to give the benefit. As defined in Islamic Financial Services Act (2013), 'person' may refer to an individual, any corporation, statutory body, local authority, society, trade union, co-operative society, partnership and any other body, organization, association or group of persons, whether corporate or unincorporated. So far, there is no instance where general policy or certificate is made an assignment. This may be due to the fact that assignment will transfer the takaful benefits to an individual assignee or in the context of institutions to cover financial obligation in the event of participant's death. Differently, benefits in general takaful are intended to cover properties. In other words, no general takaful benefit is used to protect the life of a person or settling debt; hence, it is not assignable. Based on Table 1.2 below, all TOs are of the view that absolute assignment is applicable only to family products and not to general products:

Table 1.2: The Applicability of Absolute Assignment to Takaful Products

TOs	Applicability of Absolute Assignment	
	Family Products	General Products
TO1	√	
TO2	√	
TO3	√	
TO4	√	
TO5	√	
TO6	√	
TO7	√	

Source: Interview data

In the context of the application of assignment in Malaysia takaful industry, there are different arrangements among takaful operators. Almost all takaful operators apply absolute assignment with a few of them practice additional types of assignment namely partial assignment and collateral assignment (refer Table 1.3 below). As mentioned earlier, Schedule 10 Clause 7 (1) and 7 (2) of Islamic Financial Services Act (2013) extend the application of assignment to a pledge. In the event where assignment is made a pledge, the right of assignee over the pledged assignment is given priority over the nominee. In other words, the claim of assignee/pledgee against full or partial takaful benefits is prioritized over the claim of nominee. When there is balance after the claim is made against takaful benefits, the institution at which the participant/assignor has financial obligations is liable to refund the balance to the assignor.

Table 1.3: Different Practices of Assignments in Takaful Industry

TOs	Absolute Assignment	Partial Assignment	Collateral Assignment	Partial Assignment and Nomination	No practice
TO1	√				
TO2	√	√			
TO3					√
TO4	√				
TO5	√	√	√		
TO6	√				
TO7	√				

Source: Interview data

According to one takaful operator that applies collateral assignment, the *fiqh* adaption for collateral is not *rahn* but rather *kafālah*. The basis of *takyīf* is that the risk fund acts as a *kafīl* to guarantee the financial obligation of the participants. According to some jurists inter alia Al-Kāsānī (1986, 6: 6), Ibn ʿĀbidīn (1966, 5: 294), Ibn Qudāmah (1997, 4: 405), and Al-Shirbīnī (1994, 3: 199), there are two conditions for a *kafīl* to be valid:

1. A person with capacity of reason and puberty, that is, the capacity to donate (أهلية العقل والبلوغ أى أهلية التبرع)

2. Freedom to transact (الحرية)

Based on the above conditions, an individual but not a pledged asset would normally be a guarantor or *kafīl*. As far as the risk fund is concerned, its status is no longer related to a person but to a legal entity. Nevertheless, a legal entity as defined by law can be a lawful or legally standing association, corporation, partnership, proprietorship, trust, or individual. It has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, and sue (The Law Dictionary, 2022). Thus, a risk fund fits the requirement of a valid *kafīl*, as it is a legal entity that includes individual.

With regard to the rights and obligations arising from the practice of assignment, some takaful operators let the assignor transfer only the rights over takaful benefits to the assignee, but the former maintains the obligation to pay for the takaful contribution. On the one hand, the assignor is still the owner of the certificate in this case. On the other hand, some takaful operators allow the assignor to fully transfer the right of takaful benefits, including takaful certificate, to the assignee. The legal effect of this practice, among others, is that the assignor will no longer be the certificate owner, thus losing the power to make a nomination, but still has to pay contributions accordingly to honor the assignment (Ahmad Basri & Ahmad Fadhil Hamdi, 2015).

Based on the above, by right the assignor should lose his power to surrender, and the certificate owner's name should be changed to assignee's name as well, if the takaful certificate is assigned. However, Ahmad Basri & Ahmad Fadhil Hamdi (2015) discovered that is not the practice in both conventional insurance and takaful. They confirm that the market practice of assignment is to assign takaful benefits only. Consequently, the assignor still retains his ownership on the certificate, maintains the power to nominate and surrender, but does not own the takaful benefits, since they belong to the assignee. This is evidenced in Table 1.4 below, which reveals that the ownership of the assigned takaful certificate still belongs to the assignor or participant. Even though the assignor maintains the power to surrender, he or she has to obtain the assignee's permission in doing so.

Table 1.4: Ownership Status of the Assigned Takaful Certificate and Benefits

TOs	**Ownership Status**	
	Assignor (Takaful Certificate)	**Assignee (Takaful Benefits)**
TO1	√	√
TO2	√	√
TO3	√	√
TO4	√	√
TO5	√	√
TO6	√	√
TO7	√	√

Source: Interview data

Issues in Absolute Assignment

Whilst considering the issues in absolute assignment are not exhaustive, Ahmad Basri & Ahmad Fadhil Hamdi (2015) have identified a number of issues, the first three of which are *sharīʿah*-related issues:

1. Lapse and surrender in absolute assignment
2. Predeceased issue
3. Absolute assignment as medium of debt payment
4. Operational issues

Lapse and surrender in absolute assignment

As explained earlier, an assignee has a greater right on takaful benefits compared to a nominee. Even so, the assignor can still surrender the certificate if he wishes to, after the certificate has been fully assigned. This gives rise to a question as to whether the surrender amount will go to the assignee or else it goes to the assignor himself. Another question arises from the first question: what will be the *fiqh* adaptation on absolute assignment in the case of certificate lapse as well as surrender by the assignor?

Despite of the takaful certificate being assigned, a lapse of certificate can still occur. Normally, a sum of money will be automatically deducted from the PIF if the participant fails to pay the takaful contribution on time The PIF becomes gradually exhausted and finally certificate lapse will follow suit. So, what is the view of *sharīʿah* in this regard? Does an assignee still have the absolute right to claim the takaful benefits? What will be the *fiqh* adaptation on absolute assignment if a lapse occurs? The issue is quite inexplicable. Theoretically, the assignor assigned his certificate to the assignee and from individual assignment point of view this was regarded previously as *hibah*. As far as *hibah* is concerned, no *hibah* can be executed because of non-existence of its subject matter (takaful benefits) as a result from lapse. This is because given that there is no contribution paid during lapse period; thus, no takaful benefits are payable to the participant. Since *hibah* is comparable to assignment, the latter cannot be performed as well.

As for certificate surrender, the benefits which are the subject matter of *hibah* do not exist and so it cannot be executed. For the reason that *hibah* cannot be executed in a surrendered certificate, all benefits embedded to the certificate cannot be assigned too. Since PIF is one of the benefits, it shouldn't be assigned therefore it belongs to the assignor (Ahmad Basri

& Ahmad Fadhil Hamdi, 2015). From collateral assignment viewpoint, the proposed solution by both the authors might be relevant with the case of cancellation of *rahn* in which all the physical of the *marhūn* or pledged asset should be returned to the pledgor. This is because the ownership of the *marhūn* always remains with the pledgor. One takaful operator pointed out that the assignor needs to get the assignee's permission if the former intended to surrender the certificate, as shown in Table 1.5 below:

Table 1.5: Lapse and Surrender in Absolute Assignment

TOs	Lapse	Surrender
TO1	No case so far	Assignee's permission needs to be obtained
TO2	No discussion	No discussion
TO3	No discussion	No discussion
TO4	No justification	No justification
TO5	Cash value will be given to assignee	No case so far
TO6	No absolute assignment	No absolute assignment
TO7	No case so far	No case so far

Source: Interview data

Predeceased issue

The issue of predecease is only raised in the case of individual assignment. In discussing this issue, Ahmad Basri & Ahmad Fadhil Hamdi (2015) gave an example of takaful benefit for individual assignment. Given Participant A absolutely assigned his takaful benefit to assignee B, who is his best friend on the basis of affection. Logically, all the benefits under the certificate are now belong to assignee B. Unfortunately, assignee B passed away a few months later. The question arises as to whether the takaful benefits remain with assignee B, or are to be returned back to Participant A. If transferred back to Participant A, the *fiqh* adaptation for the absolute assignment would be *hibah ruqbah*. Otherwise, if it cannot be transferred back and has to remain with the deceased/assignee B, and his/her heirs must wait for Participant A to pass away first in order for them to attain the takaful benefits. This situation might not be as simple, especially in the case in which Participant A lives a long life. To a certain extent, the case becomes more complicated if B's heirs who are entitled to *farā'iḍ* pass away prior to Participant A.

In a suggestion related to this issue, Ahmad Basri & Ahmad Fadhil Hamdi (2015) have also suggested that if the assignee predeceased, the assignment will be revoked automatically. This is because the subject matter of *hibah* i.e., takaful benefits have not exist yet before the assignee deceased and the assignor is still alive. As stipulated in Islamic law of transaction, for a *hibah* to be executable, its subject matter should exist during the act of giving *hibah* (Wizārat al-Awqāf wa al-Shu'ūn Al-Islāmiyyah, 1983). According to Al-Zuḥailī (n.d., 5: 3988), for a subject matter of *hibah* to be valid, certain conditions have to be met as follows:

i. It exists at the time of the gift (أن يكون موجوداً وقت الهبة)

ii. It is a valuable asset according to *sharī'ah* (أن يكون مالاً متقوماً)

iii. It is a kind of property that can be owned (أن يكون مملوكاً فى نفسه)

iv. It is owned by the donor (أن يكون مملوكاً للواهب)

v. It is attainable i.e., detachable (أن يكون محرزاً أى مفرزاً)

If the subject matter did not exist yet, the *hibah* is just considered as assignor's declaration or commitment or promise (*waʿd*) to give *hibah*, but not to the extent of executing it. However, if the subject matter has been confirmed as unable to be delivered during the assignee's lifetime, the *hibah* or commitment to do *hibah* should be considered as being revoked. Hence, in the long run, it is recommended for takaful operators to allow the assignment of sums covered only (payable from PRF). PIF amount or maturity value and other benefits, such as *badal ḥajj* (replacement pilgrimage by a proxy) or bereavement benefit is excluded from being assigned in order to avoid unnecessary *sharīʿah* issues. Furthermore, it is not just the takaful benefit that does not exist as yet, but the status of PIF is also uncertain as to whether it can generate return or otherwise. However, there is difference of opinion on the ability to pay the PIF. Some takaful operators are of the view that takaful benefits, be they pecuniary or not, are payable be it in the form of PIF, gained surplus, and contributed contributions placed in a safeguarded savings and investment account.

Nevertheless, such a situation might not be that complicated if the absolute assignment is arranged between individual and institution in which the individual is a takaful participant and the institution is a financial institution. This is because the latter is not subject to death as it has its successor in title, except in an extreme condition like winding up and closing down of business. Based on the industry interview data in Table 1.6 below, most of the takaful operators have not had any discussion with regard to the predeceased issue so far, assuming that some of them have not encountered such case yet, while one of them has not applied absolute assignment in their organization.

Table 1.6: Predeceased in Absolute Assignment

TOs	Individual	Institution
TO1	Applicable	Applicable
TO2	No deliberation internally	No deliberation internally
TO3	No deliberation internally	No deliberation internally
TO4	No justification	No justification
TO5	Applicable	Not applicable
TO6	Applicable (absolute assignment will be revoked)	Applicable
TO7	No deliberation internally	No deliberation internally

Source: Interview data

Absolute assignment as medium of debt settlement

On this issue, Ahmad Basri & Ahmad Fadhil Hamdi (2015) relates that the *ribawī* element might occur if the value of absolute assignment is more than the amount of financial obligations the customer or takaful participant has to settle. To understand this issue better, an example is as follows. Assuming that an Islamic bank offers financing to Participant A, as a collateral, Participant A may absolutely assign his/her takaful certificate together with all of the underlying takaful benefits to the bank. In the event in which he/she is unable to pay the debt, the outstanding amount will be paid from the assigned takaful benefits. As affirmed earlier, the general *fiqh* adaptation for absolute assignment is *hibah*. However, in this context, the assigned takaful certificate acts as a collateral to the debt, and not a *hibah* contract per se.

Theoretically, if the value of assigned takaful benefits is higher than the outstanding amount of debt, this may give rise to the issue of *ribā*, because Participant A has to pay more than what he/she is due. However, in practice, even if all of the takaful benefits have been absolutely assigned, the bank will only take the outstanding amount and will refund the remaining balance to the nominee, if any. This practice seems to resolve the issue of the bank taking more than what it is entitled to and subsequently eliminate concern about *ribā*. On the same note, concern about *ribā* can be mitigated if the contract that underlies the debt transaction is not *qarḍ*-based. Nonetheless, should the contract that underlie the financing is debt or sale-based, the assignee must not take the benefits, the value of which is above the amount of outstanding amount to avoid using up the property of others illegally (*akl al-māl bi al-bāṭil*).

Despite of suggesting *hibah* to replicate modern absolute assignment, Ahmad Basri & Ahmad Fadhil Hamdi (2015) do not agree that *hibah* is given purposely to settle a debt. In a normal terminology, payment or settlement of debt would be the word used by the debtor instead of giving *hibah* for a debt to be settled. Considering the issues that may arise from associating *hibah* with absolute assignment, both of them discovered that pledge (*rahn*) is a potential alternative for absolute assignment. The idea is that the certificate holder (pledgor) may place his/her takaful certificate with the bank (pledgee) as a collateral for the financing. At the same time, the takaful operator must be made known of the pledge given by the certificate owner. Whenever the pledgor dies or in the PPD or TPD condition and his/her outstanding debt is still due, the takaful operator will deduct a portion from takaful benefits to satisfy the outstanding amount. If there is any balance after deduction, this should be refunded to the assignor/pledgor.

From juristic point of view, the conditions of a valid sale contract are equally applicable to *rahn*. According to Ibn Qudāmah (1997):

اتفق الفقهاء على أنه يشترط في المرهون ما يشترط في المبيع حتى يمكن بيعه، لاستيفاء الدين منه

"The jurists have unanimously agreed that the condition of pledge is the same to the condition of the thing sold, so that the pledge can be sold in order to recover the debt from it."

Nevertheless, Ḥanafī school further specified certain conditions for the validity of *rahn* among others (Al-Kāsānī, 1986, 6: 135-140; Ibn ʿĀbidīn, 1966, 6: 489):

1. The debt must be validly confirmed (أن يكون الدين لازماً صحيحاً)
2. The pledge is saleable (أن يكون المرهون قابلاً للبيع);
3. Be an asset/property (أن يكون مالاً);
4. Valuable, from *sharīʿah* perspective (أن يكون متقوماً);
5. Can be identified (أن يكون معلوماً);
6. Owned by the pledgor (أن يكون مملوكاً للراهن);
7. Free from incumbrances (أن يكون مفرَّغاً);
8. Can be possessed (أن يكون محوزاً);
9. Can be distinguished (أن يكون متميزاً);

The only difference between a pledge and an assignment for debt payment is that the former is a straightforward contract, in the sense that the subject matter of *rahn* supposedly exist at the time of contract whereas the assigned takaful benefit does not exist at the time of contract but it will take place in the event of future incidents. Premised on that, absolute assignment is not applicable in Malaysia's common law from legal point of view. Nevertheless, Islamic Financial Services Act, (2013) clearly states in Schedule 10 that takaful benefits can be assigned 'or' pledged. According to Ahmad Basri & Ahmad Fadhil Hamdi (2015), there are divergent views of legal practitioners about the way they look at takaful benefit as an assignment or a pledge. Some of them are of the view that takaful benefit is a kind of assignment but some look at it as a pledge. However, since there is no case regarding pledging of takaful benefits being brought before the court, the takaful operator that begins the pledging might be exposed to a high risk in terms of court-dealing if such a case arises.

Thus, Ahmad Basri & Ahmad Fadhil Hamdi (2015) opine that the proposed *fiqh* adaptation for absolute assignment i.e., *rahn*, does not fit well with the concept of absolute assignment. This is due to the nonexistence of subject matter in absolute assignment distinguish it from *rahn* in the sense that subject matter of *rahn* must exist during conclusion of contract. In addition, according to them, absolute assignment is a transfer of right only, while *rahn* will require full transfer of the asset, including the transfer of rights and liability.

Nevertheless, to the best of this author's knowledge, there is not even a transfer of right and obligation in *rahn* as its ownership remains always with the pledgor/assignor from the perspective of Islamic law of transaction, based on the condition that the pledge is owned by the pledgor (أن يكون مملوكاً للراهن). As a result, any increments and expenses arising from the pledge are the rights and obligations of the pledgor (Al-Miṣrī, 1997).

Therefore, from the perspective of conventional finance and civil law, 'pledge' might better suit the meaning of absolute assignment, despite an established rule in civil law that provides that no pledge can be made without its existence. However, in this case the pledge which takes the form of takaful certificate does exist but not its benefits at the time of absolute assignment is done. In justifying the non-existent of subject matter or benefits in the context of *rahn*, it should not be an issue as some jurisdiction allows constructive *rahn* or pledge which will exist in the future. For instance, this is clearly spelt out by BNM (2018) in their Rahn Policy Document as follows,

> 14.4 In relation to paragraph 14.3, the pledgor may pledge an asset that will exist and will be owned in the future as collateral under a *rahn* contract.

This clause perhaps shares the same idea about *rahn tasjīlī* or *rahn ḥukmī* which was decided by MUI, (2008) in Fatwa Dewan Syariah Nasional No: 68/DSN-MUI/III2008.

Table 1.7: Absolute Assignment as Medium of Debt Payment

TOs	*Hibah*	*Kafālah*	*Rahn*	No Justification
TO1			√	
TO2				√
TO3				√
TO4			√	
TO5		√		
TO6		√		
TO7	√			

Source: Interview data

Ahmad Basri & Ahmad Fadhil Hamdi (2015) have also suggested *kafālah* or guarantee as the *fiqh* adaptation for absolute assignment. In this context, the risk fund acts as a guarantor (*kafīl*) who guarantees the debt of takaful participant (*makfūl ʿanhu*). However, to draw a parallel between *kafālah* and absolute assignment might not be that accurate, because the typical practice of guarantee has nothing to do with offering something (in this case, takaful benefits) as a security. Guarantee is an act of a person to secure the debt for the creditor. In addition, a question may arise as to whether a risk fund can be a guarantor on its capacity as a legal entity. Another question that may create an issue is whether consent from all participants need to be secured for the risk fund to be the guarantor of any financial obligation. Thus, the practical way to address this problem is by resorting to *rahn* as the *sharīʿah* basis for institutional or collateral assignment. This is because the ownership of *marhūn* (in this context takaful certificate) still belongs to the participants, but the benefits of the *marhūn* will be vested to the assignee if a certain adverse incident is triggered.

Operational Issues

Apart from *sharīʿah* issues, operational issues may occur if assignment is to include PIF. This is because in the event of predecease i.e., when the assignee dies, the only amount that already exists is the balance in PIF. If PIF is assigned, the available amount has to be taken out and distributed to the assignee's heirs as soon as possible to avoid the *farāʾiḍ* distribution issue. In order to implement this, there will be system limitation subsequently contribute to increase in the amount of certificate lapse. By distributing only PIF portion of the benefits, this practice might be considered as a kind of partial assignment.

However, assigning partial benefits is not being practiced in the industry so far since many of the takaful operators preferred full assignment. The reason being, this practice creates no operational issues, as indicated by the practitioners in Table 1.8 below:

Table 1.8: Operational & Sharīah Issues in Absolute Assignment

TOs	Operational Issues		Additional Sharīʿah Issues	
	Yes	No	Yes	No
TO1		√		√
TO2	√			√
TO3	√			
TO4		√		
TO5		√	√	
TO6		√		√
TO7	No deliberation internally	No deliberation internally	No deliberation internally	No deliberation internally

Source: Interview data

In reference to Table 1.8 above, one of the takaful operators has identified a *sharīʿah* issue pertaining to the absolute assignment between individual and institution or specifically collateral assignment. This *sharīʿah* concern arises when the assigned takaful benefits are used as a pledge for a conventional loan. This gives rise to the issue of permissible takaful interest. Nevertheless, the takaful operator has laid down a *sharīʿah* parameter to address this issue, namely the assigned benefit can only be utilized for settling Islamic financing debt. Notwithstanding this, certain types of conventional loans might be settled via absolute assignment, but on case-by-case basis after consulting its *Sharīʿah* Committee.

Conclusion

So far, there is no specific *fiqh* adaptation that can fit neatly into the application of absolute assignment in the industry. This might be due to the fact that absolute assignment was spelt out in IFSA 2013 therefore the industry takes it for granted and practices it as it is. As far as literature on this matter is concerned, there was an article to analyze this practice from *sharīʿah* perspective and a number of issues were identified. The authors of the article have categorized two types of absolute assignment in terms of perspective, namely *hibah*-based assignment for individual and *kafālah*-based assignment or collateral assignment for institution. In addition to *kafālah*, *rahn* was also put under scrutiny in that research. On top of that, the authors highlighted the issue of revocation of assignment in the cases of lapse, surrender and predecease. This is founded on the idea that the takaful benefits, namely the sum covered by the PRF, does not exist at the time of assignment but only the investment income exist from PIF exists. This is due to the separation of sum covered from investment income component of the takaful benefits, on the basis that the sum covered belongs to the risk fund, but the investment income belongs to the participant. By separating both the components, this could render the takaful benefits inexistent during lapse, surrender and predecease. However, if both components are embedded in the takaful benefits, it is not accurate to say that takaful benefits do not exist throughout the assignment, because the component of investment income does exist, despite the non-existence of the sum covered.

Having deliberated upon and analyzed the said contracts, *hibah* may serve as the *fiqh* justification for the practice of absolute assignment for individual. As for collateral assignment, it can be inferred that the basis of different *takyīf* might arise from different consideration about the ownership of the benefits. One takaful operator was of the opinion the *kafālah* would best fit the concept of collateral assignment on the ground that the benefits belong to the risk fund. Whilst, if *rahn* is considered to be best fit collateral assignment, the ownership of the benefits belongs to the participant, as represented by ownership of the certificate. Ultimately, the concepts or contracts discussed are not free from issues which require further analysis in order for them to be viably operationalized.

02

APPLICATION OF KHIYAR IN THE FREE-LOOK PERIOD

KHAIRUL ANUAR AHMAD

Introduction

From the perspective of Islamic jurisprudence or *fiqh Islāmī*, there are extensive classical writings on *khiyār* (lit. options). Islamic scholars have identified over ten types of *khiyār* and extensively deliberated issues inherent in these. This indicates the significance of *khiyār*, particularly in the context of its practice in the early period of Islam. A number of *ḥadīth* enlightened the Muslims on the legitimacy of *khiyār* and the manner in which it should be exercised. The *sharīʿah* permissibility of *khiyār* is nothing but to ensure a harmonious relationship among Muslims and non-Muslims alike in doing commercial transactions. By exercising *khiyār*, the parties to a contract are protected in terms of their rights and eventually will ensure a smooth process of business dealing. In other words, *khiyār* affirms the element of consent between the contracting parties, without which they might end up in dispute, or in the worst situation inflicting physical injury to each other.

In a normal day-to-day transaction of the modern society, the practice of *khiyār* is rarely encountered, especially with the introduction of 'warranty' concept that carries the meaning of guarantee (Ar. *ḍamān*) rather than *khiyār* (Mohd Murshidi et al., 2013). Nevertheless, the practice of *khiyār* in commercial transactions, especially in the context of the Islamic banking industry, takes place in several occasions as stated in some of the regulatory documents (BNM, 2013a, 2013b, 2015a, 2015b, 2018). However, it is difficult to find a specific discussion of *khiyār* in the practice of the takaful industry.

As far as literature review is concerned, there is a few writings on *khiyār* with specific reference to *khiyār al-ʿayb* and its application practically in Islamic banking and conceptually in capital market (Ali, 2007; Arbouna, 2004; Elahi & Aziz, 2011; Kamali, 1997; Khairul Anuar, 2016; Mohd Murshidi et al., 2013; Obaidullah, 2001; Saiful Azhar et al., 2000). On the other hand, no literature on *khiyār* has been identified in the field of Islamic insurance or takaful. On that note, this article attempts to fill the gap of Islamic finance literature pertaining to the application of *khiyār* in the takaful Industry.

Definition of *Khiyār*

Khiyār is a derivative word of *ikhtāra*, *yakhtāru*, and *ikhtiyāran* according to Al-Baʿlī (2003; p. 279) and according to Ibn Manẓūr (2000; 4:266) it is also called *ikhtiyār*, which means "choosing something". *Khiyarah* is also equivalent to *khiyār* or *ikhtiyār*, from which the term "option of viewing/ sighting" is derived. It has been said that they are two terms with one meaning, in reference to the revelation of the Qurʾan, {مَا كَانَ لَهُمُ الْخِيَرَةُ} [Al-Qasas: 68], which means "they have no choice". Hence, the literal meaning of the *khiyār* in our topic is to demand the best of two things, here whether to perform a sale or cancel it (Ibn Manẓūr, 2000; 4:266).

According to Lane (1968, 2:830), *khiyār* is an "option or choice and preference." When this word is associated with sale transaction or *bayʿ*, the meaning turns out to be "option of returning", as when one says "*al-*

bayʿ ṣafaqatun ʾaw khiyārun" which means "selling is confirmation or with the option of returning". There are some examples of *khiyār* found in this lexicon such as "*khiyār al-ruʾyah*, *khiyār al-majlis*, *khiyār al-ʿayb* or *khiyār al-naqīṣah*, *khiyār al-sharṭ* and *khiyār al-taʿyīn*".

Technically, *khiyār* means "the choice between execution and annulment" (Al-Misrī, n.d.; 6:2). By breaking down the definitions from lexicon, it is a name for *ikhtiyār*, and it is "a request for the better of the two things either to execute the sale or to return it" (Al-Zarqānī, 2003; 3:478). According to Al-Shirbīnī (1994; 2:402) *khiyār* is "to ask for the best of two things, from executing or rescinding the contract". In the same way, it also means "asking for the best of both worlds, annulment and execution" (Al-Bahūtī, 2008; 7:410). As summarized by Al-Zuḥailī (n.d.; 5:516), *khiyār* refers to when "the contracting party has the choice between signing the contract and not signing it by cancelling it".

The technical meaning of the single word *khiyār* is very general, hence its common usage is normally combined with other words so as to produce a more specific definition. In this context, the definition provided by *al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah* would best represent the meaning of *khiyār* i.e. "the rights of parties to a contract either to rescind a contract or proceed with it, due to manifest *sharīʿah* justification or requirement of contractual consensus" (Wizārat al-Awqāf 1983, 20:41).

Based on the definitions, there are not many differences between the lexical and technical definitions of *khiyār* because both associate *khiyār* as an option either to continue with something or rescind it. Nevertheless, the technical or *fiqhī* meaning of *khiyār* is more often associated with legal consequences resulting from such an act.

Legitimacy of *Khiyār*

During pre-Islamic time of ignorance (*al-jāhiliyyah*), there was no proof of legitimacy of *khiyār*. This is evidenced in the *ḥadīth* as reported from Al-Ṣanʿānī (2013; 7:471), under a chapter about sales with option before the parties part company in the Book of Sale, which reads:

أخبرنا عَبْدُ الرَّزَّاقِ، قَالَ: أَخْبَرَنَا مَعْمَرٌ وَابْنُ عُيَيْنَةَ، عَنِ ابْنِ طَاوُسٍ، عَنْ أَبِيهِ قَالَ: ابْتَاعَ النَّبِيُّ – صلى الله عليه وسلم – قَبْلَ النُّبُوَّةِ مِنْ أَعْرَابِيٍّ بَعِيرًا أَوْ غَيْرَ ذَلِكَ، فَقَالَ لَهُ النَّبِيُّ – صلى الله عليه وسلم – بَعْدَ الْبَيْعِ: "اخْتَرْ، فَنَظَرَ إِلَيْهِ الْأَعْرَابِيُّ، فَقَالَ: عَمَّرَكَ اللَّهُ مَنْ أَنْتَ؟

ʿAbd al-Razzāq told us, he said, "Maʿmar and Ibn ʿUyaynah told us, from Ibn Ṭāʾūs, from his father he said, "The Prophet (PBUH) bought a camel or something other than that from a Bedouin before the prophethood, and the Prophet (PBUH) said to the Bedouin, "Choose" after the sale. Then the Bedouin looked at him and said, "God bless you, who are you?"

(Ḥadīth no. 15196)

When Islam came, the Prophet (PBUH) made this option applicable after the sale (Al-Ṣanʿānī, 2013; 7:471). Ibn Rushd (2004; 3:225) cited Al-Bukhārī in his Ṣaḥīḥ on the Chapter of Sale regarding the legality status if a seller sells with option, in which the latter reported a *ḥadīth* narrated by Ibn ʿUmar that elucidated the legality of a sale contract after exercising *khiyār*, which reads:

حَدَّثَنَا مُحَمَّدُ بْنُ يُوسُفَ، حَدَّثَنَا سُفْيَانُ، عَنْ عَبْدِ اللَّهِ بْنِ دِينَارٍ، عَنِ ابْنِ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: كُلُّ بَيِّعَيْنِ لاَ بَيْعَ بَيْنَهُمَا حَتَّى يَتَفَرَّقَا، إِلَّا بَيْعَ الخيار.

Muḥammad bin Yūsuf told us, Sufyān told us from ʿAbd Allāh bin Dīnār, from Ibn ʿUmar (may Allah be pleased with both of them), from the Prophet (PBUH) he said, "No sale between sellers until they part company, except the sale of option."

(Al-Bukhārī, n.d.; *ḥadīth* no. 2029)

From the *ḥadīth*, it can be understood that the phrase "no sale between sellers until they part company" indicates *khiyār al-majlis* wherein the parties are given option to cancel during the contractual session until they leave the session upon which the contract is binding. The other phrase, "except the sale of option" refers to conditional option or *khiyār al-sharṭ* on which the contract is effective even though the contracting parties have parted company.

Despite the permissibility of *khiyār al-sharṭ*, some classical scholars were of the view that this *khiyār* is forbidden on the ground that it is ambiguous (*gharar*). Originally, a sale was binding, unless there is evidence for the permissibility of the sale of option from the Qur'an or a confirmed Sunnah, or a unanimous consensus of the *mujtahidūn* (*ijmā*ʿ) (Ibn Rushd, 2004; 3:255). The opponents of *khiyār* commented about *ḥadīth* Ibn ʿUmar regarding his saying on "except the sale of option". He explained the meaning intended by this expression of *ḥadīth*, which is what was mentioned from another expression of *ḥadīth* i.e. "One of them says to his counterparty, "Choose!"" It can be inferred that the word 'choose or *ikhtar*' here refers to the word *ikhtar* used in *ḥadīth* ʿAbd al-Razzāq, which means *khiyār al-majlis* instead.

The Wisdom of the Legality of *Khiyār*

The reason for permissibility of option in sale is the people's need for advice and testing or experimenting (Ibn Rushd, 1988; 2:87). As for *khiyār al-tarawwī*, it was made legal to prevent deception (Al-Zaylāʿī, n.d.; 4:14).

In averting expected harm, Allah legislated for a person the option of a contractual session and the option of conditions. In order to ward off any harm that a contracting party expects to incur, he may redress it in the contractual session or during the period of option, and gets rid of it. This is because a contract may take place suddenly, without considering the price or value. Hence, the merits of the *sharīʿah* necessitate that the contract is given an option in which the two contracting parties may reconsider and reconsider; therefore, each one of them can make up for what he missed (Al-Dubyān, n.d.; 6:17).

As for deterring the harm that has occurred such as option of defect, option of fraud, option of speculation (*najash*), the option of meeting the farmer on his way to a market place before knowing the market price and the like, verily a man by his human nature as described by Allah is unjust and ignorant. One of the two contracting parties may be exposed to cheating and fraud or other types of injustice at the hands of the other. Hence, *sharīʿah* has permitted the contracting party who has fallen under the influence of fraud and deception to ward off this harm by confirming an option for him in this case. The establishment of the option was one of the indispensable advantages of legislation to ward off harm (Al-Dubyān, n.d.; 6:17).

Types of *Khiyār*

Classical scholars have identified many types of *khiyār*. As shown in Table 1 below, there have been more than twenty types of *khiyār* identified by the leading schools of Islamic law. The Ḥanafī school has discovered most of them. Perhaps the difference in the amount of *khiyār* identified might be due to generalization of the specific type. For example, the Shāfiʿī school put *al-taṣriyah* (unmilking cattle to show its udder is full of milk), *al-ḥalf* (swearing), and *talaqqī al-rukbān* (meeting the farmer on his way to a market place before knowing the market price) under the general classification of *khiyār al-ʿayb*.

Table 2.1: Types of Khiyār According to the Leading Schools of Islamic Law

No.	Types of options	Schools of Islamic Law			
		Ḥanafī	Mālikī	Shāfiʿī	Ḥanbalī
1	*Khiyār al-majlis*			√	√
2	*Khiyār al-sharṭ/khiyār al-tarawwī*	√	√	√	√
3	*Khiyār al-ru'yah*	√			
4	*Khiyār al-ʿayb/khiyār al-naqīṣah*	√	√	√	√
5	*Khiyār al-taʿyīn*	√			
6	*Khiyār al-ghabn*	√			√
7	*Khiyār al-naqd*	√			
8	*Khiyār al-kammiyyah*	√			
9	*Khiyār al-istiḥqāq*	√			
10	*Khiyār taghrīr fiʿlī*	√			
11	*Khiyār kashf al-ḥāl*	√			
12	*Khiyār khiyānah murābaḥah*	√			

13	*Khiyār al-tawliyyah*	√			
14	*Khiyār fawāt waṣf marghūb fīh*	√			
15	*Khiyār tafrīq ṣafaqah bi halāk baʿḍ mabīʿ*	√			
16	*Khiyār ijāzat ʿaqd fuḍūlī*	√			
17	*Khiyār ẓuhūr al-mabīʿ mustaʾjaran ʾaw marhūnan*	√			
18	*Khiyār al-tashhī*			√	
19	*Khiyār al-tadlīs*				√
20	*Khiyār takhbīr al-thaman*				√
21	*Khiyār iktilāf al-mutabāyiʿayn fī al-thaman*				√
22	*Khiyār li al-khilf fi al-ṣiffah*				√

Sources: (Ibn ʿĀbidīn, 1966; 4: 565-566); (Al-Dusūqī, n.d.; 3:91); (Al-Shirbīnī, 1994; 2:402); (Al-Bahūtī, 2008; 7: 410, 417, 433, 437, 442, 467, 480)

A disciple of Shāfiʿī, Al-Anṣārī (1997; 144-145), further identified sixteen types of *khiyār* in sale, some of which are mentioned in Table 2.1 above namely *khiyār al-majlis* (option of contractual session); *khiyār al-sharṭ* (option of condition); *khiyār al-ʿayb* (option of defect); *khiyār talaqqī al-rukbān* (option of meeting the farmer on his way to a market place before knowing the market price); *khiyār tafarruq al-ṣafaqah* (option of separating the deal); *khiyār faqd al-waṣf al-mashrūṭ* (option of losing the stipulated description); *khiyār li jahl al-ghāṣb maʿa al-qudrah ʿalā intizāʿ al-maʿqūd ālayh min al-ghāṣib* (option of ignorance of usurpation with the ability to take back the subject matter from the usurper); *khiyār li ṭiryān al-ʿajz ʿan intizāʿihi min al-ghāṣib* (option due to the inability to get back the subject matter from the usurper); *khiyār li jahl kawn al-mabīʿ muktarānʾaw mazrūʿan* (the option for not knowing whether the thing sold is rented or planted); *khiyār li al-imtināʿ min al-wafāʾ bi al-sharṭ al-ṣaḥīḥ* (the option to refrain from fulfilling a correct condition); *khiyār li al-taḥāluf fīmā ʾidhā ittafaqā ʿalā ṣiḥḥat al-ʿaqd* (option for oath pertaining to agreement of both parties on the validity of the contract); *khiyār li al-bāʾiʿ li ẓuhūr ziyādat al-thaman fī al-murābaḥah* (option for the seller because of increase in the price of *murābaḥah*); *khiyār li al-mushtarī li ikhtilāṭ al-thamarah al-mabīʿah bi al-mutajaddidah qabl al-takhliyyah* (option for the buyer because sold fruit co-mingles with the renewed one before parting company); *khiyār li al-ʿajz ʿan thaman* (option for the inability to pay the price); *khiyār li taghayyur ṣiffah mā raʾāhu qabl al-ʿaqd* (option due to the change of attribute of what the buyer saw before the contract); and *khiyār li taʿyyub al-thamarah bi tark al-bāʾiʿ al-saqiyy baʿd al-takhliyyah* (option due to defective fruit by leaving the seller-waterer after parting company).

Contemporarily, Elahi & Aziz (2011) identified some types of *khiyār* from what were earlier mentioned by the classical scholars, inter alia *khiyār al-sharṭ* (option of condition); *khiyār al-ʿayb* (option from defect); *khiyār al-taʿyīn* (option of determination or choice); *khiyār al-ruʾyah* (option of viewing or inspection); *khiyār al-majlis* (option of meeting/acceptance); *khiyār al-ghabn* (option of deception); *khiyār al-taʾkhīr* (option of delay); *khiyār kashf al-ḥāl* (option of status disclosure); *khiyār al-naqd* (option of payment); *khiyār al-qabūl* (option of acceptance); and *khiyār al-taghrīr* (option of fraud). In another writing by Habib ur Rahman et al. (2017), the Ḥanafī school opines that once the offer and acceptance are made, the sale arrangement is concluded and binding; hence, there would be no option for any of the parties to cancel the contract even during a contractual session (*majlis al-ʿaqd*) except in the case of a defect in goods or not having done any inspection earlier. The same opinion was taken by Mālikī school in invalidating *khiyār al-majlis*.

Despite extensive types of *khiyār* identified by the scholars, many of them might not be relevant with the topic of this chapter. Possibly the one which is the nearest to the practice of free look could be *khiyār al-sharṭ* considering the nature of this option comes with certain time period to cancel the contract.

Free Look Period in Current Takaful Practices

A study on takaful operators in Malaysia in terms of application of *khiyār* in their products hardly reveals any specific use of the word '*khiyār*' in product documentation, except for one takaful operator (Takaful Ikhlas, n.d.). Almost all takaful operators adopt the phrase certificate cancellation in the event the participant chooses to opt out from the takaful subscription. The word 'cancellation' as used by the TO might be considered to relate literally to the meaning of *khiyār*, without any specific reference to technical or *sharīʿah* meaning.

As far as the cancellation of certificate is concerned, normally it is done within a certain period of time known as 'free look period or free examination period.' According to Insuranceopedia (2016), a free look period refers to "the time allotted for the insured to enjoy full coverage and review the policy, clarify its terms and conditions, and in case they decide to cancel the contract, receive a full refund of the premiums paid without the need to pay any penalties". The receipt of a full refund in the case of a cancelled contract represents similar terms in *khiyār*.

By virtue of *khiyār* in *muʿāmalāt*, the return and full refund is supposed to take place if the transacting parties exercise the right to cancel a contract. Nevertheless, in a normal industry practice and as required by regulators, all contributions (total account value, *wakālah* fee, *tabarru*ʿ, any fees and charges) will only be refunded after deducting medical expenses (medical check-up cost) and cancellation fees (for certain takaful operators). This indicates a slight variance between the theoretical concept of *khiyār* and actual practice.

If the takaful participant decides to cancel the policy during the free look period, he or she is required to submit a written notice of cancellation before receiving a refund. Upon the expiration of this period, the takaful certificate and all its terms and conditions are deemed accepted by the certificate holder and any cancellations may result in forfeited contributions. Referencing Table 2.2 below, if a participant gives a notice of cancellation after the expiry of free look period, the cancellation becomes a certificate surrender, through which the surrender value and underwriting surplus will be refunded.

In regard to the cancellation period, different jurisdictions have different periods in which the insurance policy or takaful certificate can be cancelled. For instance, some states in the US allocate the cancellation period of 10 to 14 days from the time the insurance contract is received by the insured. In New York, a 30-day free look period is required for policies offered via mail.

In the Malaysian context, a period of 15 days or more can be allocated for either a takaful certificate or insurance policy to be cancelled (Islamic Financial Services Act, 2013; Financial Services Act, 2013). In summary, the free look period is different across jurisdictions in terms of its timeframe which is operative within the minimum of 10 days.

According to some documents found from takaful operator's website in Malaysia (as per Table 2.2), all of them put the provision of 15 days free look period in the main product documents such as a brochure, product disclosure sheet and so on that gives room for participants to cancel the takaful certificate (despite some takaful operators put a condition for the participant to give 14-day cancellation notice). This is because the free look period is an option required by law – as stated in Schedule 8 IFSA 2013 – to be given to the participant. The debate about the period of conditional option is nothing new in Islam. Juristically, scholars of different schools of law have deliberated in detail about the time of option, but a majority have fixed the period at three days. A minority view is that the time frame to exercise cancellation can be extended to more than three days, depending on the circumstances, such as the type of good transacted. Thus, the period of cancellation is not of great concern.

Table 2.2: Cancellation of Takaful Certificate During the free look period as Practised by TOs in Malaysia

Criteria of Free Look Period	Takaful Operators (TOs)														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
15 Days Free-look Period	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
The right to cancel should be requested in writing by the participant after receiving the Takaful Certificate within 15 days	√	√	√	√	√	√	√	√	√	√	√	√		√	√
The certificate can be cancelled by giving 14 days' notice													√		
All the contribution (total account value, *wakālah* fee, *tabarru'*, any charges) paid less medical expenses (if any) will be refunded if cancellation is made during the free look period of 15 days and no claim is made. TO will cancel the certificate, and the participant will not be able to claim any benefits under it		√		√	√	√	√	√	√	√	√	√		√	√
The free look period starts from the date the participant first received his/her new Certificate document	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√

In relation to Investment-Linked Takaful Products, if the Certificate is cancelled by the Certificate Holder within 15 days of receipt of the Certificate, TO shall refund: a. the Wakālah fee; AND b. the prevailing value of units (if any) in the Participant's Investment Fund (PIF) at the Unit Price at the Next Valuation Date; AND c. any Tabarru's and monthly service fee that have been deducted		√				√	√	√							√
If TO receives any written cancellation notice from the participant (with agreement from participant's mortgage financier) after 1 year from the commencement date, TO shall refund the participant the surrender value and underwriting surplus from PRF (if any)			√												
The right to cancel is specifically called as khiyār												√			
There is a cancellation fee of RM10													√		

Source: Takaful Operators' Product Brochures

Based on the above discussion, it can be summarized that the cancellation of takaful certificates during the free look period has a closer resemblance to *khiyār al-sharṭ* than to other types of *khiyār*. This is because the former shares a common feature viz. option to cancel within a stipulated period. Factors which motivate the participant to cancel during free look period might be due to some other reasons of his or her choice. These could include a change of mind, lack of suitability with the takaful terms and conditions, sudden occurrence of financial difficulty and so forth.

Notwithstanding the potential application of *khiyār al-sharṭ*, a majority of takaful operators reserve their opinions in justifying certificate cancellation during free-look period as a kind of *khiyār al-sharṭ* as indicated in Table 2.3 below. According to them, there is no specific and clear *fiqh* adaptation (*takyīf fiqhī*) in rendering the meaning of cancellation during free look period with *khiyār al-sharṭ*, for the reason that it might not be in line with what is defined in *sharīʿah* as *khiyār al-sharṭ*, in view of the fact that *khiyār al-sharṭ* is not applicable to a gratuitous contract as adopted in takaful. Furthermore, the practice of certificate cancellation is a provision under Schedule 8 of Islamic Financial Services Act (2013), through which the takaful operators take it for granted without any need to justify its application from *sharīʿah* point of view.

Nevertheless, some takaful operators are of the view that cancellation of certificate during free look period resembles *khiyār al-sharṭ*. This is because associating takaful with pure *tabarruʿ* might not be accurate since *tabarruʿ* in takaful takes the form of calculated *tabarruʿ* that is, the participants who surrenders the certificate will get the refund of amount left in cash value as well as underwriting surplus. In addition, to consider only *tabarruʿ* contract constitutes takaful is not accurate too for the reason that it is embedded with other contracts such as *wakālah*, hybrid etc. The minority TO takes the middle ground, in that the cancellation is a kind of *khiyār*-liked transaction in the sense that it has the spirit of *khiyār*, but is not entirely a *khiyār*.

Table 2.3: The Fiqh Adaptation of Free Look Period

TOs	Fiqh Adaptation		
	Khiyār al-sharṭ	*Khiyār*-liked transaction	No clear fiqh adaptation
TO1			√
TO2		√	
TO3			√
TO4			√
TO5	√		
TO6			√
TO7	√		

Source: Interview data

Sharīʿah Issues

Based on the deliberation by classical scholars described above, it can be inferred that the focal point of discussion was centered on the application of *khiyār al-sharṭ* to exchange contract (*ʿuqūd al-muʿāwaḍāt*). As a result, there has not been much discussion as to how *khiyār al-sharṭ* can be applied to gratuitous contracts (*ʿuqūd al-tabarruʿāt*). Since the contractual basis of takaful is *tabarruʿ*, the question arises as to the applicability of *khiyār al-sharṭ* on gratuitous contracts. Furthermore, should *khiyār al-sharṭ* is applicable, another question regarding legal status of the contract arises as to whether it is effective or not. This will give rise to the questions of rights and obligations of the contracting parties too.

Application of *khiyār al-shart* to gratuitous contracts

There are two major scholarly views pertaining to the applicability of *khiyār al-sharṭ* to contract, namely the majority and minority views. According to the majority view of the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools, *khiyār al-sharṭ* can only be applied to certain types of contracts but not all of them. Pertinent discussion by Ibn Qudāmah (1997) divided the contract according to whether it accepts *khiyār al-sharṭ* or not, into six categories, and he explained the rulings of these categories as follows:

1. A binding contract, from which exchange is intended, which is the sale and its types, and it is of two kinds:
    i. The first type for which the two options i.e., the *khiyār al-majlis* and the *khiyār al-sharṭ* are confirmed in it, such as the sale in which the physical possession is not required in the contractual session, the reconciliation (*ṣulḥ*) with the meaning of sale, the gift in return for exchange in one of the two narrations, the forward lease like one says, "I hired you to sew this garment for me and the like, this will make the option effective. As for the normal lease, if its period is from the time of the contract, only *khiyār al-majlis* is applicable but not the *khiyār al-sharṭ*. This is because application of the *khiyār al-sharṭ* on normal lease leads to missing out on some of the benefits contracted for, or for them to be fulfilled during the option period, and both of which are not permissible.
    ii. The second type is what is stipulated to be physically possessed in the contractual session, such as currency exchange, advance sale, sale of usurious item of the same type; these are the contracts in which *khiyār al-sharṭ* is not applicable.

2. A binding contract with no intention of exchange such as marriage and *khulu*ʿ, the option is not applicable in it. This is because the option is effective in order to know the chance in the condition that the exchange is permissible for what is spent from his money, and the exchange in marriage is not intended, likewise the endowment and gift. Furthermore, the validation of option in the marriage is harmful.

3. A contract that is binding on one of its parties without the other, such as a mortgage that is binding on the part of the mortgagor but not binding from the part of the mortgagee; the option is not applicable in it. This is because the mortgagee dispenses with the permissibility of his right if another option is confirmed, and the mortgagor dispenses with the evidence of the option for him until he possesses it, likewise the guarantor.

4. A contract that is non-binding on both parties, such as partnership, capital venture, reward, agency, safekeeping and will. All these contracts are not applicable of option due to its non-bindingness and possibility to rescind it on the basis of its original status.

5. A contract that revolves between non-binding and binding, such as watering (*musāqāt*) and farming (*muzāraʿah*) and apparently, they are non-binding, so no option is applicable in them. However, it is said that both of these contracts are binding, and that there are two ways in which the option can be confirmed in them.

6. A binding contract that one of the contracting parties relinquishes it such as transfer of debt and taking pre-emption, there is no option applicable in both of them. This is because he whose consent is not considered has no option. So, if the option is not effective from one side of the party, it is also not applicable in the other, as in all other contracts.

Based on the classifications above, it can be inferred that *khiyār al-sharṭ* is not effective in contracts which stipulates physical possession at the contractual session (such as currency exchange (*bayʿ al-ṣarf*), sale of the same *ribawī* items, and advance sale (*bayʿ al-salam*)), certain type of binding contracts (such as a contract with no intention of exchange or binding only on one party), non-binding contracts (either to both or one of the contracting parties), and contracts in which revocation is prohibited.

Many other scholars have expressed something along these lines. For example, *khiyār al-majlis* is only applicable to a contract that binds both parties, according to Al-Nawāwī (n.d., 9:186; Al-Zuḥailī (n.d., 4:3104). As we know, financial exchange contracts (*ʿuqūd al-muʿāwaḍāt al-māliyyah*) particularly sales, mutual amicable solution (*ṣulḥ al-muʿāwadāh*), and lease fall under the purview of binding contracts. With regard to *khiyār al-taʿyīn*, it is only effective in financial exchange contracts which entail transfer of ownership of asset like sale, gift with compensation (*hibah bi ʿiwaḍ*), division of asset (*qismah*) and so forth (Al-Zuḥailī, n.d., 4:3107; Demetriades et al., 2000, Art. 316-329). As for *khiyār al-sharṭ*, it is effective for a binding contract that open for termination with the consent of both parties even though it only binds one of the parties. Conversely, non-binding contracts such as *wakālah*, *iʿārah*, *wadīʿah*, *hibah*, and *waṣiyyah* are not in need of exercising *khiyār al-sharṭ*, on the ground that the contracts are by nature non-binding (Al-Zuḥailī, n.d., 4:3109; Demetriades et al., 2000, Art. 300-309). In the same way, *khiyār al-ʿayb* and *khiyār al-ruʾyah* is only operative in binding contracts which are subject to annulment like sale, lease, division of property, and a mutually amicable solution (Al-Zuḥailī, n.d., 4:3116; Demetriades et al., 2000, Art. 320-324).

Nevertheless, *khiyār al-sharṭ* is applicable in every type of contract be it binding or not according to the minority view. This is the view given by Ibn Taymiyyah, which differs from the well-known views of Ḥanbalī school, as per what was reported by his disciples, "Our great scholar said, "It (khiyār al-sharṭ) is permissible in every contract (يجوز في كل العقود)." (Abū Ghuddah, 1985, 242; Jād Allāh, 2019, 135). Nevertheless, Abū Ghuddah (1985) guessed that the term every contract (*kull al-ʿaqd*) might be referring to every binding contract (ولعل المراد العقود اللازمة).

The *sharīʿah* basis of justification for the minority view is as follows:

i. Qurʾan texts that indicate the obligation to fulfil all promises and contracts:

يَاأَيُّهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ

"O those who believes! Fulfil all obligations".

(Al-Māʾidah: 1)

وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولاً

"And fulfil (every) commitment. Indeed, the commitment is ever (that about which one will be) questioned".

(Al-Israʾ: 34)

ii. *Ḥadīth* texts that indicate the prohibition of walk away, betrayal and breach of promise:

عن أبي هريرة رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: آية المنافق ثلاث: إذا حدّث كذب، وإذا وعد أخلف، وإذا اؤتمن خان. (متفق عليه)

From Abū Hurayrah (Allah pleased him) he said, "The Messenger of Allah (PBUH) said, "The signs of a hypocrite are three: when he speaks, he lies; and when he makes a promise, he breaks it; and when he is charged with a trust, he deceives"". This ḥadīth is unanimously agreed (muttafaq ʿalayh).

(Al-Bukhārī, n.d., Ḥadīth no. 33 in the Book of Faith)

Among the forms of textual implication (*wajh al-dalālāt*) are contracts which established on the basis of mutual consent and cannot be attained except with the conditions stipulated throughout the contract. As the Prophet (PBUH) said, "All Muslims are bound by their stipulations". Therefore, according to this *ḥadīth* fulfilment of every contract is required; in other words, the evidence is general and not specific.

In the light of this, Al-Najdī (2004) quoted that Shaykh al-Islām Ibn Taymiyyah said,

"Allah Most High has ordered the fulfilment of contracts, and this (order) is general. Likewise, He commanded the fulfilment of His promise and any promise. This includes what was covenanted by a person on his self as indicated in the evidence "وَلَقَدْ كَانُوا عَاهَدُوا اللَّهَ مِنْ قَبْلُ". This indicates that His promise includes what was contracted

*by a person in it. And God had not commanded the same thing that was entrusted to him before the covenant, such as vows and selling, but rather He commanded them to be fulfilled. That is why He tied it to the truth in His saying "*وَإِذَا قُلْتُمْ فَاعْدِلُوا وَلَوْ كَانَ ذَا قُرْبَى وَبِعَهْدِ اللَّهِ أَوْفُوا*". This is because justice in His saying is a predicate which is associated with the past and present whereas the fulfilment of promise in the saying is related to something in the future. As Allah said "*وَمِنْهُمْ مَنْ عَاهَدَ اللَّهَ لَئِنْ آتَانَا مِنْ فَضْلِهِ لَنَصَّدَّقَنَّ وَلَنَكُونَنَّ مِنَ الصَّالِحِينَ * فَلَمَّا آتَاهُمْ مِنْ فَضْلِهِ بَخِلُوا بِهِ وَتَوَلَّوْا وَهُمْ مُعْرِضُونَ * فَأَعْقَبَهُمْ نِفَاقًا فِي قُلُوبِهِمْ إِلَى يَوْمِ يَلْقَوْنَهُ بِمَا أَخْلَفُوا اللَّهَ مَا وَعَدُوهُ وَبِمَا كَانُوا يَكْذِبُونَ*" and "*وَالَّذِينَ هُمْ لِأَمَانَاتِهِمْ وَعَهْدِهِمْ رَاعُونَ*." This necessitates obligation on that because he did not exclude from the blameworthy except those who were characterized by all of that. That is why only what is obligatory is mentioned in it."*

iii. The general principle in breaking covenants and conditions and breaching promises is the prohibition, and deviating from this principle needs evidence. The Qur'ān and the Sunnah have commanded the fulfilment of covenants, conditions, pledges and contracts, observation of trust and taking care of it, forbidding escape, breaking covenants, treachery, and stressing punishment for those who do that. Since the original principle in it is hazard and destruction (except what is made permissible by *sharī'ah*), it is not permissible to order it at all, and those who revoke it, and escape is condemned unconditionally. Similarly, killing oneself when the original principle in it is hazard (except what was only made permissible and obligatory by *sharī'ah*), it is not permissible to order the killing of souls. It is carried out to the extent permissible, unlike what is made obligatory in itself, such as prayer (Ibn Taymiyyah, n.d.).

iv. *Qiyās* on the validation of other types of *khiyār* in the contracts in which *khiyār al-sharṭ* is prevented, such as *khiyār al-ʿayb* in the marriage contract and so forth, and the jurists accept it (Ibn Mufliḥ, 2003, 5:175).

Mubārak Āli Sayf (2013) is inclined to support the minority view based on the justifications as follows:

i. For the strength and relevance of their evidence (*dalīl*).

ii. Weak evidence of opponents and their deliberation.

iii. This is supported by the fact that the principle in transactions is permissibility, and deterrence from that is contrary to the principle, just as permissibility does not cause any harm, and prohibition of it will cause hardship, and the *sharīʿah* came to ease and relief hardship.

iv. The principle in breaking covenants, conditions, and breaking promises is prohibition, just like the principle that conditions, promises and covenants must be fulfilled, and deviation from this principle requires evidence.

Perhaps the reason for the disagreement in this matter is what Ibn Taymiyyah (n.d.) referred to in the following:

> "There are three sayings regarding conditional option in marriage, the strongest (view) of which is valid. If it is said to be invalid, the contract is not binding without it. In principle, any condition must be fulfilled and this means stipulating an option is valid, particularly in marriage. This is due to the different opinion among Islamic scholars as to whether conditional option in sale contract in principle is valid or not. The first is the view of the leading jurists namely Mālik, Aḥmad, Ibn Abī

> Laylā, Abū Yūsuf and Muḥammad. The second is the view of Abū Ḥanīfah and al-Shāfiʿī, and that is the reason wherefore options in most contracts i.e., marriage and others are invalid according to both of them."
>
> Among these reasons are disagreement regarding the obligation of fulfilling the promise, as it was said that it is obligatory and desirable, which Ibn Taymiyyah referred to by saying, "Likewise to tie up (*taʿlīq*) a marriage with a condition...what is meant here is that the principles and texts dictate that the condition is binding, unless it contradicts the book of God" (Ibn Taymiyyah, n.d.; Mubārak Āli Sayf, 2013).

The rights and obligations in the event of certificate cancellation

In reference to Table 2.1 previously, if cancellation is made during the free look period of 15 days (provided that no claim is made), all the contribution (total account value, *wakālah* fee, *tabarru*ʿ, any charges) paid less medical expenses (if any) will be refunded. Consequently, TO will cancel the certificate, and the participant will not be able to claim any benefits under it. As far as Investment-Linked Takaful (ILT) products are concerned, if a certificate is cancelled by the participant within 15 days of receipt of the certificate, TO shall refund the *wakālah* fee, the prevailing value of units (if any) in the Participant's Investment Fund (PIF) at the unit price at the next valuation date, any *tabarru*ʿ, and any monthly service fee that has been deducted. At a first glance, it seems there is different treatment between non-ILT and ILT products in terms of cancellation during free look period, in which no medical check-up cost is chargeable in the latter. Nevertheless, in this author's understanding, there is actually no different of refundable items between both types of products. Even though there will be deduction of medical expenses in non-ILT products, this deduction is from the participant's end. In other words, the said deduction is not for the takaful company to refund as it is normally considered the obligation of the participant to pay to the third party (medical service provider or clinic). It is worth noting that one of the takaful operators highlighted the issue of refunding the *wakālah* fee to the participant, the practice of which is not fair according to them. This is because the initial work has already been done by the takaful operator, but ultimately the *wakālah* fee has to be refunded.

As presented in Table 2.4 below, there are no differing practices among takaful operators pertaining to the refund in the event the certificate is cancelled during free look period. However, as indicated earlier, one of the operators suggested that this practice is different from *khiyār* because in a normal practice of *khiyār*, the entire amount paid will be refunded to the buyer and the item purchased will be returned to the seller. This is indicated in the classical *fiqh* literature, where the cancelled sale due to *khiyār* al-*sharṭ* has to be reversed back to its original state by which the return and refund should takes place. Al-Nawāwī (n.d.) stated in his book Muhadhdhab:

«قال صاحب البحر إذا تقابضا الثمن والمثمن في مدة الخيار ثم تفاسخا لزمهما ترداد العوضين وليس لواحد منهما حبس ما في يده بعد طلب صاحبه...»

"The owner of Al-Baḥr (al-Muhadhdhab) said, "If both (the seller and buyer) exchanged the price and the merchandise during the option period, then they cancelled it, they must return the two considerations, and

neither of them has the right to retain what is in his possession after the request of the owner...”

(Al-Rūyānī, 2009).

Nevertheless, in the context of a certificate cancellation during free look period, a full refund does not apply, as there will be deduction of medical expenses due from the participants. Though, if the medical cost is on the participant to pay, logically no deduction for any charges should be refunded thus full refund will be exercised. In this circumstance, it will make the original state of transaction is restored after the cancellation. This arrangement appears to be in line with the original concept of *khiyār* in *mu'āmalāt*. The only issue which arises is takaful operators might be deprived of their due on *wakālah* fee as they have done some works as the participant's agent.

Even though there is deduction chargeable on the participants upon certificate cancellation (i.e., no full refund), it might be fair to consider this practice as a kind of *khiyār*. According to the commentary of Shaykh 'Umar Barakāt on Al-Miṣrī (1997), if the option to cancel is given to the buyer, the item purchased belongs to the buyer together with its increment and expenses during this option period. In other words, if the medical expenses are charged to the participants, it will not ruin the concept of *khiyār*, since the obligation to pay the expenses is his/hers. After all, to legitimize this idea might not be fully acceptable, since the underlying basis for *khiyār* in this context is sale contract, whereas that for takaful is gratuitous contract.

Table 2.4: The Rights and Obligations in the Event of Certificate Cancellation

TOs	Rights and Obligations	
	Full Refund (*wakālah* fee, *tabarru'*, total account value, other charges)	Partial Refund (*wakālah* fee, *tabarru'*, total account value, other charges minus medical expenses)
TO1		√
TO2		√
TO3		√
TO4		√
TO5		√
TO6		√
TO7		√

Source: Interview data

The legal status of takaful contract during free look period

The free look period creates uncertainty as to whether the takaful contract is concluded or not during this time frame. Nonetheless, by virtue of submitting proposal form and paying the contribution, it can be inferred that the purpose of doing so by the participants might indicate his/her intention in subscribing to the takaful plan is to get him/her covered. Furthermore, the takaful operator will normally pay the benefit in the event of accidental death during free look period.

From the *maqāṣid al-sharīʿah* point of view, the objective of the participants in taking up takaful coverage is to indemnify themselves from any damages or loss which is very much in tandem with the protection of wealth. This objective is deemed to be realized by the participants submitting proposal forms together with the payment of contribution.

In the same light, the act of takaful operator in paying benefits to the participants during free look period might be considered as a way to realize *maqāṣid al-sharīʿah* by indemnifying the family of the deceased from any loss.

From contractual perspective particularly *tabarruʿ*, the takaful contract can be considered as concluded and executed (*nafādh*) upon possession of the contribution payment by the takaful operators. This is because by possessing (*qabḍ*) the *tabarruʿ* payment, the takaful contract is impliedly concluded if the underlying contract of takaful is happened to be *hibah* according to Zufar (Al-Sarakhsī, 2001, 12/57). While the majority view of classical scholars stipulated the acceptance (*qabūl*) as the pillar (*rukn*) of *hibah*, a minority of them specifically Abū Ḥanīfah, Muḥammad, and Abū Yūsuf took the stand that *hibah* can be concluded with the offer (*ijāb*) only on the ground of *istiḥsān* (Al-Sarakhsī, 2001: 12/57; Al-Shirbīnī, 1994: 3/560 ; Ibn Qudāmah, 1997: 8/245). Taking the above into consideration, all takaful operators are of the view that the takaful contract is concluded here; thus, the takaful certificate is in force, as presented in Table 2.5 below:

Table 2.5: The Status of a Takaful Contract during the Free Look Period

TOs	**Status of Takaful Contract**	
	In force	**Not In Force**
TO1	√	
TO2	√	
TO3	√	
TO4	√	
TO5	√	
TO6	√	
TO7	√	

Source: Interview data

As far as Islamic jurisprudence is concerned, the takaful contract is not binding even if it has been considered as executed. The legal basis for that is for a contract to be binding, it must be free of any options (*khiyārāt*) (Ibn ʻĀbidīn, 1966, 4: 505-506).

Operational Issues

There are mixed opinions among takaful operators concerning the operationalizing of a certificate cancellation during the free look period. Those who suggested no operational issue look at the cancellation during free look period as a requirement by law, as it is not against any guidelines by the regulator. Even if there is no operational problem encountered but there will be financial impact to certain TO. This is because the TO must refund the *wakālah* fee even if the agency works have been done. In a more complicated situation in which the agency works with a third party such as takaful distribution partner (especially for online distribution), a refund is impossible because the *wakālah* fee has been collected by the third party.

Among the operational issues highlighted by some of the TOs is that the 15 days free look period might not be sufficient for the participant to exercise his/her right. The reason for insufficient time is that the posted contract may take more than 15 days after certificate commencement date to be delivered. Apart from that, one of the operators apprised an issue with regard to eligibility to surplus payments, especially for those certificate holders whose free look period is extended to next year.

Table 2.6: Operational Issues in Free Look Period

TOs	Operational Issues	
	Yes	**No**
TO1	√	
TO2		√
TO3	√	
TO4		
TO5	√	
TO6		√
TO7	√	

Source: Interview data

Conclusion

In conclusion, to draw a precise parallel between *khiyār al-sharṭ* and certificate cancellation during free look period might be very challenging because of their different legal bases. Despite sharing a common meaning i.e., cancellation, their specific criteria are different from a *sharīʿah* point of view. For example, if a person cancels a contract during the period of *khiyār al-sharṭ*, the status of the transaction should be back to the original status by which it means the seller has to do the full refund and the buyer has to return fully. However, in the context of cancellation during free look period, the refund cannot be fully remitted if the takaful operators deduct certain cost such as medical check-up charge. This is the first scenario. In the second scenario, if the medical examination charge is borne by the participant, the issue of partial refund would not arise hence, a full refund can be done. Apparently, in the second scenario, there is a resemblance of *khiyār al-sharṭ* with cancellation of takaful certificate during free look period.

On top of that, another issue is the applicability of *khiyār* to exchange (*muʿāwaḍāt*) contracts but not to gratuitous (*tabarruʿāt*) contracts according to the majority view of *fiqh* scholars. Nevertheless, there is a small room for the application of *khiyār al-sharṭ* to *tabarruʿāt* contracts according to a minority view particularly that of Ibn Taymiyyah. Furthermore, the very nature of the underlying takaful contract should be taken from a new perspective as the element of *tabarruʿ* is not purely characterized. With other types of contracts arranged together with *tabarruʿ* contract in takaful, this may taint the pure character of *tabarruʿ* making it somewhat more acceptable in the application of *khiyār*.

03

NON-*ḤALĀL* OCCUPATION/ INCOME

MOHD ROFAIZAL IBHRAIM

INTRODUCTION

Muslims are bound to adhere to *ḥalāl* (lawful) and *ḥarām* (unlawful) items that are clearly prescribed by the Qur'an and the Sunnah, and have no option on such matters. There are exceptional provisions provided by the Qur'an and Sunnah in certain unpredictable circumstances, such as when a person is facing hardship (*ḍarūrah*) that they cannot bear. The problem arises when the issue in question is in grey areas known as *al-shubuhāt* or doubtful matter and such a matter calls for fresh inquiry and *ijtihād* to determine its status from the Islamic perspective. This is especially in relation of dealing with a person who earns income from non-ḥalāl activities and businesses. In takaful business issue of receiving non-ḥalāl contribution occurs from a participant who earns non-ḥalāl income. The question arises whether this can be considered as helping in committing sin, while considering that Islam is a flexible (*murūnah*) religion that always considers the interest (*maṣlaḥah*) of the peoples.

The next question Is what *ijtihād* is used by takaful operators to accept the contributions from participants who gain their income from non-ḥalāl or *shubhah* sources. The jurists have differences on the receipt of money known from ḥarām sources. There are several *ijtihād* and opinion by *sharīʿah* scholars found in their *fatwā*s in relation to this issue. Some of them took a strict approach up to a point that they totally forbid its receipt if the owner is known to have income mixed with ḥarām sources. This article describes the views and *ijtihād* of jurists in the discussed issue, including what is the *ijtihād* and views of *Sharīʿah* Advisors of takaful operators on the issue.

Non-Halāl Wealth From a *Sharī'ah* Perspective

In general, money gained through illegal means should be returned to the real owner. In the case that the real owner has died, the heirs have the right to own the said property or money. If the heirs are unknown, the property has to be given to charity especially to the needy and poor. In situations in which the real owner is unknown, the property is required to be channeled to charity for the public interest.

Undoubtedly, avoiding *ḥarām* earnings is a key to being blessed and remaining satisfied with what one has, while *ḥarām* earnings are a source of harm and evil in this life and in the Hereafter. In addition, any human that benefits from *ḥarām* sources deserves to be thrown into Hell, and that the person will remain standing on the day of judgment until he is asked about four things, among which are his wealth, from which it was earned, and how it was spent. Evildoers are all cursed and kept away from the blessings of Allah (SWT). Thus, purely permissible and lawful (*ḥalāl*) businesses and jobs are highly demanded and required. Another important issue that could lead to *sharīʿah* non-compliant event in takaful operation is getting the contribution for the takaful product from a participant who obtain income through non-*ḥalāl* occupation. Wahbah Al-Zuḥaylī in *Fatāwā Muāṣirah* states that *māl al-ḥarām* is an income that is obtained through unlawful means which cannot be used or benefitted by the holder whether the prohibition is made in the Quran, a prophetic text (*ḥadīth*), consensus (*ijmāʿ*) or decisive evidence (*al-adillah al-muʿtabarah*). *Māl al-ḥarām* is wealth which cannot be benefitted from or owned by Muslims.

Benefitting means including all acts related to the use of property or asset such as consuming, buying, renting and so on. According to some opinions, the definition which limits *ḥarām* property only to property that is forbidden to take any benefit from it. This is weak because it does not include illegal property that comes into the possession of Muslims that is only for storage and not for benefit.

As to what comes within the scope of event and occupation that are non-compliant to *sharīʿah* rules and principles, some contemporary Muslim scholars have expanded the area to comprise current unlawful income obtained from lottery, dealing with conventional banks and investing in *sharīʿah* non-compliant businesses that involve interest based financial services, gambling and betting operations, selling and purchasing of unlawful assets, conventional insurance, prohibited entertainment, selling of tobacco or related products which are harmful, dealing in unlawful securities, and all other unacceptable activities that violate the precepts of *sharīʿah* (Al-Qaraḍāwī, 2003).

Classification of Harām into لذاته and لغيره

In Islamic Jurisprudence, *māl al-ḥarām* is divided into *ḥarām lidhātih* and *lighayrih*, which is extended to the nature of that prohibited elements. *Ḥarām lidhātih* is wealth that is prohibited in itself, as *sharīʿah* prohibits its consumption and acquisition due to the harm that it brings to the consumers. *Ḥarām lighayrih* is wealth prohibited because of the external factors, such as sales that incur the element of interest (*ribā*) or consisting of voidable condition. Income-generating activities that involve money do not invoke the issue of *ḥarām* in its essence such as pork and wine since money in its substance is permissible. Nevertheless, a particular sum of money may be deemed impermissible due to external factors if it is derived from illegitimate sources. The issue of impermissible money due to external factors may arise due to income generated or received from events and occupations that are non-compliant with *sharīʿah* rules and principles.

Ḥarām lighayrih is a thing or act which is principally permissible and *ḥalāl*, but due to certain elements in it that make it *ḥarām* such as *ribā*. Sale and purchase are initially permissible if their requirements and conditions are satisfied including the willfulness between contracting parties. However, if there is an element of *ribā* in the transaction, the sale and purchase is considered *ḥarām* due to the existence of *ribā* not because of the contract itself (Ḥamīdī, n.d.). A majority of Mālikiyyah, Shāfiʿiyyah, Ḥanābilah and Ẓāhiriyyah are of the view that a *ḥarām* element which exists intransitively (*lāzim*) i.e., becoming part of something which is principally permissible, will cause a thing to become *ḥarām*. On the other hand, a transitively (*ghayr lāzim*) existing *ḥarām* element in something which does not become part of it, such as performing *wuḍūʾ* (ablution) using stolen water or water taken without permission of its owner will not affect the validity of the *wuḍūʾ* or its permissibility (al-Shikh, n.d.). This situation is explained further in the table below:

Table 3.1: Transitiveness Factor in Determining Ruling of Sharīʿah

Ḥarām Element	Transitiveness (*Luzūm*)	Ruling	Example
Exists in a permissible matter	Intransitively (*lāzim*)	Affecting its permissibility	*Ribā*
Exists in a permissible matter	Transitively (*ghayr lāzim*)	Not affecting its permissibility	Performing ablution using stolen water

Source: Author

A *ḥarām* element that exists in money, such as income from non-*ḥalāl* sources exists intransitively i.e., it is part of the money. Therefore, based on this opinion, a person is prohibited to receive money known to have come from *ḥarām* sources.

Shubhah Wealth

Shubhah, according to Imām al-Ghazzālī (2005), is:

> "...*Something which is ambiguous due to the occurrence of a clash between two opinions arising from two evidence or reasons.*"

Shubhah occurs due to the existence of certain reasons which raise a question either something is *ḥalāl* or *ḥarām*. The question of *shubhah* does not rise solely from doubtfulness which is assumptions that are not supported by reasons that can raise any doubts. The *ḥalāl* or *ḥarām* status of a particular matter only has to be questioned when there are two contradictory signs or evidence.

Al-Ghazzālī said:

الشُّبْهَةُ الْمَحْذُورَةُ مَا تَنْشَأُ مِنَ الشَّكِّ. وَالشَّكُّ عِبَارَةٌ عَنِ اعْتِقَادَيْنِ مُتَقَابِلَيْنِ نَشَأَ عَنْ سَبَبَيْنِ فَمَا لَا سَبَبَ لَهُ لَا يَثْبُتُ عَقْدُهُ فِي النَّفْسِ حَتَّى يُسَاوِيَ الْعَقْدَ الْمُقَابِلَ لَهُ فَيَصِيرُ شَكًّا

"Shubhah which is to be avoided is a shubhah comes from shak (doubtfulness). Shak means a contradiction between two opinions due to existence of two reasons (permitting and prohibiting reasons). Assumption which is not based on a reason is a fragile assumption so it will be equally strong to another assumption opposed to it hence leading to shak."

Briefly, jurists differ in their views on *al-mutasyābihāt* in several opinions:

1. *Shubhah* is a matter which has a contradiction of *dalīl* (evidence) between a prohibiting *dalīl* and a permitting one. This contradiction applies to *mujtahid*-level scholars who are looking for evidence, and to the general public who have doubts about the ruling of a matter (Husain, 2001).

2. *Shubhah* is a matter which has a difference of opinion among scholars about it. This applies to the general public or *muqallid* (al-Wahhāb, n.d.).

3. *Shubhah* is a *makrūh* matter because *makrūh* is closer to *ḥarām* compared to *ḥalāl* (al-Marūzī, 2004).

4. *Shubhah* is a matter about which there is no proof. However, the most accurate opinion is that a matter, which there is no proof of whether it is *ḥarām* or *ḥalāl*, remains *ḥalāl* and permissible (al-Kandahlawī, 1975).

5. *Shubhah* is a mixture between *ḥalāl* and *ḥarām*. It is prohibited to do business with a person whose *ḥarām* property is greater than *ḥalāl* (al-Khaṭṭābī, 1932).

6. *Mutashābihāt* is a matter that is proven using weak evidence or using *qiyās* (Soleh, 2007).

According to al-Ghazzālī, everything that is prohibited is due to the following two conditions:

Table 3.2: Cause of Ḥarām Conditions

Particular	1st Condition	2nd Condition
Reason	Existence of *ḥarām* element in its essence.	Existence of defect or doubt in its ownership.
Example	Something that is mind-numbing, causes death or intoxicates, or because it has been condemned as ḥarām.	Accepting *ḥarām* money as debt repayment.

Source: Author

A person's ownership of an item does not fall outside the following six situations:

1. Taking something that does not have an owner, such as revitalizing an abandoned land to dig for minerals. Then, it is *ḥalāl* as long as what is obtained does not have a sign that it has been owned by someone else.

2. Something obtained by force from infidels whose blood is *ḥalāl* such as *fay'* property and booty (*ghanīmah*). The ruling is *ḥalāl* when a fifth of it is issued and distributed to those who deserve it and not taken from the infidels who are given security and protection.

3. Something obtained by force because of demanding rights from people who disobey their obligations, such as people who refuse to pay zakat on property or crops, and so on. This is *ḥalāl* when the conditions are fulfilled.

4. Something obtained by agreement through an exchange contract (sale and purchase). This is *ḥalāl* if it is ensured that the conditions of the goods sold and the price, the conditions of the contracting party, the conditions of *ījāb* and *qabūl* and not bringing any harm are fulfilled.

5. Something obtained with consent without any exchange such as *hibah*, gifts and so on. This is *ḥalāl* when the conditions are fulfilled.

6. Something obtained without effort, such as an inheritance or will. This is *ḥalāl* as long as the original owner of the property owns it through one of the ways of these situations.

The Principle of Halāl and Harām in Islam

The Islamic principles related to *ḥalāl* and *ḥarām* are as follows:

1. The presumption of something is it is permissible.

2. Nothing is *ḥarām* except what is forbidden by a sound and explicit *naṣ* (i.e., either a Quranic verse or a clear, authentic, and explicit Sunnah (practice or saying) of the Prophet (PBUH).

3. Forbidding what is lawful and permitting what is unlawful is the same as committing *shirk* to Allah (SWT).

4. The prohibition is due to filthiness and harm.

5. With *ḥalāl* things, one no longer needs to resort to *ḥarām*.

6. Whatever leads to something that is *ḥarām* is also *ḥarām*.

7. It is *ḥarām* to do tricks for *ḥarām* things.

8. Good intentions cannot legitimize what is *ḥarām*.

9. Protect yourself from things that are dubious i.e., ambiguous.

10. Something that is *ḥarām* is still *ḥarām* for everyone.

11. *Ḍarūrah* legalize prohibited thing. (Al-Qaraḍāwī, 2007)

Nu'man bin Basyīr narrated that the Prophet (PBUH) said:

الْحَلَالَ بَيِّنٌ، وَإِنَّ الْحَرَامَ بَيِّنٌ، وَبَيْنَهُمَا أُمُورٌ مُشْتَبِهَاتٌ لَا يَعْلَمُهُنَّ كَثِيرٌ مِنَ النَّاسِ، فَمَنِ اتَّقَى الشُّبُهَاتِ فَقَدْ اسْتَبْرَأَ لِدِينِهِ وَعِرْضِهِ، وَمَنْ وَقَعَ فِي الشُّبُهَاتِ وَقَعَ فِي الْحَرَامِ، كَالرَّاعِي يَرْعَى حَوْلَ الْحِمَى يُوشِكُ أَنْ يَرْتَعَ فِيهِ.

"That which is lawful is clear and that which is unlawful is clear, and between the two of them are doubtful matters about which many people do not know. Thus, he who avoids doubtful matters clears himself in regard to his religion and his honour, but he who falls into doubtful matters [eventually] falls into that which is unlawful, like the shepherd who pastures around a sanctuary, all but grazing therein."

(Muslim, 2006)

This *ḥadīth* explains that the area and scope of *ḥalāl* matters is very wide. In fact, it is wider than the area of *ḥarām* things. This can be understood from the parable by the Prophet (PBUH) which compares forbidden things to forbidden areas. Therefore, outside the prohibited area is the *ḥalāl* area. This signifies how large and wide the area of *ḥalāl* matters compared to *ḥarām* matters is.

Receiving Money from One's Unlawful Earning

As for money from both lawful and unlawful activities, the main issue in question is whether or not Muslims are allowed to receive the wealth from such individuals. Regarding the avenues through which unlawful income intermix with one's lawful earning has been pointed out by Muslims jurists.

Al-Bukhārī narrated a *ḥadīth* from 'Āʿishah (Allah pleased her) which the Prophet (PBUH) was asked about a people who came with a hunted meat. 'Āʿishah (Allah pleased her) asked the Prophet (PBUH) about the meat whether they mentioned the name of Allah or not while hunting it? From the words of the Prophet (PBUH): "*Say bismillāh and eat!*", Ibn Ḥazm derived a method from this *ḥadīth*:

> *"Something that is invisible from sight does not need to be questioned."*

If it is assumed that the meat of the hunted animal does not mention the name of Allah on it, then the assumption will surely cause difficulties, while it is necessary to be kind to fellow Muslims. It is absolutely impossible to harbor negative assumptions towards fellow Muslims. The Muslims in the time of the Prophet (PBUH) were a very strong religious group. They were praised by the Prophet (PBUH) as the best generation. Thus, there should not be any bad assumptions towards them (Ibn Baṭṭāl, 2003).

Apart from that, the Prophet (PBUH) accepted the Jews' invitation who served him food and he did not question the meal served for him. There are also some views which permitted enquiries about the *ḥalāl* and *ḥarām* status of something before accepting it. This view is based on a *ḥadīth* narrated by Abū Thaʿlabah al-Khushanī who asked the Prophet (PBUH) on the use of food containers owned by the people of the book (*Ahl al-Kitāb*), because they also consume pork and alcohol.

أَتَيْتُ رَسُولَ اللهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقُلْتُ: يَا رَسُولَ اللهِ، إِنَّا بِأَرْضِ قَوْمٍ أَهْلِ كِتَابٍ نَأْكُلُ فِي آنِيَتِهِمْ، قَالَ: إِنْ وَجَدْتُمْ غَيْرَ آنِيَتِهِمْ فَلاَ تَأْكُلُوا فِيهَا، فَإِنْ لَمْ تَجِدُوا فَاغْسِلُوهَا وَكُلُوا فِيهَا.

"I came to the Prophet (PBUH), and I asked him: "O Allah's Messenger! We are living in a land inhabited by the people of the Book; can we take our meals in their utensils?" He said, "If you can get utensils other than theirs, do not eat in theirs, but if you cannot get other than theirs, wash them and eat in them."

(al-Tirmidhī, 2000)

Ḥakīm bin Ḥizām (Allah pleased him) reported that the Prophet (PBUH) sent 'Urwah to buy an *uḍḥiyah* (sacrificial offering animal) for him with one dinar. So, he bought him the *uḍḥiyah* and profited one dinar. Then, he bought another in its place and came with an *uḍḥiyah* and a dinar to the Messenger of Allah, who said, "*Sacrifice the sheep and give the dinar in charity*". The animal became *uḍḥiyah* and he couldn't sell it; thus, the Prophet (PBUH) asked him to sacrifice it (Al-Shawkānī, 1993).

From this narration, it is understood that one who receive unlawful income based on the nature of the action should give *ṣadaqah* on it as a means of purifying the wealth, but may not be rewarded. Income that has been seized and taken unlawfully is completely *ḥarām*, should be returned, and cannot be given in *ṣadaqah*. In the case of money for which sources are unlawful, it is impermissible for Muslims to receive and utilize them. In this case, it is unlawful and sinful for any Muslim to receive unlawful money, as this could assist in many ways to expand the owner's benefits and support their unlawful activities. *Ḥarām* money is made *ḥalāl* for a person or organization it is gifted to, as long as the people or organization receiving it have no knowledge that the money was obtained in a *ḥarām* manner.

Allah (SWT) says:

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى

"No soul burdened with sin will bear the burden of another."

(Fāṭir 35:18)

This verse contains the assumption that anyone who had no part, encourage or support in the earning of money through *ḥarām* means, unaware receiving things from others that were acquired with unlawful money, then the above verse is applicable for him. It also indicates a situation of doubt or uncertain. Assuming other person's wealth is mostly *ḥalāl*, even if they are non-Muslims, and dealing with them whenever there are no genuine reasons to doubt is *wājib*:

الْأَصْلُ بَرَاءَةُ الذِّمَّةِ.

"Freedom from liability is a fundamental principle."

(Muhammad, 1996)

It is obligatory for everyone to have a good assumption of all, even non-Muslims, and not spy on others or assume the worst of them.

Al-Ghazzālī, in his discussion on the issue in which unlawful income intermix with one's lawful earnings, argued that transition of one's unlawful income through permissible transaction cannot be rendered lawful and could not be utilized by the receiver if such money is known derived from unlawful means. Unlawful means like usury (*ribā*), uncertainties (*gharar*), gambling (*maysir*), fraudulence, robbery, hoarding, bribery, stealing and conducting *sharīʿah* non-compliant business such as selling pork, alcohol, dead animals and dealing in prostitution and pornographic activities could not be kept, utilized, and consumed for personal benefit, as these offer no *maṣlaḥah*. They are required to be disposed of as to prevent the possessor from committing a sin. Al-Ghazzālī opined that unlawful property could be channeled to the poor, as they are more deserving, or given as charity for the benefit of Muslims. However, such property should be returned to the real owner if impure money or property is obtained through stealing, fraudulence, and robbery. It is *makrūh* or disapproved to deal with the unlawful income holder. Al-Ghazzālī opined that if the *ḥarām* wealth of the other person is more than *ḥalāl* wealth, it is not permitted to transact with them or accept their gifts. If such wealth of the other person is very slight and intermixed with lawful earnings, it is also not permitted to transact with them or accept their gifts, because the chance of receiving non-*ḥalāl* money is greater. If it is known that the very item received was acquired in a purely *ḥarām* way (such as with 100% *ḥarām* money), it would not be permitted to accept such an item (Al-Ghazzālī, 2005).

However, a review of opinions in Shāfiʿī school of thought shows us with a different view from al-Ghazzālī. A popular view in the Shāfiʿ**ī** school is that it is *makrūh* to do business with parties who have illegal jobs, unless it is known that the source of the property handed over is from an illegal source (al-Suyūṭī, 1983). Doing business with parties who have illegal jobs is *makrūh* as long as it cannot be ascertained whether the source of the money is handed over from a *ḥalāl* or *ḥarām* source (al-Nawawī, n.d.). The acceptance of charity, food, gifts from owners of illegal jobs is permissible (al-Qalyūbī, 1995). Al-Nawawi opined that doing business with a person whose most wealth is ḥarām as well as accepting his invitation is *makrūh* (al-Nawawī, 1991).

Acceptance of money such as debt repayment, purchase of goods and so on that are clearly from illegal sources is *ḥarām*. The dealings of the Prophet (PBUH) with the Jews and Christians only involved their assets whose source was not known, whether from *ḥarām* or *ḥalāl* sources. Dealing with parties who have illegal jobs is *makrūh* such as accepting invitations, giving gifts and so on even if the illegal property he owns is more than that which is *ḥalāl* (Al-Ḥaythamī, n.d.). The view of Shāfiʿī school on the issue of receiving money is that money known to be from an illegal source is *ḥarām*. The view of majority in Shāfiʿ**ī** school that it is *makrūh* to do business with parties who are known to have more *ḥarām* income than *ḥalāl* one. This view is also the view chosen by al-Nawawī.

The Shāfiʿī school generally views that it is *makrūh* of doing business with parties known to have mixed income between *ḥalāl* and *ḥarām*. Although the percentage of *ḥarām* income mixed in the property of the individual involved is higher than the *ḥalāl*, the ruling of dealing with such parties such as receiving donations, gifts and so on is only considered as *makrūh* unless it can be ascertained for sure that the property handed over is property of *ḥarām* origin. Some scholars of the Ḥanafī school have developed a method based on several narrations from the Prophet (PBUH). The method is:

الْحَرَامُ لَا يَتَعَدَّى ذِمَّتَيْنِ.

"Ḥarām does not go beyond two dhimmah."

(Al-Ḥamawī, 1985)

This method means that even if an individual's ownership of a property is illegal due to the way it is obtained having been contrary to *sharīʿah*, such as usury, lottery and salary from work related to alcohol, by transferring the money to another individual through legal means, the illegal money can be converted to *ḥalāl* for the second owner. In short, when illegal money is transferred through legal means such as buying and selling, renting and so on, then the ruling is *ḥalāl*, because ownership has already changed hands through legal means.

Among the *ḥadīth* which are the basis of the method in the Ḥanafī's school is:

عَنْ أَنَسٍ أَنَّ يَهُودِيًّا دَعَا النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ إِلَى خُبْزِ شَعِيرٍ وَإِهَالَةٍ سَنِخَةٍ فَأَجَابَهُ

"Anas reported that the Prophet (PBUH) accepted invitation to a meal of barley bread and stale meat from a Jewish."

(Aḥmad, 2001).

They were obtained income through means not acceptable by sharīʿah.

This opinion is also strengthened by a *ḥadīth* from the Prophet (PBUH), regarding the meat that was gifted to Barīrah (Allah pleased him), he said:

هُوَ لَهَا صَدَقَةٌ وَلَنَا هَدِيَّةٌ

For her i.e., Barīrah (the meat that was gifted) is considered as charity and to us (the family of the Prophet) as a gift.

(Al-Bukhārī, 2001).

From the *ḥadīth* above, it can be understood that what is forbidden is not the *ʿayn* or the physicality of the meat because when the meat changes from being charity meat, which is forbidden to the Prophet (PBUH) and his family members, to a gift, then the Prophet (PBUH) eats it (Ibn Baṭṭāl, 2003). The Prophet (PBUH), as narrated in authentic *ḥadīths*, ate food given to him by the Jews and performed transactions with them, such as buying and selling, pawning goods and so on, while Allah (SWT) said in the *Qur'an* that they also have *ḥalāl* and *ḥarām* rules, but they do not obey them. This matter is also included in the issue of mixing and obtaining property by illegal means. However, according to the explanation given by al-Shihāb Ibn al-Shiblī, as narrated by Sheikh ʿAbd al-Wahhāb al-Shaʿrānī, the opinion is based on the fact that the recipient did not know that what was handed over was illegal money. It is *ḥarām* to accept it if it is known that the money handed over is *ḥarām* (al-Ḥamawī, 1985).

Money from Both Lawful and Unlawful Activities/ Partly Lawful and Partly Unlawful

Generally, there are four parties involved in a takaful operation:

- The participants, who contribute the premium to the fund;
- The operator, which is a licensed body which manages the fund according to sharīʿah principles;
- The insured, who are the participants who face the risk and are assisted by the fund; and
- The beneficiaries, who are those who benefit from the fund.

The current takaful practice uses a combination of two types of main ʿ*aqd* (contracts); the contract of *tabarru*ʿ (donation) and contract of *wakālah* (agency). *Tabarru*ʿ means a donation, charity, or gift without expecting any compensation in return. Generally, a percentage of the participants' contribution or premium that each participant makes (based on the type of cover they require) will be considered as *tabarru*ʿ allocated through the *tabarru*ʿ principle to help all participants from unexpected risks. From a *sharīʿah* perspective, *tabarru*ʿ is charitable contract which is normally unilateral in nature as opposed to contract of exchange. *Tabarru*ʿ from takaful perspective is a contribution which are used to pay claims for damages suffered by some of the participants. Takaful operator's role is to receive this contribution from participants, managing the insurance operations and investing the insurance contributions. In the classical works of *fiqh*, the word *tabarruʿ* is explained in the context of the types of contracts made for the purpose of assistance, such as *ṣadaqah*, *hibah* and *qarḍ* (al-Anṣārī Z. B., 1997). *Tabarruʿ* such as *ṣadaqah*, *hibah* and *hadiyyah* are discussed under the topic of *hibah*. *Hibah* is a gift of love, while a *hadiyyah* is a gift of appreciation, love or honoring someone. Charity is a gift to help those who are in sincere need for the sake of Allah (SWT). *Hadiyyah* and *ṣadaqah* are gifts, but gift giving does not necessarily imply *ṣadaqah* or *hadiyyah* (Ibn al-Rifʿah, 2009). Contracts such as *ʿāriyyah*, *wadīʿah*, *wakālah* without fee, providing services or doing a job for free are *tabarruʿ* (Abū Zahrah, 1996).

Then, the concept of *tabarruʿ* has a wide scope and *ṣadaqah* is one of its meanings. However, there is no clear definition of *tabarruʿ* contract in takaful policies. Considering the absence of a clear definition of *tabarruʿ* contract in takaful policies some scholars are of the opinion that the most appropriate principle to apply is the principle of *ṣadaqah* (Shamsiah, 2010). In addition to this, the word *ṣadaqah* is not limited solely as a means of aid to the poor (al-Khaṭīb, 1997). *Ṣadaqah* should also be given to the rich. It is permissible to give voluntary alms to the rich, and the one who pays it will be rewarded for it (Al-Nawawī, n.d.). *Ṣadaqah* is more flexible than zakat and can be given to non-Muslims, as long as they are not at war with Muslims.

Ibnu Rajab concluded that illegal property does not qualify to be donated and such property must be discarded due to its illegality (Ibn Rajab, 1988). This is in accordance with a *ḥadīth* narrated by Ibn ʿUmar that the Prophet (PBUH) said:

لاَ يَقْبَلُ اللَّهُ صَلاَةً بِغَيْرِ طُهُورٍ وَلاَ صَدَقَةً مِنْ غُلُولٍ

"Allah does not accept ṣalāh without purification (wuḍū'), nor charity from ghulūl."

(al-Tirmidhī, 2000).

The word *ghulūl* means *al-akhdh khufyah*, which is to take things in secret such as stealing something and used in the case of *ghanīmah* theft before being distributed (al-Marāghī, 2006), commission, which is the act of taking an income outside the salary (Abū Dāwūd, 2000) gifts, which is the gifts that a person gets because of the position attached to him (Aḥmad, n.d.). The use of the word *ghulūl* is betrayal in general, either betrayal in the context of the mandate submitted for the benefit of the community or certain groups, but use it for personal gain (M. Quraish, 2002). Money obtained from illegal sources cannot be used for any benefit by the owner, even in the name of *ṣadaqah*, *hibah*, *hadiyyah* and so on. *Ḥarām* money also cannot be given to other party as alimony because providing alimony from *ḥarām* money is the same as taking benefits from *ḥarām* property. The party that receives *ḥarām* money does not bear any sin if they do not know the source of the money (al-Nawawī, 1991). *Ḥarām* money is required to be disposed of by channeling the money to another party in need, such as the poor and needy (al-Ghazzālī, 2005).

Table 3.3: The Fiqh Adaptation of Receiving Non-Ḥalāl Contributions from Participants

TO	Receiving Non-Ḥalāl Contribution from Participants
TO1	Accepting participation of takaful participant, although his source of income is mixed between *ḥarām* and *ḥalāl* sources based on the principle of *tabādul al-milk yaqūm maqām tabādul al-dhāt* (the exchange of ownership takes the place of the exchange of one's essence); and based on BNM's guidelines. Only the participant's occupation is enquired thoroughly. *Sharīʿah* non-compliance is required to be purified by giving charity (*tabarru*ʿ). The transfer of ownership to a 3rd party with legal means (*tabarru*ʿ) is considered *sharīʿah* compliant.
TO2	No verification is made on the participant unless it is too obvious. If the participant's income is declared from a non-ḥalāl sources, it is treated by case-to-case basis. There is also a negative list which is not covered by the takaful operator. The coverage for mixed activities between *ḥalāl* and non-*ḥalāl* activities, the non-*ḥalāl* activities shall not exceed more than 30% and it is applied to all businesses.
TO3	Differentiate between individual and group of companies. Non-ḥalāl business by group of companies is not covered. **Personal opinion:** Individual non-*ḥalāl* income is accepted because each person has the right to be covered due to a *maṣlaḥah* of preventing the person to opt for conventional insurance and an opportunity to do *daʿwah*.

TO4	Contributions from all individuals and companies are accepted.
TO5	**Individual:** Considered to be acceptable due to *ḥusn al-ẓann*. **Company:** Not acceptable. If the company's income is mixed between *ḥarām* and *ḥalāl* sources, its financial reporting has to be reviewed e.g., Hard Rock which is mixed between bar and hotel.
TO6	No specific *takyīf fiqhī* (Fiqh adaptation).
TO7	It is not required to know the source of income. It is only sufficient to meet the eligibility requirements to be a takaful participant.

Source: Interview Data

Conclusion

The jurists have different opinions on accepting money from someone who is known to have *ḥarām* income.

1. Acceptance of money for which status cannot be verified physically, whether it is *ḥarām* or *ḥalāl*, is permissible even from someone whose wealth is mostly *ḥarām*.

2. It is *makrūh* to do transactions with parties who have *ḥarām* income.

3. It is *ḥarām* to receive money that is known to come from *ḥarām* sources.

4. *Ḥarām* money changes status to *ḥalāl* when it is handed over to another party through a legal transaction.

5. Takaful operators in Malaysia have differing opinions on the issue of accepting contributions from participants who work in illegal places such as alcohol factories, gambling premises, and so on.

04

DISTRIBUTION OF TAKAFUL PRODUCTS BY DUAL AGENCY FROM A *SHARĪʿAH* PERSPECTIVE

MOHD ROFAIZAL IBHRAIM

INTRODUCTION

Agents remain the key distribution channel for insurance and takaful products. For many financial consumers (customers), agents play a critical role in providing sound advice and recommendations to help customers in choosing suitable products as well as in ensuring timely claims submission. Dual agency refers to a situation in which an individual may serve as an agent for two parties in the same transaction. Dual agency commonly occurs in takaful and insurance when the same person appointed as an agent representing both takaful and insurance company to market and distribute their products. As is the case for all agents, a dual agent's commission is based on how aggressive they distribute the product and convince customers to subscribe the policy either takaful or insurance. *wakālah* contract is a contract that is required by *sharīʿah*. There are many arguments that are used as arguments to support the necessity of *wakālah* contracts. The principles and conditions of the *wakālah* must be fulfilled for the *wakālah* contract to be valid. The scholars do not disagree that a person cannot be a representative or delegate illegal things.

The contract of agency is legally approved and practiced on several evidence from the al-Quran, Sunnah and *Ijmā'*. Islam promotes the use of *wakālah* in various fields of activities, as long as they do not contravene *sharīʿah* principles. There is an abundance of evidence for the practice of *wakālah* by the Prophet (PBUH) and his companions. Muslim jurists agreed that the subject matter of *wakālah* contract should be eligible for legal authorization.

Wakālah from Islamic Perspective

In Arabic, term agent is *wakīl* derives from the word *wakālah*, which is an Arabic term derived from the word *wakala* means maintaining, guarantees, submit, and replace (Al-Nawāwī, 2001). In Arabic term, agent is *wakīl*.

Based on the Accounting and Auditing Organization for Islamic Financial Institution (AAOIFI) *Sharīʿah* Standard (standard no. 23, clause 2/1), *wakālah* is the act of one party delegating the other to act on its behalf in what can be a subject matter of delegation (Islamic Financial System, 2012). The current takaful practice uses a combination of two types of main *ʿaqd* (contract) of which the contract of *tabarruʿ* (donation) and contract of *wakālah*. In the case of *wakālah*, this is an agency contract whereby one party designates another party as his agent to perform a particular task. Adopting *wakālah* concept in the takaful practice, the principal (*muwakkil*) is known as the participant while the agent (*wakīl*) is regarded as the takaful operator. The participant appoints the takaful operator as an agent to manage the fund. As compensation, the takaful operator is entitled to attain a pre-determined and agreed-upon fee. The takaful operator then invests the fund in *sharīʿah*-compliant investments. Any profit or surplus will be fully distributed to the participants.

The contract of *wakālah* or agency is legally approved and practiced based on several pieces of evidence from the *Qur'an*, *ḥadīth*, and the consensus of Muslim jurists.

إِنَّمَا الصَّدَقَاتُ لِلْفُقَرَاءِ وَالْمَسَاكِينِ وَالْعَامِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِي الرِّقَابِ وَالْغَارِمِينَ وَفِي سَبِيلِ اللَّهِ وَابْنِ السَّبِيلِ ۖ فَرِيضَةً مِّنَ اللَّهِ ۗ وَاللَّهُ عَلِيمٌ حَكِيمٌ

"Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the cause of Allah. And for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom."

(Al-Tawbah 9:60)

فَابْعَثُوا أَحَدَكُم بِوَرِقِكُمْ هَٰذِهِ إِلَى الْمَدِينَةِ فَلْيَنظُرْ أَيُّهَا أَزْكَىٰ طَعَامًا فَلْيَأْتِكُم بِرِزْقٍ مِّنْهُ وَلْيَتَلَطَّفْ وَلَا يُشْعِرَنَّ بِكُمْ أَحَدًا

"Now, send one of you with your money to the town. Let him find out which is the best food (to be had) and bring some to you, that (you may) satisfy your hunger therewith: and let him behave with care and courtesy: not inform any one about you."

(Al-Kahf 18:19).

حَدِيثُ جَابِرٍ: أَرَدْتُ الْخُرُوجَ إِلَى خَيْبَرَ، فَذَكَرْتُهُ لِرَسُولِ اللهِ فَقَالَ: إِذَا لَقِيتَ وَكِيلِي فَخُذْ مِنْهُ خَمْسَةَ عَشَرَ وَسْقًا، فَإِنِ ابْتَغَى مِنْكَ آيَةً، فَضَعْ يَدَكَ عَلَى تَرْقُوَتِهِ.

Narrated by Jābir (Allah pleased him), he said, "I went out to Khaybar, and I came to the Prophet (PBUH) he said, "If you meet my agent, take or ask from him fifteen wasqs (of dates). If he asks you for a sign, then place your hand on his collarbone.""

(Abū Dāwūd, 2000).

عَنْ عُرْوَةَ الْبَارِقِيِّ رَضِيَ اللهُ عَنْهُ أَنَّ اَلنَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ أَعْطَاهُ دِينَارًا يَشْتَرِي بِهِ أُضْحِيَّةً، أَوْ شَاةً، فَاشْتَرَى شَاتَيْنِ، فَبَاعَ إِحْدَاهُمَا بِدِينَارٍ، فَأَتَاهُ بِشَاةٍ وَدِينَارٍ، فَدَعَا لَهُ بِالْبَرَكَةِ فِي بَيْعِهِ، فَكَانَ لَوْ اِشْتَرَى تُرَابًا لَرَبِحَ فِيهِ.

ʿUrwah al-Bāriqī (Allah pleased him) reported that the Prophet (PBUH) gave him a dinar to buy an uḍhiyah (sacrificial animal or a sheep). He bought two sheep, sold one of them for a dinar, and brought him a sheep and a dinar. So, the Prophet (PBUH) invoked a blessing on him in his business dealing, and he was such that if he bought dust, he would make a profit from it."

(al-Bukhārī, 2001).

Muslim jurists have reached *ijmā'* on the permissibility of *wakālah* due to peoples' desperate need for assistance in accomplishing certain task that they are incapable of doing on their own. It is permissible to employ administer on collecting and distributing zakat benefits the ruling of the agency on behalf of those entitled to receive their rights, *nikāḥ*, collecting zakat, in the sale contract, mortgage and all other transactions like custody, *hawālah* (transfer of debt) guarantees, partnership, declaration and reconciliation, just as it is permissible in the *ḥajj* (pilgrimage) (al-Subkī, n.d.).

Basic Rules for *Wakālah* Contracts

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لَا تَأْكُلُوٓا۟ أَمْوَٰلَكُم بَيْنَكُم بِٱلْبَـٰطِلِ إِلَّآ أَن
تَكُونَ تِجَـٰرَةً عَن تَرَاضٍ مِّنكُمْ ۚ

> *"O ye who believe, squander not your wealth among yourselves in vanity, except it be a trade my mutual business to an agent, for the latter to perform and act on consent."*
>
> (Al-Nisā' 4:29)

The first part of the verse forbids any agreement based on vanity (*bāṭil*), whereas the second part enjoins that every agreement should be based on mutual consent. The religious validity of a transaction under an agency contract may become important in any transaction involving agency contract. The agency contract is subject to regulations, in which the essential elements of the agency contract are the same as the general Islamic contract.

Narrated by ʿAbd al-Raḥmān bin ʿAwf (Allah pleased him) he said:

كَاتَبْتُ أُمَيَّةَ بْنَ خَلَفٍ كِتَابًا، بِأَنْ يَحْفَظَنِي فِي صَاغِيَتِي بِمَكَّةَ، وَأَحْفَظَهُ فِي صَاغِيَتِهِ بِالْمَدِينَةِ. فَلَمَّا ذَكَرْتُ الرَّحْمَنَ» قَالَ: لاَ أَعْرِفُ الرَّحْمَنَ، كَاتِبْنِي بِاسْمِكَ الّذِي كَانَ فِي الجَاهِلِيَّةِ، فَكَاتَبْتُهُ: عَبْدَ عَمْرٍو، فَلَمَّا كَانَ فِي يَوْمِ بَدْرٍ، خَرَجْتُ إِلَى جَبَلٍ لِأُحْرِزَهُ حِينَ نَامَ النَّاسُ، فَأَبْصَرَهُ بِلاَلٌ، فَخَرَجَ حَتَّى وَقَفَ عَلَى مَجْلِسٍ مِنَ الأَنْصَارِ، فَقَالَ أُمَيَّةُ بْنُ خَلَفٍ: لاَ نَجَوْتُ إِنْ نَجَا أُمَيَّةُ، فَخَرَجَ مَعَهُ فَرِيقٌ مِنَ الأَنْصَارِ فِي آثَارِنَا. فَلَمَّا خَشِيتُ أَنْ يَلْحَقُونَا، خَلَّفْتُ لَهُمُ ابْنَهُ لِأَشْغَلَهُمْ فَقَتَلُوهُ، ثُمَّ أَبَوْا حَتَّى يَتْبَعُونَا، وَكَانَ رَجُلًا ثَقِيلًا، فَلَمَّا أَدْرَكُونَا، قُلْتُ لَهُ: ابْرُكْ، فَبَرَكَ، فَأَلْقَيْتُ عَلَيْهِ نَفْسِي لِأَمْنَعَهُ، فَتَخَلَّلُوهُ بِالسُّيُوفِ مِنْ تَحْتِي حَتَّى قَتَلُوهُ، وَأَصَابَ أَحَدُهُمْ رِجْلِي بِسَيْفِهِ، وَكَانَ عَبْدُ الرَّحْمَنِ بْنُ عَوْفٍ يُرِينَا ذَلِكَ الأَثَرَ فِي ظَهْرِ قَدَمِهِ.

"I got an agreement written between me and Umayyah bin Khalaf that Umayyah would look after my property (or family) in Mecca, and I would look after his in Medina. When I mentioned the word 'al-Raḥmān' in the documents, Umayyah said, "I do not know 'al-Raḥmān'. Write down to me your name, (with which you called yourself) in the Pre-Islamic Period of Ignorance." So, I wrote my name, "Abdu ʿAmr'. On the day (of the battle) of Badr, when all the people went to sleep, I went up the hill to

> *protect him. Bilāl saw Umayyah and went to a gathering of Anṣār and said, "(Here is) Umayyah bin Khalaf! Woe to me if he escapes!" So, a group of Anṣār went out with Bilāl to follow us ('Abd al-Raḥmān and Umayyah). Being afraid that they would catch us, I left Umayyah's son for them to keep them busy, but the Anṣār killed the son and insisted on following us. Umayyah was a fat man, and when they approached us, I told him to kneel down, and he knelt, and I laid myself on him to protect him, but the Anṣār killed him by passing their swords underneath me, and one of them injured my foot with his sword. The sub narrator said, "Abd al-Raḥmān used to show us the trace of the wound on the back of his foot."*
>
> (Al-Bukhārī, 2001).

The agreement between ʿAbd al-Raḥmān bin ʿAwf and Umayyah bin Khalaf was that he (ʿAbd al-Raḥmān) would look after Umayyah's property and family in Medina if he were to do the same for him in Mecca. ʿAbd al-Raḥmān bin ʿAwf had a long-standing friendship with Umayyah bin Khalaf when they were in Mecca. The *ḥadīth* also indicates that if a Muslim deputizes a non-Muslim, the contract is valid.

For the elements of *wakālah* contract, the Ḥanafi jurists take the same approach as in any other contract whereby it consists of offer and acceptance. Majority scholars including the Shāfiʿī, Mālikī and Ḥanbalī are of the opinion that *wakālah* comprises of four elements:

i. Offer and acceptance;

ii. The principal or *al-muwakkil* the person who authorizes the power;

iii. The agent or *al-wakīl*; and

iv. The subject matter of *wakālah*.

There are two parties in a *wakālah* contract, namely the principal and the agent. The basic condition for both parties is to have a legal capacity to enter into a contract. Therefore, an insane or a minor cannot enter into a contract of *wakālah* due to the absence of legal capacity. The principal should delegate the responsibility and employ an agent based on his freewill. It is necessary for both parties in an agency agreement to know each other. The offer and acceptance are essential elements of a contract. The contract of *wakālah* also requires offer and acceptance, as in any other contract. The Islamic jurists have agreed that the acceptance of a *wakālah* contract can be established by way of verbal, action, writing or sign etc. If the principal says: "*I authorize you to sell my land on my behalf*," and the agent says: "*I accept that*", then the contract of *wakālah* becomes completed.

The agent or *al-wakīl* is appointed to exercise specified powers. A power of attorney is an instrument authorizing another to act as one's agent in things which are possible to undertake on another's behalf during one's lifetime. A power of attorney becomes invalid when either the agent or the grantor ceases to be qualified to engage in transactions. The agent does not have the right to dispose of anything except what is required by the principal in terms of pronunciation or in terms of custom, because his disposal by permission does not include anything except what is required by the permission; this permission is known by pronunciation and by custom (al-Nawawī, n.d.)

The subject matter of *wakālah* refers to a delegated task or the matter of which the authority that is given to exercise. The objects of the agency contract according to *sharīʿah* are as follows:

1. Must be lawful and permissible in *sharīʿah*; not involved in activities which are prohibited in Islam or acts of dishonesty; and should be eligible for legal authorization such as financial matters, sale and purchase, borrowing and lending and making gifts, (al-Shirbīnī, 2004). The agency agreement can only be done on activities or legal actions that may be represented.

2. Should be known and clear to the agent in some respects, so that deceit would not be magnified.

3. And in which the representation is imposed, the basic principle is that there is no representation in *ʿibādah* except *ḥajj*, *zakāh*, *kaffārah*, and *uḍhiyyah*. It is permissible to give power of attorney to both parties in *muʿāwaḍah* contract such as *al-salam*, *al-ṣarf*, *al-tawliyah*, *al-rahn*, *al-nikāh* and *al-hibah*. There is no way to be appointed for disobedient acts for each one is intended to abstain from it (al-Nawawī, 1991).

The scholars differed as to whether the agent should delegate another person. The majority of scholars are of the view that the agent does not have the right to delegate someone else unless the principal authorizes him to do so. Whoever does not have the power to dispose except with permission, such as the agent and the authorized slave, then he does not have the power of attorney except with permission because he has the right to dispose of by permission. According to Shāfiʿī jurists, the agent should delegate another person if the appointed agent is unable to perform some tasks assigned to him or if the tasks are inappropriate for him (al-Nawawī, n.d.).

The *wakālah* or agency contract can be paid or not paid based on the consent of the parties. If it is a paid agency contract, then it falls under the rulings of *ijārah* contract. On the other hand, if it is a non-paid agency contract, then it is regarded as a charity contract. A representative does not have to bear the loss against matters represented in the event of damage or loss that is not because of his negligence or carelessness (al-Nawawī, 1991).

Overview of the Contract of *Wakālah* in Takaful

Most Muslim jurists have agreed that the operation of conventional insurance does not conform to the rules and requirements of *sharīʿah* whereby conventional insurance involves elements of uncertainty (*gharar*) in the contract of insurance, gambling (*maysir*) as the consequence of the presence of uncertainty and interest (*ribā*) in the investment activities of the conventional insurance companies which contravene the rules of *sharīʿah*. Fatwa Committee of the National Council for Islamic Religious Affairs (Malaysia) on 15 June 1972, issued a fatwa that conventional life insurance is contradicting *sharīʿah* or Islamic rules (BNM, 2008). In general, as an alternative to the insurance model, there are two basic models for commercial takaful, namely profit-sharing (*muḍārabah*) and agency models (*wakālah*). The most widely applied model for takaful operation nowadays is the *wakālah* model. In *wakālah* takaful model, takaful operator acts as a *wakīl* on behalf of the participants. Under the *wakālah* takaful model, the takaful operator as a *wakīl* will manage and invest the contribution received from the participants into specific investment account. The participants remain the actual owner of takaful funds and surplus (Selim, 2013).

Wakālah principle is applied when the takaful operator provides service on managing the risk fund (the amount of donation deducted from the participants' contributions) on behalf of the participant at a pre-agreed fee basis and *muḍārabah* for the investment account. Takaful operator, as a *wakīl*, will manage the risk fund into specific investment account. Takaful funds and surplus will be invested in *sharīʿah* compliant activities. In the *wakālah* model, the participants remain the actual owner of takaful funds, and all investment profits belong to the participant. The takaful operator in *wakālah* model simply earns their income from the *wakālah* fee (Selim, 2013).

The Roles of Agency in Takaful

The second layer of *wakālah* in takaful practice is an agent authorized by takaful operator to perform the marketing in propagation and promotion of takaful products. An agent's authority is derived and defined by the particular type of agency he undertakes. In this sense, under the *wakālah* structure, the authority of the second layer wakil in the takaful operation regarding the agency refers to the promotion and distribution of various takaful products and plans. An agency relationship is agreed upon between the takaful operator and agent to conduct a certain business undertaking which main subject is distribution of takaful products.

The agency is the takaful distribution channels from various components of the marketing for takaful and insurance companies, such as direct marketing, broking, bancassurance, agency, and e-business/internet system. *Wakālah* in this sense describes an agency agreement between the agent, acting as the *wakīl* to the operator to distribute takaful product and the agent earns its revenue from the agency fee. The term for revenue from the agency fee is *ujrah*, which in terms of language means *ʿiwaḍ* (remuneration) (Karim, 1997). It is permissible in agency agreement that an agent will receive fee (al-Subkī, n.d.). Acting as the *wakīl* for the takaful operator, a supporting operator will promote and introduce a *sharīʿah* certificate of takaful policy in exchange (*ujrah*) in accordance with *sharīʿah.*

Issue of Distribution of Takaful Products by Dual Agency

In Islamic jurisprudence dual agency occurs when one party (principal or agent) assumes two roles; that of buyer and seller at the same of sale of goods by *wakīl* to himself (al-Nawawī, 1991). The permissibility of dual agency practices has been a subject of disagreement among Muslim jurists. The majority of Islamic jurists, i.e., the Ḥanafites (Ibn ʿAbidin, 2000), the Mālikites (Ibn Juzay, 1982), the Shāfiʿītes (al-Shirbīnī, 2004) 1994), and the Ḥanbalites (al-Mardawī, n.d.) ruled that it is not permissible for a *wakīl* to transact with himself (*wakīl* representing both parties of a contract). Their basis of reasoning is to safeguard the interest of the principal. Apart from that, the argument was also centered around the issue of consent by the principal for agent to execute sale and purchase transaction on his behalf. Most of the Shāfiʿī and some of the Ḥanbalī jurists have ruled that a selling agent may not sell to himself or his underage child (al-Zuḥaylī, 2007). Dual agency commonly occurs in takaful when the same person, either Muslim or non-Muslim, is appointed as an agent representing both takaful and insurance company to market and distribute their products. Takaful companies use agents to activate their distribution channels in a proper way and to develop their ways of distribution, because the distribution channel is the main factor for every industry. A current marketing practice of the takaful industry requires agents to represent the takaful operators to market and distribute the takaful products.

Consequently, a number of *fiqh* issues have been raised with regard to the dual agency. In this regard, the takaful agent plays an important role on behalf of the takaful operator to disseminate knowledge of takaful to

Muslims and non-Muslims takaful's policy and products, whether family takaful or general takaful. They also explain the benefits of takaful and give the insured information as to what is covered and what isn't. Agents are responsible for providing service after a loss; informing the insured what steps need to be taken to have the claim paid; assisting their customers in all circumstances related to their financial well-being; and assisting their customers in all circumstances related to their financial well-being (Azrak, 2016).

Generally, the concept of takaful has been set up approximately based on the Islamic rules and principles. The three elements of takaful, which are brotherhood, solidarity, and mutual assistance (Section 2 of Takaful Act 1984) and the concept of takaful, which are *muḍārabah*, *takāful*, and *tabarru*ʿ, basically follow the rules from the Qur'an and the Sunnah of Prophet (PBUH). The agent who represents the takaful operators, whether Muslim or non-Muslim, would present the image of takaful as an Islamic type of insurance and spread knowledge of takaful to Muslims and non-Muslims, thorough preparation and be properly informed of the necessary information (Jamal, 2010). Events that can bring reputational risks to the takaful operator include bad service, inappropriate appearance of an agent, insufficient agent knowledge about *sharīʿah* agreements, and so on.

Takaful reputation is the collection of the takaful's image in the minds of customers or stakeholders. Failure in presenting the image of the takaful as an Islamic type of insurance could damage the takaful's reputation. Allah (SWT) mentioned this role:

وَكَذٰلِكَ بَعَثْنٰهُمْ لِيَتَسَاۤءَلُوْا بَيْنَهُمْۗ قَالَ قَاۤىِٕلٌ مِّنْهُمْ كَمْ لَبِثْتُمْۗ قَالُوْا لَبِثْنَا يَوْمًا اَوْ بَعْضَ يَوْمٍۗ قَالُوْا رَبُّكُمْ اَعْلَمُ بِمَا لَبِثْتُمْۗ فَابْعَثُوْٓا اَحَدَكُمْ بِوَرِقِكُمْ هٰذِهٖٓ اِلَى الْمَدِيْنَةِ فَلْيَنْظُرْ اَيُّهَآ اَزْكٰى طَعَامًا فَلْيَأْتِكُمْ بِرِزْقٍ مِّنْهُ وَلْيَتَلَطَّفْ وَلَا يُشْعِرَنَّ بِكُمْ اَحَدًا

When we resurrected them, they asked each other, "How long have you been here?" "We have been here one day or part of the day," they answered. "Your Lord knows best how long we stayed here, so let us send one of us with this money to the city. Let him fetch the cleanest food and buy some for us. Let him keep a low profile and attract no attention."

(Al-Kahf, 15:19).

"*Let him fetch the cleanest food*" indicates that the agent should play a decisive role in acknowledging takaful as the best Islamic solution for financial management. The agent is a factor that could influence the customer into participating in takaful and promoting ḥalāl.

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تُقَدِّمُوا بَيْنَ يَدَيِ اللَّهِ وَرَسُولِهِ ۖ وَاتَّقُوا اللَّهَ ۚ إِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ

"O you who have believed, do not put [yourselves] before Allah and His Messenger but fear Allah. Indeed, Allah is Hearing and Knowing."

(Al-Ḥujurāt 49: 1)

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَن يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ ۗ وَمَن يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُّبِينًا

"It is not for a believing man or a believing woman when Allah and His Messenger have decided a matter that they should [thereafter] have any choice about their affair and whoever disobeys Allah and His Messenger has certainly strayed into clear error."

(Al-Aḥzāb 33:36)

These commands are not only confined to the individual matters of the Muslims, but also apply to their collective affairs. These verses indicates that one should not give his own opinion and view precedence over the decision of Allah and His Messenger (PBUH) (al-Mawdūdī, n.d.). That is because if Allah and His Messenger (PBUH) judge something, no one has the right to oppose this, and no one has the right to choose, nor an opinion, nor saying (Ibn Kathīr, 1999). It would be a contradiction in terms if a person or a nation claimed to be a Muslim and then reserved for themselves the freedom of choice and action. Promoting insurance policy over takaful product by dual agency is regards as giving of precedence over the decision of Allah and His messenger as insurance policy does not conform to the rules and requirements of *sharīʿah*.

On the authority of Tamīm al-Dārī (Allah pleased him), the Prophet (PBUH) said:

الدِّينُ النَّصِيحَةُ. قُلْنَا: لِمَنْ؟ قَالَ: لِلَّهِ، وَلِكِتَابِهِ، وَلِرَسُولِهِ، وَلِأَئِمَّةِ الْمُسْلِمِينَ وَعَامَّتِهِمْ

> *"The religion is naṣīḥah (sincerity). We said: To whom? The Prophet (PBUH) said: To Allah, His Book, His Messenger and to the leaders of the Muslim and their common folk."*

Giving advice to Muslims is one of the responsibilities of every Muslim. The Prophet (PBUH) said: "*The rights of a believer over a believer are six*," and then he mentioned that among them is, "*if he asks you for some advice you have to give him advice*" (Muslim n.d). Giving advice includes providing guidance, showing to something that is beneficial in this world and in the hereafter, not letting them wallow in illegal matters, helping them in times of need and providing support for them to do the right thing. The agent acts as an advisor who provides information about the party he represents.

Regarding takaful agent's role, examples of *naṣīḥah* to the common Muslims include the following:

- To guide them towards what is good for them, takaful or insurance;
- To work towards preventing any difficulty befalling them in akhirah (hereafter) for choosing insurance policy;
- To teach them that which they know not i.e., promoting takaful; and

- To overlook and cover their faults in choosing an insurance policy.

Furthermore, it is also said that in delegating any prospective *wakīl*, emphasis should be given to two (2) main elements namely, strength (*qawiyy*) and trustworthiness (*amānah*). This is indicated in the following Quranic revelation:

قَالَتْ إِحْدَاهُمَا يَا أَبَتِ اسْتَأْجِرْهُ ۖ إِنَّ خَيْرَ مَنِ اسْتَأْجَرْتَ الْقَوِيُّ الْأَمِينُ

One of the women said, "O my father, hire him. Indeed, the best one you can hire is the strong and the trustworthy"

(Al-Qaṣaṣ, 28:26)

The verse indicates that there are two pre-requisites in selecting any person to do something on behalf another set i.e., strength and trustworthiness. Per the above verse, the strength referred to is according to the kind of the duty to be entrusted beside the capability in knowledge, field of specialization, experience, personal abilities, potentials, and character. Trustworthiness in this context refers to the trustworthiness as a Muslim. These should result in an agent carrying out his duty with knowledge, diligence, accountability, and effective and in full obedience not only to the existing rules set forth by takaful operator but more importantly the laws and injunction by Allah (SWT). The agent must have excellent knowledge of takaful products and practice the Islamic marketing to approach the public, together with sufficient skills to market them.

وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ

"...but do not cooperate in sin and aggression."

(Al-Mā'idah, 4: 2)

An agent who promotes insurance products have violated Allah's prohibition of helping in matters forbidden by Allah and the Messenger (PBUH).

وَمَنْ يُشَاقِقِ الرَّسُولَ مِنْ بَعْدِ مَا تَبَيَّنَ لَهُ الْهُدَى وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُوَلِّهِ مَا تَوَلَّى وَنُصْلِهِ جَهَنَّمَ وَسَاءَتْ مَصِيرًا

"And whoever defies the Messenger after guidance has become clear to them and follows a path other than that of the believers, We will let them pursue what they have chosen, then burn them in Hell—what an evil end!"

(Al-Nisā', 3:115)

An agent should ensure that his actions are pure, such that they conform with authentic texts from the Quran and Sunnah. Regarding dual agency issues in takaful, an agent should be compliant with the understanding and practice of Islamic teaching by avoiding in promoting conventional insurance. Promoting conventional insurance contradicts and opposes the Messenger of Allah after knowing that the operation of conventional insurance does not conform to the rules and requirements of *sharīʿah*. An agent should educate and guide Muslims towards purified Islam, so as to implement its teachings and reveal its virtues and ethics.

Table 4.1: The Fiqh Adaptation of Dual Agency by Takaful Operator

TO	Dual Agency Practices
TO1	Dual agency is not practiced. Based on other takaful operators' practices, placing a takaful agency under an insurance agency is allowed subject to a certain period. Afterwards, one has to choose either one of the agencies. It can be justified as a *maṣlaḥah*.
TO2	Permits dual agency on the basis of *maṣlaḥah* to develop takaful products. Dual agency is not allowed after the "grace period", because the essence shall be fully *sharīʿah*-compliant. Permits dual agency only for general takaful because it is permissible by law.
TO3	Permits dual agency because the company allows an insurance agent selling takaful products, including a Muslim agent who act as an insurance agent.
TO4	Dual agency is allowed for general takaful only. There are no conditions that should be placed to ensure that an agent cannot be an insurance agent at the same time as a takaful agent because the market of takaful industry is still small (below 20% of market share). Takaful operators need the expertise of insurance agents, to penetrate the market as well as preaching in the conventional market. Using a legal maxim: إِذَا ضَاقَ الْأَمْرُ اتَّسَعَ "When in a predicament, facilitation (rukhṣah) is given."
TO5	Dual agency is not permitted, because there is an agreement that does not allow agent to promote conventional insurance.
TO6	No specific *fiqh* adaptation.
TO7	Takaful operator only has the right to advise the agent. However, from a legal point of view takaful operators have no right to prevent conventional insurance promotion by agent.

Source: Interview Data

Conclusion

In general, a Muslim is prohibited from being a representative in matters prohibited by *sharīʿah*. A person who does something illegal will bear the consequences himself based on Allah's words:

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى

"No soul burdened with sin will bear the burden of another."

(Fāṭir, 35:18)

Appointing a non-Muslim as a representative is permitted, and the appointing party is only responsible for the authorized matters. The takaful operators have different opinions on the issue of appointing agents who promote conventional insurance as takaful agents. Among the *takyīf* used to allow conventional insurance agents to be takaful representatives is the legal maxim, "*When in a predicament, facilitation (rukhṣah) is given*," and on the basis of *maṣlaḥah*.

05

TAKAFUL COVERAGE OF SUICIDE

NIK ABDUL RAHIM NIK ABDUL GHANI

INTRODUCTION

Takaful is one of the main Islamic financial sectors which provides protection against the risks of financial misfortune. This is demonstrated by the initiatives from the Malaysian government via the Central Bank of Malaysia (BNM) to encourage Malaysian to have a protection for themselves and their families by introducing various innovations and initiatives to the takaful industry in Malaysia. Among these initiatives has been the introduction of affordable personal and family protection called "*Perlindungan Tenang*", which was launched in 2017 (BNM, 2017).

Basically, takaful is a scheme of mutual assistance based on the concept of *taʿāwun* and *tabarruʿ*. *Taʿāwun* is described as mutual assistance, which is a broad and crucial concept in Islam. It has become the basis for the formation of takaful as one of the *sharīʿah*-compliant risk management instruments. If a person i.e., participant holds a takaful certificate, any occurred event as per stipulated in its terms and conditions, the participants, including family members, are entitled to compensation and takaful benefits.

However, there are several events which disqualify them from that entitlement within one or two years effective date. One of them is suicide committed by the participant in family takaful. Most family takaful, including life insurance, exclude death due to suicide from the events which qualify participant to make a claim. Usually, takaful operators include an exclusion clause in the takaful certificate to exclude compensation (coverage) in the event of death due to suicide within a certain period, such as 1 or 2 years after the effective date.

This causes legal heirs to fail to get any compensation if the takaful participant commits suicide. This article attempts to describe and study the principles of *sharīʿah* related to this issue and highlights a few *sharīʿah* issues arising from such suicide clauses.

Suicide from an Islamic Perspective

Every year 703,000 people take their own life and there are many more people who attempt suicide. Every suicide is a tragedy that affects families, communities, and entire countries. Moreover, suicide has long-lasting effects on the people left behind, i.e. heirs and close relatives. According to World Health Organization (WHO), in 2019 suicide was the fourth leading cause of death among those aged 15-29 worldwide *(https://www.who.int/news-room/fact-sheets/detail/suicide)*.

Suicide does not just occur in high-income countries, but is a global phenomenon in all regions of the world. In fact, in 2019 over 77% of global suicides occurred in low-and middle-income countries *(https://www.who.int/news-room/fact-sheets/detail/suicide)*. WHO considers suicide as a serious public health problem, but it is preventable with the correct methods.

From *sharīʿah* point of view, suicide is one of the major sins and crimes. There are several testaments in the Qur'an and Sunnah that explain the prohibition of committing a crime against oneself, whether it is suicide or putting oneself into destruction. Allah (SWT) clearly prohibits suicide in the Quran:

وَلَا تَقْتُلُوا أَنفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

"And do not kill 'each other or' yourselves. Surely Allah is ever Merciful to you."

(al-Nisāʾ: 29)

As narrated also from the Prophet (PBUH):

مَنْ تَرَدَّى مِنْ جَبَلٍ فَقَتَلَ نَفْسَهُ، فَهُوَ فِي نَارِ جَهَنَّمَ يَتَرَدَّى فِيهِ خَالِدًا مُخَلَّدًا فِيهَا أَبَدًا، وَمَنْ تَحَسَّى سُمًّا فَقَتَلَ نَفْسَهُ، فَسُمُّهُ فِي يَدِهِ يَتَحَسَّاهُ فِي نَارِ جَهَنَّمَ خَالِدًا مُخَلَّدًا فِيهَا أَبَدًا، وَمَنْ قَتَلَ نَفْسَهُ بِحَدِيدَةٍ، فَحَدِيدَتُهُ فِي يَدِهِ يَجَأُ بِهَا فِي بَطْنِهِ فِي نَارِ جَهَنَّمَ خَالِدًا مُخَلَّدًا فِيهَا أَبَدًا. رواه البخاري (5442) ومسلم (109).

"He who throws himself from a mountain and kills himself will be thrown down in the fire of jahannam and remain in it for ever and ever; he who sips poison and kills himself will have his poison in his hand and sip it for ever and ever in the fire of jahannam; and he who kills himself with a piece of iron will have his piece of iron in his hand and will be stabbed with it in his belly in the fire of jahannam for ever and ever."

(al-Bukhārī, n.d.; Muslim n.d.).

The jurists have also reached a consensus on the prohibition of suicide (Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah 1983). Moreover, there is a *ḥadīth* that shows that the Prophet (PBUH) refrained from offering a funeral prayer (*al-ṣalāh ʿalā al-janāzah*) over a person who committed suicide as a sign of punishment and the Prophet (PBUH) also warned people not to perform it either. This *ḥadīth* is narrated by Jābir bin Samūrah:

أُتِيَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ بِرَجُلٍ قَتَلَ نَفْسَهُ بِمَشَاقِصَ، فَلَمْ يُصَلِّ عَلَيْهِ

"(The dead body) of a person who had killed himself with a broad-headed arrow was brought before the Messenger of Allah (PBUH), but he did not offer prayers for him."

(Muslim, n.d.)

Al-Nawawī *raḥmatullāh ʿalayh*, while commenting on this *ḥadīth* in *Sharḥ Ṣaḥīḥ Muslim*, said:

وَفِي هَذَا الْحَدِيثِ دَلِيلٌ لِمَنْ يَقُولُ لَا يُصَلَّى عَلَى قَاتِلِ نَفْسِهِ لِعِصْيَانِهِ وَهَذَا مَذْهَبُ عُمَرَ بْنِ عَبْدِ الْعَزِيزِ وَالْأَوْزَاعِيّ وَقَالَ الْحَسَنُ وَالنَّخَعِيُّ وَقَتَادَةُ وَمَالِكٌ وَأَبُو حَنِيفَةَ وَالشَّافِعِيُّ وَجَمَاهِيرُ الْعُلَمَاءِ يُصَلَّى عَلَيْهِ وَأَجَابُوا عَنْ هَذَا الْحَدِيثِ بِأَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمْ يُصَلِّ عَلَيْهِ بِنَفْسِهِ زَجْرًا لِلنَّاسِ عَنْ مِثْلِ فِعْلِهِ وَصَلَّتْ عَلَيْهِ الصَّحَابَةُ

> *"This ḥadīth is evidence for the opinion that says that a person who commits suicide is not offered the funeral prayer over him because of the sin committed. This is the view of 'Umar bin 'Abd al-'Azīz and al-Awzā'ī. While al-Ḥasan, al-Nakha'ī, Qatādah, Mālik, Abū Ḥanīfah, al-Shāfi'ī, and the majority of scholars think that it is necessary to offer the funeral prayer over him. They rebutted the ḥadīth above where the Prophet (PBUH) did not pray over him as a warning sign of the act, but the companions (ṣaḥābah) did pray over him."*

However, this does not mean that we are not allowed to pray for goodness, mercy, and forgiveness to him. In fact, it is very necessary for the prayer. Suicide is not an act of disbelief; it is a major sin that lies under the will of Allah (SWT) in the afterlife.

From a legal perspective, suicide is considered as a crime as stated under section 309 of the Penal Code, which states:

> *"Whoever attempts to commit suicide, and does any act towards the commission of such offense, shall be punished with imprisonment for a term which may extend to one year or with fine or with both."*

Attempted suicide is a crime and the individual who commits the act can be imprisoned for up to one (1) year or fined or both (Penal Code, Act 574).

Although the Malaysian law considers suicide as a form of crime, there is no denying that a person's psychological problems and stress are some of the factors that lead to suicide. The main causes of suicide include mental disorders due to mental illnesses such as depression, self-delusion, alcoholism, schizophrenia, personality disorders and depression (Jodi & Hussain, 2017).

In fact, several countries with similar legal practices to Malaysia, including most European countries, began to take measures that did not include attempted suicide as a crime after the French Revolution in the 18th century. In fact, Scotland has never had a law punishing those who attempted to commit suicide (Sharifuddin et al., 2020).

In the United Kingdom, on the insistence and efforts of various parties, the Suicide Act 1961 was enacted which dropped the notion of suicide as a form of crime, but as a step towards paying attention to those who tend to commit such acts (Sharifuddin et al., 2020).

Suicide in the Takaful Industry

Suicide is the act of killing yourself intentionally. In 2020, suicide was among the top 9 leading causes of death for people aged 10-64. Suicide was also the second leading cause of death for people aged 10-14 and 25-34 *(https://www.cdc.gov/suicide/facts/index.html).*

Although insurance or takaful can provide compensation in the event of death due to suicide, most policies or takaful certificates have specific provisions that prevent the payment of such benefits if suicide occurs in the early period after the certificate is in effect. Insurance and takaful companies provide suicide clauses in order to prevent policy owners or takaful participants from receiving financial incentives due to suicide *(https://www.investopedia.com/does-life-insurance-cover-suicide-5105027).*

As stated in the insurance policy or takaful certificate, insurance companies and takaful operators will usually not pay compensation or death benefits if the covered person dies due to suicide within the first two (2) years of coverage. This period is known as the exclusion period. When this exclusion period ends, the beneficiary can receive a death benefit if the covered participant dies by suicide after that date *(https://www.law.cornell.edu/wex/suicide_clause)*.

Suicide Clause in Takaful Operators

Historically, suicide was covered by the concept of *ta'āwun*. After that, suicide was not covered on the basis of non-complicity. Afterwards, suicide was not covered in the first year of a takaful certificate due to the argument of moral hazard. According to Takaful Operator 2 (TO2), "This practice is based on the principle of preventing moral hazard to preserve the capability of risk fund which may also based on the principle of *sadd al-dhariah*".

Principally, Malaysian takaful operators place suicide in an exclusion clause to prevent the liability to pay any compensation due to suicidal death. The suicide clauses based on Product Disclosure Sheet and 11 websites of Malaysian life takaful operator can be seen in Table 5.1 below:

Table 5.1: Suicide Clauses in Selected Takaful Operators

Takaful Operators & Products	Suicide Clauses
AIA PUBLIC Takaful Bhd	
AIA i-Essential Cover	Any death arising from the occurrence of the following is not covered: Death caused by suicide.
A-life Kasih Famili	Death due to: • Suicide within one (1) year from the Issue Date or Commencement Date of the certificate, whichever is later.
AmMetLife Takaful Berhad	
i-ProtectEase	This rider does not cover any critical illness caused directly or indirectly, wholly or partly, by any of the following occurrences: • Suicide or any attempted suicide or self-inflicted injury or any attempt thereat while sane or insane;
Protect i-Budi	AmMetLife Takaful will not pay the death benefit if the participant dies due to: a) suicide (whether while sane or insane) within one (1) year from the commencement date or reinstatement date, whichever is later;
Etiqa Family Takaful Berhad	

i-Secure	No benefit amount will be paid (Suicide within one year of plan commencement).
Mortgage Reducing Term Takaful	This certificate shall pay Death Benefit if the death resulting from: • Suicide If the person covered commits suicide while sane within 1 year from the commencement date, We shall refund the contribution paid after 1 year from the commencement date, We shall pay the reducing sum covered. If the person covered commits suicide while insane, We shall pay the reducing sum covered.
FWD Takaful Berhad	
FWD Future First	We will not pay any benefit under this certificate if the claim arises: – from suicide, attempted suicide or a self-inflicted act by a person covered; – and within two years of the start of your certificate, or the date we last reinstated your certificate. This applies regardless of the mental state of the person covered. If this happens, the certificate will be cancelled.

FWD Family First *(1 Year)*	We will not pay any benefit under this certificate if the claim arises: – from suicide, attempted suicide or a self-inflicted act by a person covered; – and within one year of the start of your certificate, or the date we last reinstated your certificate.
Great Eastern Takaful Berhad	
i-Great Prestij	If the Person Covered, whether sane or insane, commits suicide within one (1) year from the Effective Date or from the date of any reinstatement, whichever is later, this Certificate shall be rendered void. Under such circumstance, the Takaful Operator's liability shall be limited to the refund of the following: i. Cash Value in Participant's Individual Account (if any) (excluding Underwriting Surplus); and ii. Total Account Value in the Participant's Unit Account (if any); and iii. Total amount deducted for Tabarru' Fund 1 and Tabarru' Fund 2 (less deducted Investment Booster) (for basic plan and rider(s)).

Hong Leong MSIG Takaful Berhad	
Takaful i-Salam	No Death Benefit shall be payable if: Death is due to suicide within twelve (12) months from the Entry Date.
Prudential BSN Takaful Berhad	
PruBSN ANGGUN	PruBSN Anggun does not cover any of the following situations: Death Suicide – if death was due to suicide within one year from the effective date of certificate or the date of certificate revival, whichever is later, no takaful coverage will be payable, but the remaining value in the ISA and IUA (if any) will be paid. We shall also not pay any benefit for death of Covered Person's Spouse (under Life Stage Benefit) if it is caused by or in connection with the Covered Person Spouse's suicide within one year from the effective date of the Certificate or the date it was revived, whichever is later.

Sun Life Malaysia Takaful Berhad	
Sun Legacy-i	Exclusions 1. Death benefit Only the total account value will be payable if the death of the person covered is due to suicide (while sane or insane) within 12 months from the contract commencement date or reinstatement date, whichever is later.
Syarikat Takaful Malaysia Keluarga Berhad	
Takaful myTerm	This plan does not cover the following: a. Death due to suicide, while sane or insane, within the first (1) year from the effective date or any reinstatement date, whichever is the later.
Takaful Ikhlas Family Berhad	
Ikhlas Basic Term Takaful	a. *Exclusions related to Death* We do not cover any death caused directly or indirectly, wholly or partly, by any one of the following occurrences:
Ikhlas Savings Prime Takaful	*Suicide;* If the Takaful Participant, whether sane or insane, commits suicide within one year from the effective date, this Takaful Certificate shall become void and the Company shall refund the balance from the PIA.

Zurich Takaful Malaysia Berhad	
Takaful ProInvest	Death Benefit shall not be payable for Death from suicide within 1 year from this Principal Certificate Commencement Date or Reinstatement Date, whichever is later, whether the Person Covered is sane or insane. Our liability shall be limited to the Participant Investment Account (PIA) value on the date of death.

Sources: Takaful Operator's Websites

As shown in the table above, there are similarities among takaful operators in terms of suicide clause practices. It can be said that all takaful operators consider the suicide clause as one of the exclusion clauses included in the terms and conditions. The period of exclusion is set between 1 and 2 years of suicide death after the participant has subscribed to a product. In addition, it should be noted that all takaful operators do not factor suicide into account in terms of whether it occurs in a sane or insane state.

Sharīʿah Issues in Suicide Clause

Is Stipulating suicide clause against the nature of taāwun?

in general, *sharīʿah* gives the freedom to put conditions in the agreement as long as the conditions and clauses do not conflict with the basic principles of *sharīʿah*. In an authentic *ḥadīth*, the Prophet (PBUH) said:

الْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطاً حَرَّمَ حَلَالاً وَأَحَلَّ حَرَاماً.

> *"Muslims are bound with their stipulations except that the one prohibits a ḥalāl (lawful) or permits the ḥarām (forbidden)."*
>
> (Abū Dāwūd, 2009, Bāb fī al-Ṣulḥ, Sunan Abī Dāwūd, ḥadīth no. 3594, v. 5: 446; Al-Dāraquṭnī, 2004, Bāb fī al-Ṣulḥ, Sunan Al-Dāraquṭnī, ḥadīth no. 2890, v. 3: 426).

This is also in line with a legal maxim which is specifically related to the presumption of permissibility on contractual obligations and requirements in Islam:

الْأَصْلُ فِي الْعُقُودِ وَالشُّرُوطِ الْجَوَازُ وَالصِّحَّةُ.

> *"The presumption of validity and permissibility applies to all contract and conditions."*
>
> (al-Suyūṭī, 1983).

This maxim shows that in contracts and takaful agreements, the presumption to include a suicide clause is permitted and valid. Each contracting party including participant and takaful operator is subject to and bound by the agreed terms and conditions.

However, the question arises: is this suicide clause acceptable in general without looking at any factors that cause suicide? For now, suicide can happen to both sane and insane people. Is there any justification in rejecting compensation claims, even if a person commits suicide due to mental disorder or insanity? A condition can be varied according to the circumstances and the characteristics of a person, place, and time.

Insertion of suicide clause is based on *sadd al-dharī'ah*

Basically, the justification issue for exemption from claims due to suicide is still within the scope of *ijtihād*. Among the *sharīʿah* justifications for the exclusion of claims is based on *sadd al-dharīʿah* (blocking the means) (Rahman et al., 2012). Specifically, some takaful operators say that this exclusion clause is intended to avoid moral hazard to maintain the sustainability of risk funds. Table 5.2 shows the interview data of takaful operators' opinions about the implementation of a suicide clause.

Table 5.2: TO Opinions about the Implementation of a Suicide Clause

TAKAFUL OPERATORS	SHARĪʿAH JUSTIFICATION AND TAKAFUL OPERATORS PRATICES
TO1	Currently, it is practiced by all takaful operators. In the early phase, there are certain takaful operators which do not pay the benefit to the participants who committed suicide such as Takaful Ikhlas Family Berhad. Apart from that, there are some other takaful operators which pay only part of the benefit within the range of 50-70% of the actual payable amount of benefit. This practice is based on the principle of preventing moral hazard to preserve the capability of risk fund which may also be based on the principle of *sadd al-dharīʿah*, *maṣlaḥah* or *istiḥsān*, or *ʿurf* i.e., the common industrial practice is stated thusly: الْمَعْرُوفُ بَيْنَ التُّجَّارِ كَالْمَشْرُوطِ بَيْنَهُمْ *"What is known among merchants is treated as a condition between them."*

TO2	In the early stage, suicide case is covered based on the concept of *taʿāwun* (mutual aid). In the next stage, it is not covered to avoid complicity in suicide. Afterwards, suicide cases are not covered only in the 1st year of subscription based on the justification of moral hazard.
TO3	It is based on the principle of preserving one's life as known in *maqāṣid al-sharīʿah* (the objectives of Islamic law). As per common industrial practice, the suicide cases are only covered by takaful operators after the 1st or 2nd year of subscription based on the principle of moral hazard.
TO4	There is no specific *takyīf fiqhī* (*fiqh* adaptation). It is not covered due to the principle of *maqāṣid al-sharīʿah* i.e., preserving life and the principle of *sadd al-dharīʿah*. In the 1st year of subscription, the paid contributions shall be returned to the participant (or his heir), but it is still arguable due to contradiction between the issue of moral hazard and the welfare of participant's family. However, conventional insurance does not pay the benefit to the participant.

TO5	The objective of takaful is for protection and financial assistance for the participant's family. GETB does not encourage any act of suicide, but should it occur after the 2nd year of subscription, the covered sum will be payable to the participant's family. Otherwise, if the suicide occurs within the first 2 years of subscription, the paid contribution will be returned to the participant's family. GETB firmly does not support any act of suicide. This practice was initially pioneered by conventional insurance practice. Suicide events are treated on case-by-case basis. If the participant is mentally-ill as proven by a medical report, the case will be reported to *Sharīʿah* Committee. If the event occurs after the 2nd subscription year, the coverage is payable to the participant's family. For suicide event occurs in the first 2 years of subscription, it will be brought upon *Sharīʿah* Committee as it is treated based on case-by-case basis.
TO6	The 1-year period is considered as a suitable period to probably alter the likelihood of suicidal intent. If there is an attempt to commit suicide but the participant is still alive, medical coverage will not be paid to the participant. It depends on the prescription from medical doctor. Other than that, the paid contribution will be returned to the participant under any circumstances and for any period.

TO7	It is based on the principle of moral hazard and fraud. If there is a suicide attempt but the participant is still alive, but an event of total and permanent disability occurs, takaful operator will not pay the coverage to the participant. If the participant attempted suicide within the 1st year of subscription, the coverage may be paid ex-gratia.

Source: Interview Data

Based on the perspective of precedent presumption, it can be understood that paying compensation to family of takaful participant who has committed suicide is permissible. However, there is a concern that it will lead to encouraging participants to participate in takaful in order to channel the benefit to their families through suicide. This is closely related to *maqāṣid al-sharīʿah* which is "*hifz al-nafs*" (preservation of life).

This has been clearly mentioned by some researchers such as Rahman et al. (2012), who state that the exemption from the right to receive compensation of the insured who commits suicide is basically based on the objective of one of the *maqāṣid* principles, which is to protect life.

However, a question arises: If this clause is not included, to what extent will it lead to suicide? Moreover, will the determination of a 1-year or 2-year period change the intention of takaful participants? From another perspective, as it is understood, the original purpose of takaful is *taʿāwun*. When there is a death of a covered participant, there is no doubt that this will bring grief to the participant's family members, especially if the participant is the head of the family. The burden of family members can be eased by payment of benefits to family members based on the principle of *taʿāwun*.

In addition, a person's sin will not be borne by another party. If an individual who commits suicide is a takaful participant, the sin and wrongdoing should not be borne by the participant's heirs and family. In a situation in which close family members are grieving over a tragic event, it is inappropriate to add to their burden by preventing them from receiving compensation. Allah says in the Qur'an:

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ

"And no bearer of burdens shall bear another's burden."

(Al-Fāṭir 35: 18)

For example, if the participant becomes paralyzed as a result of a suicide attempt, there is still a chance of paying takaful benefits to him and his family, especially if it can be verified that the attempt occurred as a result of chronic mental problems such as insanity.

Suicide and Mental Issue

From a medical perspective, one of the causes of suicide is due to chronic mental problems. WHO has published a statistic which indicates that nearly 800,000 people are killed by suicide (World Health Organization 2021). Apart from that, after road injury, tuberculosis, and interpersonal violence, suicide was the fourth leading cause of death in young people aged 15–29 years for both sexes (Figure 6). For females and males, respectively, suicide was the third and fourth leading cause of death in this age group. In addition, WHO has also stated that suicide is a serious public health problem and needs to be prevented (World Health Organization 2021).

According to Sharifuddin et al. (2020), among the factors that contribute to suicide attempts are partner or family problems, mental health, financial crisis, anxiety about facing punishment, chronic physical illness, and lack of support. Therefore, before punishing the person who failed in attempting suicide as a criminal, it is necessary to verify the cause of the suicide attempt first. This also shows that existing laws that punish people who attempted suicide are not sufficient in eradicating such act.

Several studies conducted show that there are various causes of suicide problems depending on the individual. For example, Sharifuddin et al. (2020) found that the causes can be categorized into two types: environmental and biological. Usually, this suicide problem starts from a mental illness that the individual suffers from. Individuals diagnosed with such a mental illness are patients who require specialist treatment depending on the case. Sharifuddin views that these patients decided to end their life because of the emotional pain they suffer as if there is no solution.

As explained in the takaful industry practice, a suicide exclusion clause is practiced regardless of the cause of the suicide, and whether it is committed in a sane or insane state, provided that it occurs within a year after the certificate is in effect. In regard to that, the question that arises is whether this matter needs to be re-evaluated from *sharīʿah* perspective, because if someone has mental and spiritual problems to the extent that these have a negative effect on the way of thinking sanely, then he can be excused (*al-maʿdhūr*).

This is because *faqd al-ʿaql* (loss of reasoning) is considered one of the factors that prevent *taklīf*. If a person is considered sick, then he is not considered as a sinner or committing crime. This coincides with a *ḥadīth* from the Prophet (PBUH):

رُفِعَ القَلَمُ عَنْ ثَلاثٍ: عَنْ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنْ الصَّغِيرِ حَتَّى يَكْبُرَ، وَعَنِ المَجْنونِ حَتَّى يعْقِلَ - أَوْ يَفِيقَ.

"There are three (persons) whose actions are not recorded: a sleeper till he awakes, a boy till he reaches puberty, and a lunatic till he comes to reason (or conscious)."

(Abū Dāwūd, 2009; Ibn Mājah, 2009).

From *sharīʿah* point of view, insanity can be defined as follows:

اخْتِلاَل الْعَقْل بِحَيْث يَمْنَعُ جَرَيَانَ الأَفْعَال وَالأَقْوَال عَلَى نَهْجِهِ إِلاَّ نَادِرًا

"Defects in mind that prevent actions and conversations according to normal manner except rarely."

(Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1983).

However, if the mental stress does not affect the mind, or in other words, does not make a person insane, then the person is not considered *al-maʿdhūr*. This should be verified or confirmed by relevant medical experts. Based on the interview data, several practices by takaful operators show that when a suicide occur within 1 or 2 years after the certificate is in effect, and there is medical evidence that it occured due to the participant's insanity, then this issues will be brought upon the *Sharīʿah* Commitee to decide whether the benefit is eligible to be paid or not.

Conclusion

Suicide is a major sin in Islam, and is also considered a crime according to Malaysian law. However, from a medical perspective, suicidal behavior and suicide attempts can be linked to psychological problems and chronic mental problems. If it can be confirmed that the suicide insane, Islam does not punish him as a sinner.

In relation to that, the practice of suicide clauses in most takaful companies does not distinguish between the cause of suicide whether in a sane state or not. The act of suicide within the period specified in the terms (1 or 2 years) may deny the heirs or beneficiaries of the participant who committed suicide the right to death benefits. This clause can be re-evaluated according to the *sharīʿah* perspective, as the basic principle of takaful is *taʿāwun*.

However, from the takaful operators' perspective, payment of takaful benefit can be made to beneficiaries of the deceased participant via ex-gratia payment. This typically occurs after getting approval from the *Sharīʿah* Committee of respective takaful companies on a case-by-case basis.

06

TAKAFUL BENEFITS FOR BADAL *HAJJ*: *SHARĪʿAH* REVISIT

NIK ABDUL RAHIM NIK ABDUL GHANI

INTRODUCTION

Ḥajj is one of the primary pillars of Islam which is associated with one's capability. If a person does not have the capability to perform the ritual, the obligation does not fall upon him/her. Nowadays, the development of takaful industries can be seen through numerous products offered to customers. In brief, takaful is a contract of mutual assistance between participants when an accident or misfortune occurred. Subsequently, a participant who experiences the misfortune will receive coverage in the form of financial benefits if the accident is stipulated in the contract's terms and conditions (Md Husin & Ab Rahman 2016; Nik Abdul Rahim Nik Abdul Ghani et al., 2018).

One of the existing takaful benefits in the market is *badal ḥajj* (substitute *ḥajj*). It can be said that most takaful operators offer this benefit as one of the additional benefits in particular products. However, the practices of Malaysian takaful operators are quite different from several aspects, such as the amount of benefits offered. Apart from that, there is a difference from the aspect of event which will consider them eligible to make the benefit claim either only due to death event or including total permanent disability (TPD) event.

This section will elaborate the practice of takaful industry in relation to the takaful benefit for *badal ḥajj* and emphasize a few *sharīʿah* issues that can be discussed at a higher level.

Istiṭāʿah Requirement in *Ḥajj* (Pilgrimage)

Pilgrimage is one the pillars in Islam and it is an obligatory to be fulfilled once in a lifetime of a *mukallaf*. In this regards, al-Nawawī (1991) clearly states:

لا يَجِبُ الْحَجُّ بِأَصْلِ الشَّرْعِ إِلَّا مَرَّةً وَاحِدَةً. وَقَدْ يَجِبُ زِيَادَةً لِعَارِضٍ كَالنَّذْرِ أَوِ الْقَضَاءِ، أَوْ لِدُخُولِ مَكَّةَ عَلَى قَوْلٍ

> *"Ḥajj is not mandatory except for once based on sharīʿah evidences. However, ḥajj can be obligatory as an additional one due to other reasons such as nadhr (vow), qaḍāʾ or entering Mecca based on an opinion."*

Ḥajj is one of the Islamic pillars and *sharīʿah* obligates it to be fulfilled once in a lifetime.

Referring to jurists' discussions, there are a few requirements to oblige a person to perform *ḥajj*. Aside from one being a Muslim, reach pubescent and free, *istiṭāʿah* is a crucial requirement of *ḥajj* (al-Nawawī, 1991). Generally, as per Shāfiʿī's school of thought (al-Nawawī, 1991), in *ḥajj*, *istiṭāʿah* is divided into two parts:

i. *Istiṭāʿah* by a person him/herself (استطاعة مباشرة بنفسه); and

ii. *Istiṭāʿah* by others performing *ḥajj* on behalf of a person (استطاعة تحصيله بغيره).

Istiṭā'ah by others means performing *ḥajj* uses the concept of *istinābah* (authorization). This concept indicates permissibility for a person to perform *ḥajj* on behalf of other person if he does not have the capability to do so due to particular circumstances such as death, disability, crippled, having an incurable disease, or too old to be able to drive or even use transportation, except with intense hardship (مشقة).

However, *istinābah* is not allowed for a capable person as it is, as jurists have stated that it is only permitted due to intense hardship (مشقة شديدة). This is demonstrated by al-Nawawī's (1991) statement:

فَمَقْطُوعُ الْيَدَيْنِ أَوِ الرِّجْلَيْنِ، إِذَا أَمْكَنَهُ الثُّبُوتُ عَلَى الرَّاحِلَةِ
مِنْ غَيْرِ مَشَقَّةٍ شَدِيدَةٍ، لَا يَجُوزُ لَهُ الِاسْتِنَابَةُ، وَلَا يَجُوزُ أَيْضًا لِمَنْ
لَا يَثْبُتُ عَلَى الرَّاحِلَةِ لِمَرَضٍ يُرْجَى زَوَالُهُ.

"For a person who is a stump (both hands cut off or both legs cut off), if he is capable to ride a transportation stably without any intense hardship, istinābah is not permitted. Same goes to a person who does not capable of standing up on a transportation due to a curable disease, istinābah is not permitted for him/her."

Furthermore, if a person who is obligated to perform *ḥajj* then turns out insane, his/her guardian is not permitted to authorize another person to perform *ḥajj* on behalf of him/her, because later he/she may recover from insanity (al-Nawawī, 1991). On the other hand, it is permissible for an heir to perform *ḥajj* on behalf of a deceased based on a strong view of Shāfi'ī's school. Thus, these rulings clearly indicate that *istiṭā'ah* as a requirement of *ḥajj* is one of the critical requirements. When a person does not have the capacity to perform *ḥajj*, it is permissible to perform it via *istinābah*.

Takaful Benefit for *Badal Ḥajj* in the Takaful Industry

In general, Malaysian takaful operators offer products which include *badal ḥajj* benefit. A result from an analysis on five official websites and product disclosure sheet of several chosen products of family takaful and general takaful, the benefits of *badal ḥajj* can be observed in Table 6.1 below:

Table 6.1: Takaful Benefit Practices in Selected Takaful Operators

NO.	COMPANY	PLAN	LINK	PARTICULARS
1.	AIA PUBLIC Takaful Bhd	A-Plus Ḥajj	*https://www.aia.com.my/content/dam/my/en/docs/individuals/life_protection/a-plus-ḥajj-product-brochure.pdf*	Badal Ḥajj Benefit • RM 5,000 will be payable upon death to assist your family to arrange for Badal Ḥajj when you are no longer around.
2.	AmMetLife Takaful Berhad	Protect Secure-i Murni	*https://www.ammetlifetakaful.com/getattachment/71028578-3207-4d93-8599-d6ca9d5be8d7/ProtectSecure-i-Murni.aspx*	Badal Ḥajj Benefit • Ḥajj is the fifth and final pillar of Islam. If you are not able to perform Ḥajj due to your disability your family should appoint someone to perform Badal Ḥajj on your behalf. • We will pay RM3,000 from the PRF to be used by your nominee to appoint wakeel to perform Badal Ḥajj, in the event of your death or TPD.

NO.	COMPANY	PLAN	LINK	PARTICULARS
3.	Etiqa Family Takaful Berhad	Mabrur	*https://www.etiqa.com.my/v2/sites/Satellite?blobcol=urldata&blobkey=id&blobtable=MungoBlobs&blobwhere=1466400216152&ssbinary=true*	Badal Ḥajj Benefit Upon death or TPD before performing Ḥajj, a Rm 3,000 Badal Ḥajj Benefit will be payable. This benefit is only applicable if Ḥajj Allowance is not claimed and the Person Covered's age must be at least 15 and above. For TPD, Badal Ḥajj Benefit is only payable upon full payment of TPD benefit.
4.	FWD Takaful Berhad	FWD kasih	*https://www.fwd.com.my/direct/Product_Disclosure_Sheet.36tC9.pdf*	Badal Haji/Charity Donation (Extra benefit) We will assist you to perform the 5th pillars of Islam due to your disability to perform it. For non-Muslim participant, we will donate RM2,500 on your behalf in the event of death.

NO.	COMPANY	PLAN	LINK	PARTICULARS
5.	Great Eastern Takaful Berhad (Bank Muamalat)	M-Tiara Ḥajj	*https://www.greateasterntakaful.com/content/dam/great-eastern/takaful/en/homepage/takaful-solutions/our-products/future-goals/m-tiara-ḥajj/m-tiara-ḥajj.pdf*	Badal Ḥajj (Ḥajj by Proxy) In the unfortunate event of your death or TPD, we will make the arrangements for Badal Ḥajj to be performed on your behalf. We will appoint an able body or organization to perform Badal Ḥajj for you, and the fees shall be deducted from the takaful benefit before it is payable to the nominee. Note: Terms and conditions apply.

NO.	COMPANY	PLAN	LINK	PARTICULARS
6.	**Hong Leong MSIG Takaful Berhad**	Badal Ḥajj Service	*https://www.hlmtakaful.com.my/Product-Brochure/Family-Takaful/HLMT-HajjByProxy-(Sept2015).asp*	How is Badal Ḥajj executed? In the event of death or TPD, a sum of RM 2,500 shall be deducted from the benefit payable of the certificate as for fee of this service. A Badal Ḥajj service Provider shall appoint a qualified person to perform this service on behalf of Person Covered. The Nominee will receive the necessary document certifying that the Badal Ḥajj service has been performed.

NO.	COMPANY	PLAN	LINK	PARTICULARS
7.	**Sun Life Malaysia Takaful Berhad**	1- Sun Ḥajj	*https://www.sunlifemalaysia.com/SunLife/media/SunLifeMedia/ProtectionNeeds/Brochure/SLM-Sun-Ḥajj-A5-Brochure-CC2017-V6_200619-R1-FA-LowRes.pdf*	In the event of death or if you are physically unable to perform Ḥajj due to TPD or diagnosed with any one of the 36 critical illnesses, a Ḥajj service provider registered with Sun Life Malaysia will perform Badal Ḥajj on your behalf. If the cost to the service provider is less than RM5,000, the excess amount will be paid to the nominee or legal claimant.
		2- Sinar Baraqah (Al-Rajhi Bank)	*https://www.sunlifemalaysia.com/SunLife/media/SunLifeMedia/ProtectionNeeds/Brochure/Al-Rajhi-Sinar-Baraqah-Flyer-A5-070518-R10.pdf*	2- Your Ḥajj obligation will be fulfilled through Badal Ḥajj (upah Haji) service due to death, total and permanent disability (TPD) or critical illness (CI).

NO.	COMPANY	PLAN	LINK	PARTICULARS
		3- Takaful Suria Plus (CIMB Bank)	*https://www.cimb.com.my/content/dam/cimb/personal/documents/insurance/NEW-CIMB-Takaful-Suria-Plus-Brochure-100x210mm-V2-100619.pdf*	3- Badal Ḥajj Benefit In the event you are unable to physically embark on this special spiritual journey due to death, TPD, or diagnosis of any one of 36 critical illnesses, the registered Ḥajj service provider with Sun Life Malaysia will help you. If the cost of arrangement with the service provider is less than RM5,000, the excess amount will be payable to the nominee or proper claimant.
8.	**Syarikat Takaful Malaysia Keluarga Berhad**	Takaful myPlus PA	*https://www.takaful-malaysia.com.my/products/general/PDS/myPlusPA/Takaful_myPlus_PA_PDS_ENG.PDF*	Badal Ḥajj (lump sum upon Death or Total Permanent Disability due to accident which prevent from ever performing Ḥajj). RM 3,000 – RM 15,000
9.	**Takaful Ikhlas General Berhad**	Ikhlas Kembara Ḥajj and Umrah Takaful	*https://www.takaful-ikhlas.com.my/sites/default/files/ikhlas_kembara_hajj_umrah_takaful_pds_bm_1021_v3.0_website.pdf*	Badal Ḥajj RM 2,500 (Adult only).

NO.	COMPANY	PLAN	LINK	PARTICULARS
10.	**Takaful Ikhlas (Bank Rakyat as distributor)**	Takaful Amani Plus	*https://www.bankrakyat.com.my/index.php?rp=finplan_takaful_amaniplus_pds*	Badal Ḥajj (if death is due to Natural Causes) – RM 1,500 In the event of death of the Person Covered, the Company shall pay the Badal Haji benefit to the nominee. For non-Muslims, this benefit will be paid on top of the Immediate Death Expense benefit.

Sources: Takaful Operator's Websites

Based on Table 6.1 above, there are several distinctions in *badal ḥajj* benefit practices among Malaysian takaful operators. A few of them pay a badal ḥajj benefit only in the event of death, while some others also include total permanent disability as one of the causes.

Apart from that, there are some takaful operators which pay on behalf of participant directly to any bodies or legal organizations such as Great Eastern Takaful and Hong Leong MSIG Takaful. Subsequently, the *badal ḥajj* service provider company will appoint eligible individuals to perform *badal ḥajj*, and only the nominee will receive related documents to verify that the pilgrimage has been completely performed. This practice is distinguished from a few other operators like AmMetLife Takaful in which the family have to appoint a person to perform *badal ḥajj* and the benefit will be payable to the authorized person.

In fact, several takaful products, for instance GTT Hasanah Takaful Plan of Etiqa Takaful company, have stipulated that if the participant has already performed *ḥajj*, the *badal ḥajj* benefit will be considered a *waqf* benefit. According to the GTT Hasanah Takaful Plan (*https://www.mbsbbank.com/sites/default/files/2021-08/PDS__Hasanah.pdf*):

> *"If the Person Covered had performed Ḥajj, the Badal Ḥajj benefit shall be deemed as Waqf benefit. For Waqf benefit, upon death or Total Permanent Disability of the Person Covered, this benefit shall be paid to the Badal Ḥajj/Waqf nominee and this benefit is to be paid to the State Baitulmal where Person Covered last resided, based on Person Covered's last known address in Etiqa Takaful's records. It is the duty of the nominee to ensure that the money is paid to the State Baitulmal on behalf of Person Covered, to be dedicated for the use or benefit of the people."*

Sharīʿah Issues in Takaful Benefits for *Badal Ḥajj*

What is *takyīf fiqhī* of takaful benefit for *badal hajj*?

Fundamentally, *ḥajj* is obligatory for a person who has the capability to perform it. However, this obligation has been discussed by jurists in terms of whether it is obligated *ʿalā al-tarākhī* (delay) or *ʿalā al-fawr* (immediacy) (Ibn Rushd, 1997). Referring to the question of *takyīf fiqhī* of takaful benefit for *badal ḥajj*, as it is known, takaful is a contract based on *tabarruʿ* (contribution) or *iltizām bi al-tabarruʿ* (commitment to contribute) where a takaful participant will donate a particular amount and it will be channeled to Participant Risk Fund (PRF) and to Participant Investment Fund (PIF). Moreover, several takaful operators have explained that the benefit for *badal ḥajj* will be paid from the shareholder's fund. Generally, IFSA 2013 allows takaful participant who have reached the age of 16 to nominate an individual as a nominee to receive the takaful benefit in the event of the participant's death; thus, either the nominee is considered as a *waṣī* (caretaker) or a beneficiary under the concept of conditional *hibah*.

However, in the context of benefit for *badal ḥajj*, it is an extra benefit provided by takaful operator, thus raising the question of what is the actual *takyīf fiqhī* that can be adapted to this practice. As per conducted interview Table 6.2, there is no clear *takyīf fiqhī* stated by all takaful operators although the practice of benefit for *badal ḥajj* is considered an *ʿurf* (customary) in the takaful industry. However, there is an opinion which suggests that *waṣiyyah* (will) is probably suitable to be justified as the *takyīf fiqhī* of this practice.

Table 6.2: Fiqh Adaptation of Benefit for Badal Ḥajj

TO	Response of takyīf	Source of Fund
TO1	No	Shareholder's Fund
TO2	No. Perhaps, wasiat can be the correct takyīf	N/A
TO3	No	N/A
TO4	No need for takyīf	Participant Risk fund
TO5	No, but the justification was taken from Quran	Participant Risk fund. If the source is taken from Shareholder's Fund, it will be considered as hibah
TO6	No takyīf, but it is close to wakālah.	Participant Risk fund
TO7	No	Participant Risk fund

Source: Interview data

In this context, Imam al-Shāfiʿī (1990) and al-Nawawī (1991, 2001) elaborated the permissibility of *waṣiyyah* to perform *ḥajj* on behalf of the deceased whether it is an obligatory *ḥajj* (*wājib*) or recommended *ḥajj* (*sunnah*). However, in relation to recommended *ḥajj*, al-Nawawī explained in *al-Majmūʿ* that it is not permissible to apply *istinābah* in recommended *ḥajj* for the deceased if it is not stipulated in his/her will. Al-Nawawī said:

(فَأَمَّا) حَجُّ التَّطَوُّعِ فَلَا تَجُوزُ الِاسْتِنَابَةُ فِيهِ عَنْ حَيٍّ لَيْسَ
بِمَعْضُوبٍ، وَلَا خِلَافَ بَيْنَ جُمْهُورِ الْأَصْحَابِ فِي عَدَمِ جَوَازِهِ،
وَلَا عَنْ مَيِّتٍ لَمْ يُوصِ بِهِ بِلَا خِلَافٍ.

> *"As for the recommended Ḥajj, it is not necessary to istinābah for a living person who is not paralysed. There is no dispute among the majority of the scholars regarding its non-permissibility, and there is no istinābah for the deceased as long as there is no will without any dispute."*

Hence, the benefit for *badal ḥajj* of a participant who has performed *ḥajj*, its *takyīf fiqhī* as *waṣiyyah* is more accurate by taking the opinion of Shāfiʿī school into consideration.

Types of eligible total and permanent disability to perform *badal ḥajj*

the benefit for *badal ḥajj* practiced by takaful industry is not only subject to event of death since majority of takaful operator also offers the benefit in the event of TPD and Critical Illness as shown in Table 1.1. However, a few takaful operators do not distinguish between the types of TPD. Hence, this raises the issue of the extent to which each TPD is considered eligible to perform *ḥajj* in the form of *niyābah/istinābah*. This also includes critical illnesses, which are generally known to vary in terms of levels such as cancer and kidney failure. These lead to a question: Can all these, i.e., types of TPD and Critical Illness, be considered an illness that qualifies for *istinābah* in *ḥajj*?

Based on the discussion of *istinābah* in performing *ḥajj*, jurists have permitted it for person who does not have the capability to perform *ḥajj*, such as a person with a disease which makes him/her to be unable to perform *ḥajj*.

However, the principle or parameter for a person with disease which allows him/her to use *istinābah* is an incurable disease or sickness. Otherwise, if it is curable, *istinābah* is not permitted. This parameter has been clearly established by scholars, such as Ibn Qudāmah (1985) in *al-Mughnī*:

وَمَنْ يُرْجَى زَوَالُ مَرَضِهِ، وَالْمَحْبُوسُ وَنَحْوُهُ، لَيْسَ لَهُ أَنْ يَسْتَنِيبَ.
فَإِنْ فَعَلَ، لَمْ يُجْزِئْهُ، وَإِنْ لَمْ يَبْرَأْ. وَبِهَذَا قَالَ الشَّافِعِيُّ.

"Whoever has a curable disease, imprisoned or something similar, he is not allowed to use istinābah. If he insists to do so, his ḥajj is not rewarded (accepted) even he has not recovered yet (from his disease or freed from imprisonment). This is also Imam al-Shāfiʿī's opinion."

This is because when a disease is curable and the sick person can recover from it, he can perform *ḥajj* by himself, just the same as a poor person. A poor person is not allowed to use *istinābah* in *ḥajj* because there is a possibility for him/her to perform *ḥajj* by having wealth. Moreover, the *naṣ* is only relevant to the elderly who have no hope of performing *ḥajj* by themselves. Thus, it cannot be analogically compared except for a person who shares the same attribute.

In *al-Majmūʿ*, al-Nawawī explained the parameter related to disease:

قَالَ أَصْحَابُنَا: مَنْ كَانَ بِهِ عِلَّةٌ يُرْجَى زَوَالُهَا، فَلَيْسَ هُوَ بِمَعْضُوبٍ، وَلَا يَجُوزُ الِاسْتِنَابَةُ عَنْهُ فِي حَيَاتِهِ بِلَا خِلَافٍ.

"Our scholars (from Shāfiʿī school) said: whoever has curable disease, and is not paralyzed, istinābah is not permissible for him as long as he is alive without any dispute (among the scholars)."

In addition, the jurists also elaborated that *maʿḍūb* is a state where a person is not capable to maintain his/her stability on a transportation without intense hardship (*lā yathbut ʿalā al-rāḥilah illā bi mashaqqah shadīdah*). Based on this guideline, the standard of that define the illness condition preventing from performing *ḥajj* is an illness which prevents anyone from travelling to perform it, whether the person is weak from an incurable disease, is unable to stabilize unless with intense hardship, or the illness may be worsen or its recovery may be slowed down due to travelling (Salamah, 2003).

Observing the industrial practices, some takaful operators do not differentiate between the types of TPD that are eligible to receive the benefit for *badal ḥajj*. In regard to that, TPD can be defined as a state of incapacity arising from any one (1) of the following conditions:

i. For a gainfully employed Person Covered, a disability caused by injury or disease which totally and permanently prevents the Person Covered from performing his/her normal activities that is, engaging in any business, occupation, profession or performing any work, for wages, compensation or profit. Such disability must continue uninterrupted for a period of six (6) months and verified by Our appointed Medical Practitioner;

ii. (For a non-gainfully employed Person Covered, a disability caused by injury or disease which will require the Person Covered, for the remainder of his/her natural life, to be subjected to constant medical care and attention and to be confined to a home, to a hospital or to a similar institution. Such disability must continue uninterrupted for a period of six (6) months and verified by Our appointed Medical Practitioner; or

iii. Upon occurrence of any of the following to the Person Covered:

- Total and irrecoverable loss of sight of both eyes;
- Total and irrecoverable loss of use of two (2) limbs at or above the wrist or ankle; or
- Total and irrecoverable loss of sight of one (1) eye and loss of use of one (1) limb at or above the wrist or ankle.

Referring to the abovementioned definition, the first issue is that the definition does not mention that the disease is curable or incurable. This is highlighted because in *fiqh*, *istinābah* is only permitted for an incurable disease. Despite of that, literally, these types of TPD can be considered as incurable diseases.

Meanwhile, the following issue is related to some types of TPD such as total and irrecoverable loss of sight of both eyes. Loss of sight is not a disease which prevents from performing *ḥajj*. As long as a blind person is physically capable and has sufficient wealth to perform *ḥajj*, the person is obligated to do so. This also includes a person who suffers total and irrevocable loss of use of two (2) limbs at or above the wrist of ankle. Al-Nawawī (2001) said that:

إنْ وُجِدَ لِلْأَعْمَى زَادٌ وَرَاحِلَةٌ وَمَنْ يَقُودُهُ وَيَهْدِيهِ عِنْدَ النُّزُولِ وَيُرْكِبُهُ وَيُنْزِلُهُ وَقَدَرَ عَلَى الثُّبُوتِ عَلَى الرَّاحِلَةِ بِلَا مَشَقَّةٍ شَدِيدَةٍ لَزِمَهُ الْحَجُّ وَكَذَلِكَ مَقْطُوعُ الْيَدَيْنِ وَالرِّجْلَيْنِ وَلَا يَجُوزُ لَهُمَا الِاسْتِئْجَارُ لِلْحَجِّ عَنْهُمَا وَالْحَالَةُ هَذِهِ.

> *"If a blind person has supplies and transportation including a person who can guide and assist him during his arrival, mounting and dismounting him, and he is capable to stabilize on his transportation without any intense hardship, ḥajj is obligated on him. The same goes to a person with amputated limbs (either hands or legs), it is not permissible for him/her to hire another person to perform ḥajj on his/her behalf in this state."*

In brief, the two primary parameter of disease which enables a person to use *niyābah/istinābah* in *ḥajj* is (1) the disease is incurable; and (2) it will cause the patient to face intense hardship in performing *ḥajj*.

Issue of *wakālah* by takaful operator

Based on takaful operators' practices as shown in Table 1.1 above, there are two types of practices for *badal ḥajj*:

1. The takaful operator pays the benefit for *badal ḥajj* directly on behalf of the participant to *ḥajj* service providing company. This company will appoint eligible individual to perform *badal ḥajj* and the nominee will only receive documents which verify that *ḥajj* has been completed by the company.

2. The takaful operator asks family of the participant to appoint another person to perform *badal ḥajj*, and the benefit for *badal ḥajj* will be payable to the authorized person.

From a *sharīʿah* perspective, in the event of death, payment of takaful benefit for *badal ḥajj*, whether using the first or second method mentioned above, does not raise any *sharīʿah* issues. Based on jurisprudential texts, it is permissible for any individual to perform *ḥajj*, either an obligatory or recommended *ḥajj*, on behalf of the deceased either with or without his/her permission. In relation to this, al-Nawawī said in *al-Majmūʿ*:

وَيَجُوزُ عَنْ الْمَيِّتِ بِإِذْنِهِ وَبِغَيْرِ إِذْنِهِ، وَيَجُوزُ مِنْ الْوَارِثِ وَالْأَجْنَبِيِّ
سَوَاءٌ أَذِنَ لَهُ الْوَارِثُ أَمْ لَا بِلَا خِلَافٍ.

> *"It is permissible perform ḥajj on behalf of the decease with or without his/her permission. There is no dispute (among scholars) that it can be performed by his/her heir or non-heir with or without his/her permission."*

Nevertheless, the event of TPD raises the question of whether the takaful operator should ask for permission from participant who suffers from TPD to pay the benefit for *badal ḥajj* on his/her behalf or not. If the takaful operator does not ask for permission, another arising issue of its validity will arise. Upon observation of several samples of terms and conditions, takaful operators will pay the benefit for *badal ḥajj* directly to *ḥajj* service providing company:

> *"We will pay the cost for badal ḥajj and arrange it through our panel of service providers on your behalf."*

This practice raises an issue of *niyābah* in *ḥajj* either it is valid or not. Al-Nawawī affirmed his justification in *al-Majmūʿ*:

لَكِنْ لَا يَجُوزُ عَنْ الْمَعْضُوبِ إلَّا بِإِذْنِهِ.

"However, it is not permissible to perform ḥajj on behalf of a paralyzed person unless with his/her permission."

It is clear that the permission of a participant who suffers from TPD is crucial in this matter. If the participant is still alive, then he will be subject to the rulings of *al-maʿḍūb*.

However, from another perspective, the permission has already been acquired from the participant through the submitted claim in the event of TPD. In fact, from the aspect of *wakālah* contract, can the appointment from the beginning of contract be considered adequate as permission in this matter?

When re-examining the jurisprudential texts which obligates the permission to perform *ḥajj* on behalf of *al-maʿḍūb*, the justification for the need to ask for *al-maʿḍūb*'s permission is because his/her intention is a primary requirement of *ḥajj*. However, can the appointment in the beginning of contract before the participant become *al-maʿḍūb* be considered a pre-existing intention?

لَا يُجْزِئُ الْحَجُّ عَنِ الْمَعْضُوبِ بِغَيْرِ إِذْنِهِ، بِخِلَافِ قَضَاءِ الدَّيْنِ عَنْ غَيْرِهِ؛ لِأَنَّ الْحَجَّ يَفْتَقِرُ إِلَى النِّيَّةِ، وَهُوَ أَهْلٌ لِلْإِذْنِ.

"Performing ḥajj on behalf of al-maʿḍūb without his/her permission is not permitted, not like repaying a debt on behalf of others, because ḥajj requires the intention and al-maʿḍūb is capable to grant his/her permission."

Therefore, as a good practice, if a takaful operator wants to channel the takaful benefit directly to *ḥajj* service provider company, it is better for the takaful operator to gain the participant's permission to channel it directly to *ḥajj* service provider company.

Conclusion

Benefit for *badal ḥajj* is an additional benefit offered to takaful participant. From a *sharīʿah* perspective, it is considered similar to the concept of *waṣiyyah* by the participant to perform *badal ḥajj* on his/her behalf, whether it is an obligatory or recommended *ḥajj*. Furthermore, the payment of that benefit due to event of death does not raise any *sharīʿah* issue. However, if the payment is made due to event of TPD, it should be re-evaluated by differentiating several TPD from the others. This is because from *sharīʿah* perspective, the jurists allow *istinābah* for people who does not capable to perform *ḥajj* such as who suffers from a disease. The disease is defined as a disease which prevents the patient from performing *ḥajj*, or as stated in another parameter, incurable disease which permits *istinābah*.

Based on this, the parameter of disease which prevents a person from performing *ḥajj* is a disease which prevents the person from travelling to perform it whether the person is weak due to incurable disease, it is impossible for the person to stabilize him/herself on his/her transportation without facing intense hardship, or the travelling will affect the disease become worse or its recovery may be slowed down. Referring to the practice of takaful industry, it is fair to say that some takaful operator does not differentiate between the types of TPD that are eligible to receive the benefit for *badal ḥajj*. This study suggests that all types of TPD should be reclassified according to parameters of the disease that prevents them from performing *hajj*.

07

PRACTICE OF INTERIM COVERAGE IN THE TAKAFUL INDUSTRY

MOHAMAD ZAHARUDDIN ZAKARIA

INTRODUCTION

Interim coverage is a normal practice in the insurance and takaful industry. There are certain situations whereby the applicant will entitle to get covered temporarily from the beginning of the application until it is approved by the takaful company. However, this practice may raise a question in relation to the *sharīʿah* compliant issues, as to whether it is allowed to offer interim coverage or not during the waiting process of approval. This chapter will discuss this issue in depth starting from the application process and how the interim coverage will be given to the client until he gets the real coverage from the company.

Definition of Interim Coverage

According to the definition given by Law Insider, "Interim coverage means the coverage provided by a Certificate between the date applied for by the proposed Certificate holder and the Certificate Effective Date, as approved by the underwriting and enrollment conditions applicable to that Certificate" *(https://www.lawinsider.com/dictionary/interim-coverage).*

The definition clearly states that the interim coverage is temporary coverage given by the insurer or takaful provider within a specific period prior getting the approval after submitting application to the company subject to certain conditions as stipulated in the agreement. Thus, the applicant will be covered by the company if anything happens to him during the process of verification and approval.

This definition is in line with the practice of interim coverage by takaful operators in Malaysia. According to the terms and conditions provided by a certain takaful company regarding interim coverage, it is stated that the takaful operator will provide a temporary coverage to a person who has submitted the application while he is waiting for the approval from the takaful operator. Any payment received by the takaful operator from the applicant will be regarded as deposit until the proposal is approved. The range of maximum period of this interim coverage is different between the takaful operators. Some offer 60 days, whereas others offer 90 days from the submission date.

Sometimes, the takaful application can take a few weeks to be processed. This is because medical underwriting — the process where the medical history is examined — takes time, as the takaful operator contacts previous doctors or ask the participants to take new medical check-up. This is where interim takaful cover comes in. It covers the participants during the time it takes for takaful application to be processed, just in case something happens to the applicant.

Application of Interim Coverage in Industry

According to the practice of takaful operators in Malaysia, there are some similar features of interim cover practiced by these takaful operators. For Takaful Operator 1 (TO1), for instance, the interim cover will be given to the prospect or applicant during the process of underwriting period when the applicant needs to undergo the process of underwriting to ensure the eligibility of the applicant to comply with takaful operator's conditions. This interim coverage only covers death caused by an accident and not a natural death. Meaning that the interim cover only valid during the period of underwriting until the operator approves the applicant. The reason of why TO1 provides interim cover is because the Takaful operator need some time to do a thorough check up for new client before he is allowed to participate in any policy under family takaful or general takaful.

The takaful operator requires the client to pay an upfront payment contribution normally for two months in advance. This is to comply the IFSA provision, which states that the takaful operator must provide a sum of coverage when they have received contribution payment from the client. This is stated in the assumption of risk clause as follows:

> "96. (1) No licensed takaful operator shall cause any takaful fund which it operates to assume any risk in respect of such description of takaful certificate as may be prescribed by the Bank unless and until the takaful contribution payable is received by the licensed takaful operator in such manner and within such time as may be prescribed by the Bank."

Therefore, according to the industry practice, the interim cover will be granted to the applicant during the underwriting process even though his proposal is yet to be approved. However, there are some companies which do not provide interim cover, such as Takaful Operator 2 (TO2) because according to them, the contract between the applicant and the company is not yet started, so the company is not responsible to cover the applicant's risk prior approval from the underwriter. There are also some operators which agree to provide interim cover based on the argument that all the participants have already agreed to protect the risk of each other among the participants including to cover the risk during the underwriting process. Thus, the interim coverage from this aspect is considered as part of the contract agreement.

In terms of the contribution payment by the applicant, according to the practice of Takaful Operator 3 (TO3), normally, the operator will ask for two-month upfront payment contribution from the applicant. If it is found that the applicant needs to undergo the underwriting process, then the operator will hold the approval until they get the result from the underwriter. This underwriting process may take 30 days or 60 days and sometimes up to 90 days. Thus, the takaful operators will provide the interim cover within 90 days maximum to those applicants. Anything happen to the applicant either accidental death or accidental TPD, the interim cover will be activated immediately and the deceased or the TPD applicant will receive the compensation for the waiting period. This is covered by the upfront contribution payment. However, if the applicant had passed away on the first month of contribution, then the second month contribution payment will be refunded to the heirs.

At Takaful Operator 4 (TO4), the interim coverage is embedded in MRTT product, whereby the client will be given interim coverage once he receives the letter of acceptance (LOA) for his financing application. This interim coverage will remain intact until the issuance of takaful certificate by TO4 once the bank disburses the financing to the client together with the amount of takaful contribution. Group credit related to financing product also apply the interim coverage to the client during the waiting period between the issuance of LOA and the takaful certificate. In the practice of Takaful Operator 5 (TO5), the interim cover applies for all product prior the enforcement of the certificate. This means a client will enjoy the benefit of interim coverage before he obtains the approval for the takaful certificate application.

Table 7.1: Practice of Interim Cover in the Takaful Industry

Applications	Industry Practice
Underwriting	Given during underwriting period
Contract	Mutual agreement among participants
Upfront payment	Two months upfront during registration
Period	Period of interim cover between 30 to 90 days
Type of cover	Accidental death and TPD

Source: Interview Data

Requirements and Conditions

Interim coverage is not provided unless the proposed participant has fulfilled the requirements and conditions of the contract. The following requirements must be fulfilled by the participants:

1. The interim cover shall only be applicable for individual Family Takaful products except for financing related or standalone medical products.

2. The interim cover shall only be applicable for death caused solely and directly by accidental means, and death arising from any illness or

disease whatever nature and howsoever shall be excluded.

3. The amount of interim cover will be the proposed basic Sum Covered, subject to a maximum under all interim cover on that proposed participant of RM500,000.

4. The interim cover shall only be granted if the proposal is acceptable by the Company on standard rates and terms, provided no fraud is perpetrated against the Company.

5. The interim cover shall cease to be effective upon acceptance or rejection of the proposal or in the event the initial contribution paid is refunded by the Company within the 90-day period for any reason whatsoever. Notwithstanding the aforesaid, there shall be no refund of initial contribution where payment of benefit has been made by the Company.

Underwriting Process

Regarding the underwriting process, it is important to note that there are three types of underwriting processes as practiced by takaful operators, namely:

i. Full Underwriting,

ii. Simplified Underwriting, and

iii. Guaranteed Issuance Offer (GIO).

The interim cover only be given to those who need to undergo the full underwriting process whereas no interim cover is provided for simplified underwriting and GIO. The different between them is how far the applicant needs to provide information regarding their health condition. The full underwriting process requires a person to undergo a full health screening to ensure he is healthy and is not suffering from any disease which disqualify him from takaful protection. However, in simplified underwriting, the applicant only needs to answer five simple questions. If any answer is "no" then he will not entitle to obtain any takaful protection from the company. Those who entitle for GIO he is not required to undergo the underwriting process. He will be covered immediately by the takaful operator once he starts paying the contributions.

Type of Coverage

The takaful company during the process of underwriting will only cover the risk that associated with accidental death and not other risk. Thus, no claim is allowed for normal death, injuries or medical claim. There are certain limits given by takaful operators for interim cover. Some of the companies provide RM250 thousands subject to maximum of RM500 thousands for interim cover. For example, although the value of the policy is RM 1 million, but the company will place a limit on interim coverage. The participant may not get a full amount of coverage. The compensation will be paid based on specific formular determined by TO1.

Sharīʿah Issues and Deliberation

Based on the practice by the takaful operators regarding the interim coverage we would like to highlight some relevant issues that need further deliberation in order to ensure its compliance with *sharīʿah* principles.

The contractual status of applicant during the underwriting period

When an applicant submits his form to participate in certain takaful policies, the company will review the application as to whether he could immediately be covered or need to undergo certain particular health screening procedures in order to ensure that he is healthy and not suffering from any diseases covered by the policy. Some takaful operators do not offer interim cover, because according to them there is no obligation to provide the cover due to absent of contract or agreement between them. The applicant simply submits the form and is not yet approved to justify the contract. Therefore, the applicant cannot be considered as part of participant and could not enjoy the benefit of the policy.

From another angle, some takaful operators do provide the interim cover based on the argument that the application is part of the agreement, since the applicant has already paid the contribution as his commitment towards the policy. This is considered as *iltizām bi al-tabarruʿ* or commitment to donate, which is a type of *waʿd mulzim* or binding promise according to *sharīʿah*. Furthermore, according to IFSA provisions, the takaful operator must provide coverage to a participant who has already paid the contribution, as mentioned earlier, without differentiating between full cover or interim cover.

There was also a decision by *Sharīʿah* Committee of takaful operators whereby the interim coverage is allowed based on the concept of *tarāḍiyy* or consensus agreement by all takaful participants to cover everyone who participate in the policy including those under period of underwriting plus they have already pay the contribution. Therefore, when a person submits an application to the takaful operator then he will be considered as conditional or constructive participant until he gets approval from the Takaful operator regarding the result of the underwriting. This is based on the *ḥadīth*:

والمُسْلِمُونَ على شُرُوطِهِمْ، إلاَّ شَرْطًا حرَّمَ حَلاَلًا أو أَحَلَّ حَرَامًا

Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful

(Al-Tirmidhī: Book 15, Ḥadīth 32)

The *ḥadīth* clearly mentions the obligation of a Muslim to adhere to any contract or condition he made with others, as long as the conditions of the contract are not contrary to *sharīʿah* principles. There was also a quote from Sayyidinā ʿUmar R.A:

إِنَّ مَقَاطِعَ الْحُقُوقِ عِنْدَ الشُّرُوطِ، وَلَكَ مَا شَرَطْتَ

Verily, rights are at the intersection of conditions. You will have what you accepted as conditions.

Sayyidinā ʿUmar established a clear guideline here to determine the right of a person in certain agreement or contract. When there is a conflict between the parties in the contract, they may refer to the conditions that being agreed among them in the contract. Consequently, all the contracting parties must fulfil the contract as agreed among them. Allah (SWT) commands us to fulfil our contracts in verse 1, Chapter Al-Mā'idah (Tafsīr Jalālain):

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

O you who believe, fulfil your bonds, the covenants confirmed between you and God and [between you and other] people.

(Al-Mā'idah 5:1)

In addition, the applicant will be removed from the list of the takaful participants if the results of the underwriting are not in the favor of that applicant. However, any claim given to the applicant upon his accidental death during the underwriting process will not be clawed back, even if the application is later rejected. The underwriter will continue the process of underwriting after the death of that applicant to ensure the status of his application whether he is entitled to that policy or not. In this case, if the status of the underwriting is approved then the contribution payment received from the deceased will follow the normal procedure flow whereby it will go to *tabarru‘* fund and the wakālah fee will be deducted from that payment as well. On the other hand, if the status of the underwriting is rejected then it will raise another issue regarding the status of payment: is it a valid contribution or not? If it is not valid, then what is the next step. Should it be returned to the heirs of the applicant, or remain with the *tabarru‘* fund as a donation to that fund?

The status of contribution payment upon rejection after the death of the applicant.

This issue has been highlighted in the previous discussion, whereby the application has been rejected and the applicant has made the contribution payment prior to his death. There is a question regarding the status of that payment whether it is a valid contribution or it is being cancelled due to rejection of his application. Back to the procedure at TO3; if a person is still alive after his application is rejected by the underwriter, the takaful operator will refund the payment to the applicant after a certain deduction of cost for medical check-up. However, if the applicant has passed away and the takaful operator has paid the interim coverage claim while the status of underwriting has been rejected. In that case, what happens to the payment and the compensation claim paid to the family of the deceased?

According to the current practice, when the underwriting participant had passed away or suffered from TPD (TO3) due to accident while the process of underwriting still not complete, the underwriter will continue the underwriting process until the result is being issued. Meanwhile, the takaful operator will pay the compensation to the family of the deceased or to the TPD applicant for to the interim cover as provided by the policy. Furthermore, he has paid the upfront contribution payment as required by the policy. The process of underwriting will not be interrupted even though the applicant had passed away whereby the underwriting process that may take a maximum period of 90 days. The takaful operator will not claw back the compensation amount although the application has been rejected by the underwriter. All of the upfront payment will be channeled to Participant Risk Fund (PRF) after the deduction of certain costs incurred by the company (TO1).

From the *sharīʿah* point of view, the contribution made by the deceased is valid and will be rewarded by Allah (SWT). Intention plays a very important role to determine the status of certain obligation or *ʿibādah* whether it is accepted by Allah or not. The Prophet Muḥammad (PBUH) said:

إِنَّمَا الأَعْمَالُ بالنِّيَّاتِ وإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى

The reward of deeds depends upon the intentions and every person will receive the rewards according to what he has intended.

(al-ʿEid, 2003)

This *ḥadīth* is the source of the Islamic legal maxim الأمور بمقاصدها or matters determined by intention. From this *ḥadīth*, we understand that the status of good deeds performed by a Muslim is determined by his intention. He will be rewarded by Allah if he performs the obligation sincerely for Allah's blessing. However, he will get nothing if he performs the obligation for the other purpose. Furthermore, an obligation or *ʿibādah* either compulsory or complementary (*sunnah*) will be considered as valid once it has fulfilled the pillars and conditions. It cannot be simply cancelled, unless there are certain issues that nullify it.

When an applicant submits his application form together with his two-month upfront contribution payment, he has already put his intention to get protection and agree to contribute or donate to the takaful fund. The company also agrees to provide interim cover if he needs to undergo the underwriting process. Therefore, his action of giving payment is sufficient to show his good intention to help other participants through that fund. This can be considered as a valid donation or *ṣadaqah* from him, starting from the period of submission until his death. Furthermore, the company also agrees to give coverage during the underwriting period for what he has paid to the takaful fund, while all the participants have already given their consent to the interim coverage condition in the takaful agreement. Therefore, no result from the underwriter will affect the status of contribution payment. It should not be considered as part of the deceased's inheritance, because it has been given away as a donation to the takaful fund. The takaful operator is allowed to make deduction from that upfront payment to cover any cost involve in managing the application process as agreed earlier. If there is any balance from the upfront payment in the event the applicant died on the first month, after he has paid the upfront payment for two months, the takaful operator will return the remaining balance to the family of the deceased.

The author holds the view that the rights of the deceased to the upfront contribution payment are resolved upon his death and consequently would remain in the *tabarru*ʿ fund to fulfill his intention to donate to the *tabarru*ʿ fund via the takaful scheme. Furthermore, it is not allowed for a Muslim to revoke his donation once it has been given away and already possessed by the intended party. The Prophet Muḥammad (PBUH) said:

الْعَائِدُ فِي صَدَقَتِهِ كَالْكَلْبِ يَقِيءُ ثُمَّ يَعُودُ فِي قَيْئِه

"He who gets back his charity is like a dog which vomits and then returns to that and eats it."

(Ṣaḥīḥ al-Bukhārī)

Finally, whoever intends to donate his wealth, he may revoke his donation before it has been taken possession by the donated parties. However, it is not allowed to revoke a donation after it has been received or possessed by the donated parties. In the case of the contribution by the deceased, it is very clear that his intention paying the upfront payment is to join the takaful scheme, based on the principle of *tabarru*ʿ or donation. His intention is to maintain it as a donation until proven otherwise. This is based on the Islamic Legal Maxim:

الأصل بقاء ما كان على ما كان

The original ruling of something is constant to what it is before.

(al-Zuḥaylī, 2006).

The current practice of maintaining the upfront payment in the *tabarruʿ* fund after the participant had passed away is not contrary to the principle of *sharīʿah* while the takaful operator still pay the coverage according to the interim cover clause stated in the receipt. Furthermore, the takaful operator will return the remaining amount of the upfront fee if the participant has passed away on the first month of the interim cover whereby according to the practice, the takaful operator will calculate the claim based on the existing period of the policy. If the participant has died on the first month of the policy, then the takaful operator will only take the first month contribution, while the remaining balance will be returned to the family.

Conclusion

Based on the practice of interim coverage in the takaful industry in Malaysia, it has been proven that the existence of this type of coverage is very important to help those in need, especially when the participants have passed away due to accident. Interim cover plays a crucial role to help them in minimizing the burden of their family during the hardship time.

Islam came to safeguard the life of mankind. This is one of the objectives of *sharīʿah*, also known as *maqāṣid al-sharīʿah*. All the *sharīʿah* rules and principles have been revealed by The Almighty Allah to protect life from harm and to uphold the public interest or *maṣlaḥah* of mankind. *Sharīʿah* recognizes things that bring *maṣlaḥah* to human being. This type of *maṣlaḥah* is known as *maṣlaḥah mursalah* and is one of the sources of Islamic law. Since the interim coverage offers many benefits to human beings, it may be considered as *maṣlaḥah mursalah* and should be allowed according to *sharīʿah* law. There is no *sharīʿah* impediment in practicing it thus make it lawful and should be offered by all takaful operators in Malaysia to help those in need. This is in line with the verse 2 of Surah Al-Mā'idah:

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ ۖ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ

Help you one another in al-birr and al-taqwā (virtue, righteousness and piety); but do not help one another in sin and transgression

(Al-Mā'idah 5:2)

Finally, we would like to suggest to all takaful operator to offer interim coverage in their takaful policy as one of the ways to help more people during their hard time. This will encourage more people to obtain a takaful policy as one of the tools to manage risk for their wealth and their lives.

08

THE PRACTICE OF REINSTATEMENT IN THE FAMILY TAKAFUL INDUSTRY

MOHAMAD ZAHARUDDIN ZAKARIA

INTRODUCTION

Takaful is currently developing rapidly to become a trusted brand in the insurance industry. It offers clarity and fairness to its participants with a special feature as an obedient to the Almighty Allah (SWT). Participants do not only get protection for their life and wealth, but also a reward from the Almighty Allah (SWT) for their contribution to help others. However, even the sky isn't always blue, and the sun doesn't always shine; sometimes people get into trouble in their life, and cannot afford to pay the contribution for reasons best known to themselves. Here comes the process of reinstatement to revive the policy when it has lapsed due to unpaid contribution for couple of months during the tenor of the policy. Participants are allowed to reinstate the policy to enjoy the same benefits and the same amount of contribution before the lapse. The participants will follow certain steps and procedures to reinstate the policy. The author will highlight some important *sharīʿah* concerns and deliberations regarding this process of reinstatement as being practiced in Family takaful industry to help us to understand the process. Finally, the participants may clearly understand the spirit of reinstatement from *sharīʿah* point of view. Consequently, it will demonstrate the goodness of takaful and its fairness to all mankind, thus making it a chosen product for all.

Definition of Reinstatement

Reinstatement is a normal practice in takaful industry. It is a process of restoration of a certificate that has lapsed because of non-payment of contribution payment after the grace period has expired (TO3). This process of putting the takaful policy back after a lapse is known as reinstatement.

When a policy lapses, it will not become effective and does not provide any coverage or protection for the participant until he reinstates or renews the policy by paying back all of the lapsed contribution amount and proceed the future payment as usual. Until that happens, he will not be allowed to file a claim from the policy (Asyrafuddin, 2021).

Application of Reinstatement in Industry

Takaful operators are very flexible in allowing participants to reinstate their policy. However, the process of reinstatement differs between operators. For example, there are certain operators that only allow to reinstate the certificate within six months from the lapse date (TO4), whereas another operator allows within one year from lapse date (TO6) while most of the operators allow to restore the policy if it does not lapse more than two years (TO1 and TO3). There is also a takaful operator which allows to reinstate within three years after lapsed date (TO5). All takaful operators unanimously agree to disallow the participants to enjoy all facilities during the lapsed period. They are not entitled to claim if anything that happens to them, unless they did reinstate the certificate prior to the claim.

The advantage of reinstatement is the participant may restore his certificate with the same risk profile without going through the new underwriting process. He is only required to proceed with the same payment that he paid earlier. However, most of the takaful operator will ask the participant to pay the whole of outstanding contribution to the fund. Some Takaful operators do not require the participant to pay back the outstanding balance because he was not covered during the lapsed period but there is also takaful operator which put a condition to pay for three months contribution to cover the previous contribution instalments (TO5). However, if a participant has already lapsed for more than allowable period, he has no more right to reinstate rather he needs to get a new policy with new contribution amount that would be slightly higher according to the result of the new process of underwriting.

For those who have an investment account linked to a certificate, the remaining balance in that account will be used to pay the outstanding balance of *tabarru'* account. Once the investment account is not able to cover the outstanding amount, the policy will become lapsed, but the participant still has the right to reinstate the policy within the permitted period. Although there is no requirement from the majority of Takaful operators to perform underwriting, the participant still needs provide some health declaration whether he is healthy or is suffering from any disease that might affect the policy. The takaful operator will decide on the application. The result may vary according to the health status of the applicant. He may be approved for the reinstatement if he is healthy, and nothing has changed in his lifestyle that might increase risk. His application may be rejected as well if he is unfit to the requirement, or he may be approved, but with some modification to his payment and coverage, according to the latest status of his health (TO4).

From the practice reinstatement among takaful operators, it is found that each of them has laid down certain condition to allow the participants to reinstate their policy. Among the important conditions are as follows:

i. The policy has not lapsed more than the period that has been determined by the Takaful operators.

ii. The participant is required to pay the outstanding balance that has been lapsed throughout the tenor of contribution. Some Takaful operators do not require this condition.

iii. The participant is required to declare his status of health upon the application of reinstatement.

iv. Only participant who is healthy and not suffering from any risk covered by the takaful policy is allowed to reinstate the certificate. The risk may be excluded but with some increment of contribution.

It is important to comply with the conditions to avoid any misrepresentation or fraud that could lead to unfairness to other participants. This could happen when a participant applies for reinstatement because he needs treatment or being hospitalized while his policy was already lapsed. His intention to restore the policy is to avoid the cost from his side, by transferring it to the takaful operator. This is unfair to the takaful operator, since the participant did not pay the contribution prior the treatment, and unfair to other participants who committedly paid their contributions although nothing happened to them during the policy period.

Table 8.1: Lapse Period for Reinstatement

Takaful Operators	Permissible Period
TO1, TO3	Two years
TO4	Six months
TO5	Three years
TO6	One year

Source: Interview Data

Shari'ah Issues and Deliberation

The practice of reinstatement in family takaful is one of the ways to help the participants to ease their burden in providing financial support during hardship. Sometimes, they cannot afford the monthly contribution payment that led to lapse of payment. Reinstatement allows them to restore their policy at the same amount of contribution. There are some requirements and procedures that must be followed to reinstate a policy. These requirements and procedures have been analyzed to see whether there are any *sharī'ah* issues behind the practice of reinstatement.

Contract of reinstatement from *sharī'ah* point of view

Takaful is an agreement between participants to guarantee any risk rise from events covered in the agreement. Takaful Act 1984 defined the meaning of takaful as:

> *"A scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose".*

The clause clearly stated that the main principle of takaful scheme is a mutual consent among the participants to contribute to the fund. From here, we could understand that there are elements of mutual consent or *tarāḍiyy* and *iltizām* to perform an action as agreed in that agreement or contract. *Iltizām* is an Arabic word which means a promise of a person to bind himself to certain rules or obligations. In the case of Takaful, there will be a group of people who are giving their consent and *iltizām* to contribute to a fund that will be utilized to provide financial aid to those participants in that fund who are facing difficulties as agreed in their terms and conditions. Although this fund has been formulated based on the concept donation or *ṣadaqah* which is a type of *ghayr lāzim*[1] contract, but when everyone has signed the agreement then it is become a binding contract or obligatory because it involves the interest of everyone in that agreement. If one of the participants fails to comply with the conditions, then the interest of other participant will be affected, because it might reduce the amount of the fund to pay any claim in the future. Although the contract was formed as *ṣadaqah* or *tabarruʿ* from the beginning, it has changed from the contract of *ghayr lāzim* into a *lāzim* contract due to the binding agreement among the participants or *iltizām* of everyone to contribute to the fund.

A promise to do something by a person will make it obligatory upon him when it effects other parties in the event of not fulfilling it (2010, Razali). Furthermore, in a takaful contract, it does not only involve the participant but also the takaful operator as the manager of the scheme or

1 Nonbinding contracts or *ghayr lāzim*, are those in which any of the parties has the right to revoke it unilaterally (without the consent of the other party) on the other hand, binding contracts or *lāzim* are *sharīʿah* compliant-contracts in which none of the parties has the unilateral right to rescind the contract without the consent of the other party unless the contract is embedded with *khiyār al-sharṭ* (option of condition). (2019, M.Adib)

fund. Indeed, a takaful contract is a contract between all parties in a takaful scheme. Therefore, it is not merely a donation, but becomes a new form of contract which combines a variety of contracts such as donation, *wakālah* and *muḍārabah* for investment linked account. At this point, the contract becomes *lāzim* or binding on the participant and the manager who manage the contract. Consequently, everyone must adhere to all conditions in the contract. This is in line with the command of The Almighty Allah (SWT):

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ۚ

O ye who believe! Fulfil (all) obligations.

(Al-Mā'idah 5:1)

Therefore, all participants are considered as the parties of the contract of takaful and they are bound to all conditions in the contract including the reinstatement clause which is allowed based on the Principe of *tarāḍiyy* or mutual consent among the takaful participants. The Prophet Muḥammad (PBUH) said:

«المسلمون عند شروطهم إلا شرطًا حَرَّمَ حلالًا أو شرطًا أَحَلَّ حرامًا

Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful.

(Al-Tirmidhī: Book 15, Ḥadīth 32)

From another point of view, when a person puts a condition on himself or agrees to do something in an agreement which is an *Iltizām* in this sense, it is indeed a valid condition and legally binding, as long as it is not contrary to *sharīʿah* principles. This is in line with a narration by al-Bukhārī from Ibn Sīrīn, who reported that Shurayh said:

مَنْ شَرَطَ عَلى نَفْسِه طَائِعًا غَيْرَ مُكْرَهٍ فَهُوَ عَلَيْهِ

> *Whoever stipulates himself a condition while he is obedient and not coerced, then he is bound to that condition*
>
> (al-Bukhārī, 1987)

Ibn ʿArafah one of the prominent Mālikī scholars said:

مَنْ أَلْزَمَ نَفْسَهُ مَعْرُوْفًا لَزِمَهُ

> *Whoever stipulates a good deed as an obligation on himself then it becomes compulsory to him*
>
> (Ibn ʿArafah, 2014).

Based on the aforementioned evidence, it is allowed to stipulate anything good as a condition in an agreement, as long as it is not contrary to *sharīʿah*. Indeed, it is also permissible for anyone to bind himself with a promise to perform any action and consequently, he is bound to that promise and remain as his obligation until it has been fulfilled. This is also known as *iltizām*, as seen in the current practice of takaful agreement. The contribution to the takaful fund becomes compulsory as an *iltizām bi al-tabarruʿ* or a binding promise to donate from the participant.

In conclusion, the reinstatement clause as provided by the takaful operators to the participants is a valid condition and not contrary to the *sharīʿah* principles. It is a facility to ease the participants whereby they are allowed to renew their takaful certificate at the same amount of contribution as similar as they paid for the first payment. Without the reinstatement facility, the contribution amount will increase accordingly based on current age and health status. This is also in line with the objective of *sharīʿah* to protect life and supported by one of the *sharīʿah* maxims المشقة تجلب التيسير or hardship beget facility, whereby in this case, the takaful operator will offer the reinstatement facility as a *rukhṣah* to the participants due to their hardships and need to have takaful protection for their medical expenses, as well as to provide financial aid after death and TPD.

Repayment of lapsed contribution

One of the conditions to restore the takaful certificate after lapse is to pay all the lapsed contribution amount before the participant can enjoy the coverage again. For example, if the participant lapsed for one year consequently he is required to pay for the whole year contribution prior to reinstatement. Let say the monthly contribution was RM100.00. He thus needs to pay RM 1200.00 to restore his certificate. There is a question regarding this matter whether *sharīʿah* allowed to enforce the participant to make the repayment since he was not covered during the lapsed time. Furthermore, the contribution is a type of donation or *ṣadaqah* and is voluntarily in nature, while the ruling of *ṣadaqah* is only recommended or *mandūb* which is not compulsory according the *sharīʿah*. Based on this principle, is it appropriate for the takaful operator to require the participants to repay all the previous lapsed contributions as a condition to reinstate the takaful certificate?

It has been mentioned earlier that there are takaful operators which require the participant to pay back the lapsed contribution in order to restore the takaful certificate while some operators do not require this condition. What is the justification of the operators for both decisions? According to the decision made by the *Sharīʿah* Committee of these takaful operators, the requirement to pay back the lapsed contribution is part of the agreement between the participant and the takaful operator. Therefore, it falls under the obligation of adherence to stipulated conditions among parties in an agreement as long as the conditions are not contrary to *sharīʿah* rulings. This is based on the abovementioned Quranic verses and *ḥadīth*, as well as the concept of *iltizām* discussed earlier. Thus, it is not contrary to *sharīʿah* rulings to enforce the payment of lapsed contribution, since it is compulsory for the participant to adhere to the agreement as well as it is an obligation to them for the *iltizām* they have made in the agreement. Once it has become compulsory then it is consequently considered as an obligation to the participant to pay the contribution including what has been lapsed from the payment. It will remain as debt if the participant does not pay the contribution, unless it has been cancelled or terminated.

From another angle, it is compulsory to pay what has been lapsed based on the rule of *istiṣḥāb*, or to maintain the original ruling regarding the payment of contribution which is compulsory towards all the participants as agreed in the contract of takaful. Therefore, what is compulsory since the beginning of the contract remain compulsory to the end of the contract including the lapsed payment. In conclusion, some of the takaful operators consider the lapsed payment as a debt, thus making it compulsory to the participant to pay back his debt for the purpose of reinstatement, while other operators do not consider it as debt but merely a normal contribution, meaning that participants are not required to pay back all the lapsed instalments.

Protection during lapsed time

Takaful have been regulated in such a way that the participants are entitled to get takaful protection for the contribution they have made in the takaful scheme. Nevertheless, those who missed the payment will not be given protection until they reinstate the certificate by paying back all the lapsed payments. However, it does not mean that the participants are entitle for any claim during the lapsed period. The takaful operator will not cover what had been lapsed in the past even upon approval of the reinstatement. This is the practice of the industry for reinstatement whereby it is stated that the policy will restart upon the reinstatement of the certificate but it will not cover anything happen during the lapsed time. It raises a question here whether it is compliant to *sharīʿah* or not to restrict a claim without giving the right to the participant to be covered by the policy if anything has happened to him during the lapsed date.

Generally, it is the right of the participant to be covered by the policy once he starts to make contributions to the takaful fund. It is a basic requirement as stated in the takaful contract. This issue has been discussed previously, whereby it is an obligation for each participant to complete the contribution as being agreed to mutually by all participants in the contract. Therefore, it will become a debt for them if they do not fulfil the agreement. This is the reason why the participant is required to pay all the lapsed amount to restore the policy. They are actually paying the debt for missing the contribution payments during the lapsed date. This is fair to other participants who regularly make contributions even though nothing has happened to them during the policy period.

The participant who is actually did not comply with the agreement when they failed to fulfil their commitment to complete the contribution payment during the lapsed period. Consequently, they lose their right to be covered by the policy for not adhering to the requirement as stated in the certificate policy:

> *"If your certificate ends because your contributions weren't paid, you can reinstate (restart) it within two years of it ending if we agree. You cannot reinstate your certificate for any other reason.*

What you need to do:

i. *Contact us.*

ii. *Provide a complete service request form. You need to select the reinstatement service option.*

iii. *Pay us all contributions due and the administrative fees, if any.*

iv. *Confirm that the health of all people to be covered still qualifies for cover (by answering the questions in the service request form).*

What we will do:

i. We will review your application, and if we are satisfied that you have met our requirements, we will reinstate (restart) your certificate.

ii. If we reinstate your certificate, your cover will restart from the date we tell you.

*You will not be covered for any event that took place before your certificate restart."

This is the reinstatement clause stated in one of the takaful certificate that clearly mentioned the requirements and the procedures to be followed by the participants to restart their policy. This clause is binding to all participants since everyone agreed and signed the contract. Therefore, any event that occurs before the reinstatement will not be covered based on this agreement as stated in this clause. This is in line with the previous *ḥadīth*:

المسلمون عند شروطهم إلا شرطًا حَرَّمَ حلالًا أو شرطًا أَحَلَّ حرامًا

Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful

(Al-Tirmidhī: Book 15, Ḥadīth 32)

The requirement is also in line with the principle of fairness in Islam. The Almighty Allah said in Surah Al-Mā'idah verse 8:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ ۖ وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا ۚ اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ ۖ

O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do.

It is a fair treatment to all participants in this event whereby the participant is required to pay all contributions due to restart the policy certificate. If not, the other participants who are committed to the agreement will be disappointed and become unfair to them who continuously pay the contributions without fail since the beginning of the contract even though no event of claim occurs along the time. As a conclusion, this clause does invalidate any *sharīʿah* principles and it is considered as a fair treatment to all participants in the scheme. Therefore, anyone who wants to restart the policy, he is required to fulfil all the requirements and follow all the procedures.

Conclusion

As a conclusion, the practice of reinstatement in family takaful is in compliant with *sharīʿah*. It should be maintained as a good practice by takaful operators to help the participants to restore their certificate at the same contribution payment without a need to submit a new application at higher contribution payment. It will reduce the burden of the participant especially when they are getting older as they will need to pay more for a new takaful policy due to the risk associated with their age. This is also in line with the objective of *sharīʿah* to protect life and wealth. It is fair to both parties whereby each of them get benefit from the reinstatement in the way that the takaful operator could maintain their client as well as the client may have the same amount of contribution for restoring the certificate.

09

DISCOUNTED CONTRIBUTION FROM *SHARĪʿAH* *PERSPECTIVE*

AHMAD ZAKI SALLEH

INTRODUCTION

In most implementations of the takaful system, takaful participants have to pay a participation fee - in takaful terms known as the contribution - to the takaful operator (TO) to eligibly enjoy the protection on a permissible takaful interest.[2] Conceptually, the contribution paid to the TO is the sum agreed by the participants who jointly agree to extend compensation to any member in the group who is affected by an accident or the occurrence of any incident that has been determined. This whole concept of takaful is equivalent to the principle of *taʿāwun* or partnership, while the payment of contribution is based on the principle of *al-iltizām bi al-tabarruʿ* i.e., the commitment to contribute.

The factors that affect the amount of contribution fee to be paid by the takaful participant are various and include the following: age, type of illness, accidents that have occurred, the lifestyle of the participant and others. The process of determining the rate of payment of the contribution fee is known as

2 Permissible takaful interest is equivalent to the term insurable interest in the insurance industry. It refers to the interest that a person has in something such as a particular property or another individual, which means that the person would suffer a loss should that property or individual be harmed. The main difference between the two, however, is that the former has a stringent list of interests based on the sharīʿah principles, compared to the latter.

underwriting. In many cases, this process will be carried out by the takaful operator to determine the rate of contribution that the participant will commit.

In a technical definition, underwriting is the process through which an individual or institution takes on financial risk for a fee while the term underwriter originated from the practice of having each risk-taker write their name under the total amount of risk they were willing to accept for a specified sum of payment. This risk most typically involves loans and financing activities – in the banking sector, protection and coverage – in the insurance and takaful sector, or investments. Underwriting continues today as a key function in the takaful industry, although its mechanics have changed over time.

The retainment of takaful participants is one of the most important elements in any takaful operator, as well as in any business operation to secure its business continuity and sustainability over time. To encourage takaful participants to maintain their participation in a takaful scheme within a takaful company, takaful operators, in general, and in many products, have resorted to various mechanisms and the most significant one is to give participants a discount on the contribution fee.

This section discusses the concept of discounts implemented by takaful operators as well as its implementation in the takaful industry widely. The applied *sharīʿah* concept of implementing a discounting mechanism will also be discussed, along with some of the key issues identified in the implementation.

The Concept and Implementation of Discounts in Takaful Contribution Fees

A discount, according to the Oxford Dictionary, means a reduction given over the original rate or cost. In the context of takaful, a discount means a reduction given to the participant on the payment of the original participation fee.

From a business perspective, discounting is a common practice in business strategies to obtain or increase sales revenue. By the virtue of discounting, new customers will be attracted by the reduction in the price of an asset or service provided while existing customers will remain loyal to the merchant and service provider. Through that context, takaful providers, as a business entity also apply the same practices to ensure the sustainability of this business.

From the *sharīʿah* perspective, in general, the practice of giving discounts on the price of goods does not violate any of the principles outlined in *muʿāmalāt*. This is based on the principle of agreement between two contracting parties (*al-tarāḍiyy*), the principle of sanctity of contract (*al-muslimūn ʿalā shurūṭihim*), and the principle of customary practice amongst merchants (*ʿurf tijāriyy*), all of which are accepted fundamentally in Islam.

In terms of the implementation of discounts in the Takaful industry, the practice of discounting in contribution payment can be noted widely in the general takaful segment of the industry. However, in the family takaful segment, based on the study that has been conducted, a very limited number of products, in which the discount on contribution payment, has been identified. The following table shows the summary of discounting practices by the Takaful operator in both the general and family segment.

Table 9.1: Implementation of Discount Based on Product

Takaful Operator	Implementation on discount	
	General Takaful	Family Takaful
TO1	Yes	Yes
TO2	-	Yes
TO3	Yes	No
TO4	Yes	Yes
TO5	Yes	

Source: Interview Data

It should also be noted that there are variations in discounting practices in the same segment based on certain products. Hence, some may find discounting features in certain products in a segment while no discount is offered on other products in the same segment.

On the mechanism of the discount, the common practice of discount in *tabarru*ʿ contribution to the takaful industry, especially in the general takaful sector, is known as a non-claim discount. In the other segment, i.e., the family takaful sector, the discounting practice, although existed in very limited products, is based on *hibah* (gift) or waiving of the fee portion.

Non-Claim Discount (NCD)

The implementation of discounts in the general takaful segment is known as Non-Claim Discount (NCD), which a system of adjusting the contribution rate paid by policyholders according to the experience of individual claims. The value of NCD is also briefly referred to as NCB, which is No Claim Benefit, but the most used in motor takaful involving vehicles is the value of the claim without discount (NCD). This term means a participant will be given a percentage discount periodically if they cover their vehicle for a minimum of twelve Gregory months continuously without any claim for loss being made. This discount can be used during policy renewal for the next twelve months.

This giving process will run all the time as long as the participant continues to use his vehicle or sells it to others. A takaful participant is entitled to a NCD value depending on the type of vehicle ranging from 0% to 55% for private vehicles and 0% to 25% for motorcycles. If the takaful participant does not subbmit any accident or personal damage claim during the takaful coverage period, then they are entitled to a no-claim discount value as determined by the takaful operator:-

Persatuan Insurans Am Malaysia (PIAM) sets the NCD rate, which every motor insurance company in Malaysia follows. For motor insurance, the maximum discount is 55% for cars and 25% for motorcycles.

Table 9.2: NCD Rates for Private Cars, Motorcycles, and Commercial Vehicles

No-Claim Period	Private Car	Motorcycle	Commercial Vehicle
1st year	0%	0%	0%
2nd year	25%	15%	15%
3rd year	30%	20%	20%
4th year	38.33%	25%	25%
5th year	45%	25%	25%
6th year onwards	55%	25%	25%

Source: PIAM

Whenever a participant renews his or her private car coverage in the second year, he is eligible for a 25% discount on your basic premium because your NCD will start accumulating after your first year of insurance.

After five years of not making claims against the takaful policy, the discount reaches the maximum rate of 55%. As a result, starting from the sixth year of renewal, a participant can enjoy a 55% discount on their private car insurance basic contribution. This discount is applicable for the rest of the policyholder's life, as long as there is no own damage or third-party claims made against the policy.

Based on the observation, all takaful companies in Malaysia practice NCD on general takaful products for vehicles. Other than vehicles, no takaful products are provided with a discount on the contribution fee charged.

Sharīʿah Deliberation on the Implementation of Discount on Contribution Fee

In terms of the *sharīʿah* structure for the implementation of the discount on the takaful contribution fee, there are several forms of structural variations practised by takaful operators. The table below shows data on the implementation of the discount structure on contribution fees based on a sample of takaful operators used:

Table 9.3: Implementation Structure of Contribution Fee on Takaful Product

Takaful Operator	Implementation on discount		Structure
	General Takaful	Family Takaful	
TO1	Yes	Yes	*Hibah* (shareholder fund to the takaful fund)
TO2	-	Yes	Waive (on *wakālah* fee portion)
TO3	Yes	No	Waive (on *wakālah* fee portion)
TO4	Yes	Yes	Waive (on *wakālah* fee portion)
TO5	Yes	Yes	Waive (on *wakālah* fee portion)

Source: Interview Data

Table 9.3 shows the implementation of discounts on contribution sums in the takaful industry practices. It can be noted that there are two main approaches adopted by the takaful operators in implementing the discounts. These two approaches are: [1] *hibah* (gift) [2] purely waive.

Hibah as an approach to discount

The first approach adopted by takaful operators in practicing discounts is *hibah*. *Hibah* in general refers to a transfer of ownership of a property or usufruct to another without any compensation during the life of the donor (Ibn Rushd, 1995). *Hibah* is material in discussing a takaful's benefits. In Malaysia, takaful businesses are regulated by Islamic Financial Services Act

2013 (Act 759) effective on 30th June 2013. Prior to that, such a business was solely regulated by Takaful Act 1984 (Act 312). Since 1984, throughout the period, the Central Bank of Malaysia has issued several guidelines and circulars in order to strengthen the takaful legal framework. Pursuant to the existing legislation, the legislation prescribes several provisions dealing with the position of *hibah* in takaful.

Hibah is one of the means to distribute one's assets in Islamic financial planning. It may be used either in one's lifetime or in the estate distribution of the deceased. It is a very simple, yet influential tool in estate planning in the sense it may influence the portion of some heirs if one executes the *hibah* when one is about to die. *Hibah* basically means a gift, as when Prophet Zakariyyā prayed to his Lord in order to be granted descendants, saying "O my Lord! Grant unto me from thee a progeny that is pure" (Āli ʿImrān 3: 38). *Hibah* may come into play when the rule of *farā'iḍ* does not allow some heirs to get the rights of inheritance and *waṣiyyah* was not made on him. It is known that the rules of *farā'iḍ* only apply to Muslims; in the case when the deceased has a different religion from their heirs, the heirs will not be entitled to any inheritance. Thus, *hibah* may solve a particular circumstance by giving a certain portion of his wealth to the heirs who have different religions and any particularly blocked heirs (heirs who are not entitled to get the inheritance, being blocked by other heirs) before he passes away.

Hibah is adapted as an additional concept of Takaful products and is practiced by most Takaful operators. (Othman Yaakob, 2008). For example, this product is offered to parents with children. Parents act as contribution payers (*hibah* contributors) and their children are participants of the takaful (*hibah* recipients). This kind of *hibah* is permissible, because it fulfils all the pillars and requirements.

In relation to the discounting practice, under this approach, the takaful operator will compensate the discounted portion of the contribution payment to the takaful fund. This is to cover the loss that the takaful fund faced by the practice of the discounts. The *hibah* compensation given by the takaful operator is a straightforward process where the exact amount of discount will be contributed to the takaful fund from the shareholder fund. From the *sharīʿah* perspective, no issues in this implementation have been identified.

An operational issue may occur in cases where the discounted amount of payment was not contributed or compensated from the shareholder fund thus resulting in a loss to the Takaful fund.

Pure waive of *wakālah* fee

The second approach adopted by the takaful operator in managing the discounting practice in contribution payment is waiving a part of the *wakālah* fee. This approach is also a straightforward process in which the takaful operator agrees to waive all or a portion of the wakālah fee from the participant.

The mechanics behind this approach is that the contribution sum paid by the participant consists of several payment portions inclusive of the *wakālah* fee, investment link fund, *tabarruʿ* or risk fund, and others. Payment by the participant will be contributed to the *tabarruʿ* fund after the deduction of *wakālah* fee and other related funds. In this approach, no loss to the *tabarruʿ* fund is realized from the discounting practice as the final drip to the *tabarruʿ* fund is done after the deduction of *wakālah* fee. The following chart explains the process:

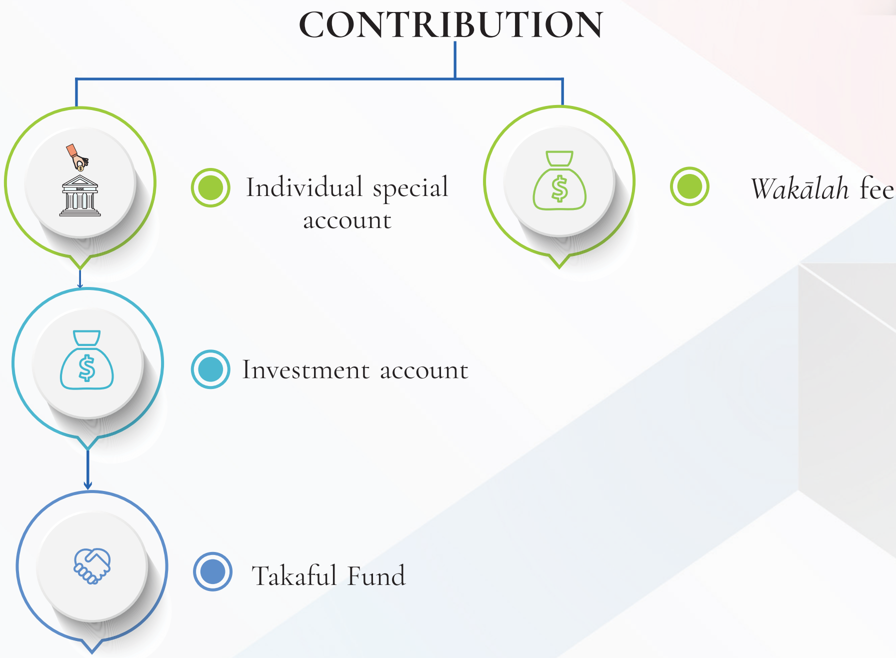


Figure 9.1: The Flow of Contribution Drip to the Takaful Fund

Issues in the Implementation of a Discount of the Contribution Fee

This part discusses issues surrounding the implementation of discounts on contribution payment in the takaful industry. In deliberating these issues, a series of interviews were conducted with takaful operator's officers and key operational individuals. Questions were posted to the interviewee in a semi-structured form where appropriate sub-questions were also posted. Information, views and opinions from the interviewee were analyzed and the summary was made based on the analysis.

Based on the interviews, two common issues and concerns were identified in relation to the practice of discounts in takaful payment. These two issues are [1] reduction of takaful fund amount; and [2] fairness to the takaful participants and fund. The following deliberates on these two issues.

Reduction of the takaful fund amount

The concern raised is due to the fact that the discounted portion of the contribution may reduce the amount of money contributed to the risk fund thus reducing the fund's capability to cover more participants and the loss of investment income opportunity. This may be the case when the discounted portion of the contribution sum is not compensated by any party including the shareholder and is covered by the risk fund, while the shareholder keeps the *wakālah* fee from the contribution payment.

Based on the study conducted on the samples of takaful operators, specifically on the takaful operator which adopted the *hibah* structure, no evidence of mis-compensated discount was identified in managing discounting practices.

To overcome this concern, it is pertinent for any takaful operator to have a written internal guideline on the practice of discounts in which the compensation sum needs to be spelt out clearly in terms of the source and the flow. In other words, who will compensate, where and when the compensation will be contributed to the takaful fund need to be certain. By establishing proper guidelines, the risk of the mis-compensation amount can be minimized operationally.

Concern about fairness to the takaful fund

There are also some concerns on the issue of fairness to the takaful fund, inclusive of the participants of the fund resulting from the discounting practice by the takaful operator. This also resulted from the issue of reduction of takaful contributions where the reduction of amount in takaful fund may reduce the coverage ability. There is also a possibility that certain participants may contribute less than the others, while in the case where any prescribed incident occurred, they will receive the same amount of compensation as others.

Upon scrutinizing the practices of takaful operators involved in the study, the issue of uneven payment contribution due to discounting practices has very little ground to realize, and perhaps none at all. This is evident from the practice of the majority of takaful operators, specifically, that adopted the waiving of the *wakālah* fee approach, as shown in Table 9.3, in which the discounted amount of contribution is taken from the *wakālah* fee portion and the final sum contribution that is contributed to the takaful fund has no relation to the discount itself.

For the waiver of the wakālah fee itself, no *sharīʿah* concern has been raised as the sum belongs to the takaful operator and the rights to demand or to waive resided with the takaful operator. Hence, it is up to the takaful operator to exercise the waiver purely based on the business decision.

Conclusion

The key takeaways from the above discussion are:

1. The discounted contribution is a common practice in the takaful industry for business continuity and customer retention. Almost every general takaful operator has discounting exercises in contribution sum payment, while in the family takaful segment, some takaful operators provide discounts.

2. Two main approaches have been identified and adopted by the takaful operator in managing the discounting practice, namely *hibah* and pure waive. As for the *hibah* structure, where the discounted sum is covered by the risk fund, the discounted amount will be compensated by the shareholder by way of a gift to the takaful fund. In the pure waive approach, the discounted sum is taken from the *wakālah* fee which is owned by the shareholder. Two major concerns have been raised in relation to the discounting practice. The reduction of the takaful fund amount and the fairness to the takaful participants are the concerns identified. Deliberation on these two concerns has shown that, having certain mechanisms such as clear guidelines and parameters that need to be adhered to by the takaful operator in managing the discounting practice may significantly reduce the risk of operational mismanagement, such as mis-compensation, among other things.

10

PRACTICE OF NO LAPSE FACILITY IN TAKAFUL INDUSTRY

AHMAD ZAKI SALLEH

INTRODUCTION

When a takaful participant is subscribed to a takaful fund, the participant is obliged to pay for the takaful contribution as agreed between the participant and the takaful operator based on the concept of *al-iltizām bi al-tabarru‘* (commitment to contibute). Any lapse in payment will, in principle, render the agreement void after a certain period of time. The direct effect in the case of a voided contract is that the participant will not be entitled to takaful benefits in the case that any prescribed events occurred.

Another effect resulting from the lapsed certificate is that the takaful operator is not entitled to claim for its *wakālah* fee, except for the actual costs that arise from managing that certificate. This is due to the relationship between the participants and the takaful operator having ended after a certain period of lapsation, hence ceasing *wakālah* fees' entitlement. These effects are translated into the loss of customers from the takaful operator's perspective and, from the business side, this is not a good business indicator, as in principle a customer should be retained.

In order to manage this issue, the takaful operator has initiated the no-lapse provision (NLP) in the agreement between them and the participants. The concept behind this provision is that the agreement remains active and in force, for a certain period of time, despite the value underlying the certificate being inadequate to be contributed into the takaful risk fund, or the value has dropped to negative.

This part discusses the NLP clauses applied in the takaful industry. It highlights the concept of NLP, the objectives of exercising the NLP, the mechanics behind the provision, *sharīʿah* deliberation in stipulating the NLP clauses and some issues surrounding the implementation.

In deliberating the issues of NLP, a series of interviews were conducted with takaful operator's officers and key operational individuals. Questions were posted to the interviewee in a semi-structured form where appropriate sub-questions were also posted. Information, views and opinions from the interviewee were analyzed and the summary was made based on the analysis.

The Concept and Implementation of Lapsation and No Lapse Provision

In technical terms, NLP is defined as a commitment by the takaful operator to keep a takaful certificate in force, even when the cash values in the certificate drop to zero or less than zero, and the certificate is no longer able to meet the *tabarruʿ* deduction and other charges imposed by the takaful operator.

Upon discussion with selected takaful operators, there are two instances where the cash value of the certificate is insufficient to meet the *tabarru‘* deduction:

i. Lapse of payment by the participant; or

ii. The certificate's value is insufficient to cover the nominal value of the *tabarru‘* deduction due to serving the larger commission and fee portion.

In the first instance, the lapse of payment is a common incident in any takaful operation where the periodic payment is not completed due to financial constraints by the participants. Other factors recorded by the takaful operators also contributed to the occurrence of the event such as dissatisfaction with the products, intention to withdraw from the subscription and other technical reasons.

Standard terms and conditions of the agreement between the participants and the takaful operator in managing the lapse of payment dictate that there will be procedures under which the takaful operator will establish actions to recover the mispayment amount up to a certain period of time and once the period is due, the certificate is considered as void. During the period of recovery, the certificate is still valid; however, the participant will not enjoy the takaful benefit in case of the occurrence of any prescribed event. In some companies, if a prescribed event occurs and there is a mispayment by the participant, the payment due must be settled in full before the benefit can be claimed.

In the second instance, i.e., the value of the certificate is not sufficient to cover the nominal value of the *tabarru‘* deduction due to serving the higher upfront *wakālah* fee in the initial years, whereby the allocated contribution portion will be smaller as compared to the tabarru deductions required. This may be due to the lower contribution rates that are deliberately made in light of price competitiveness.

This situation may occur during the few first years of the inception of the certificate. Some of the takaful operators illustratd the situation as follows: during the first few years of the inception of the takaful certificate, the larger portion of the payment by the customer will be allocated to cover the fee of the takaful operator and the commission of the agent (in the agency model). This results in the portion that was supposed to be contributed into the *tabarru'* fund being insufficient to cover the actual amount of the *tabarru'* deduction.

This is because, under the current agency commission regime, the percentage of commission from the *tabarru'* payment can only be recovered within the first few years of the certificate. After that period, only the takaful operator fee and the individual account from which the contribution payment and investment-linked fund deduction can be made from the participant payment. In other words, though a takaful contribution may be consistently being paid by the participants, the takaful contribution can still be insufficient to cover the required *tabarru'* deduction and other charges during the initial certificate years, which may lead to lapsation of the certificate.

On the competitive pricing that is deliberately developed by the takaful operator in the earlier stage of the inception of the certificate, if the actual rate of *tabarru'* deduction is to be maintained alongside the actual *wakālah* fee for the takaful operator, the price would be higher than what is expected by the participant and may not be within his capability to pay.

Therefore, the situation may require the NLP clause as risk mitigation within a specified period, to keep the certificate in force and continue providing the takaful coverage to the participants as well as to retain the customer.

NLP is applicable to products that use the contributory approach as the Takaful model, and in most cases, the products that are comprehensive such as products that cover the hospitalization of the participants and that have investment link feature.

Takaful products that allocate a contribution (after deducting the upfront *wakālah* fee) straight into the *tabarru*ʿ fund shall not be subjected to NLP as all the obligated charges and tabarru deductions have been paid. The situation may related to takaful products that have basic takaful coverage such as death and total and permanent disability of the participant and micro-takaful products. In this case, the amount of coverage is normally much lower that the products that have extra benefit such as investment link products and medical benefit products.

The illustration of the contribution payment deduction is explained in the following:

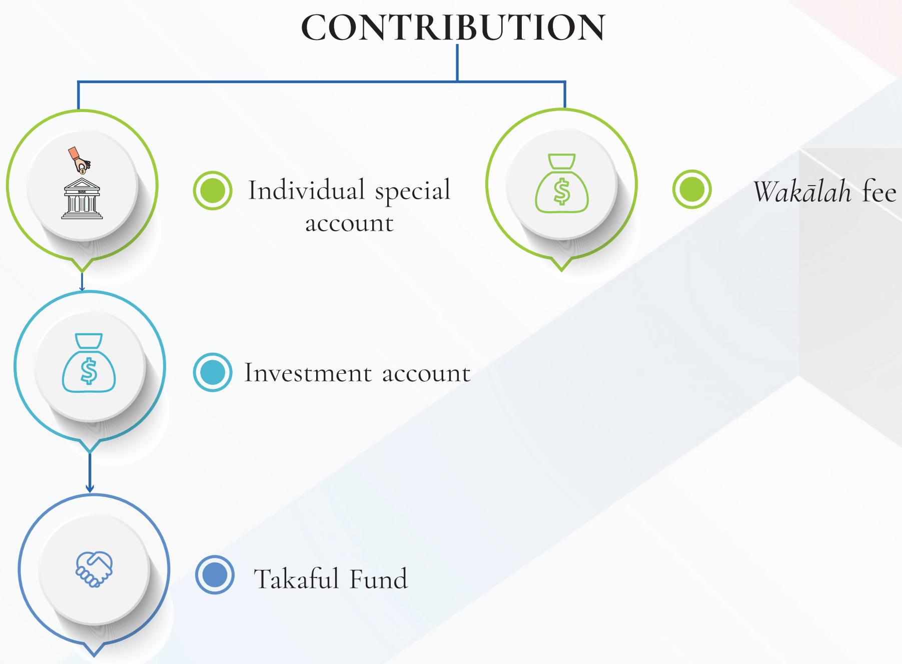


Figure 10.1 Contribution Payment Deduction

Explanation of the illustration.

i. When a contribution payment is made by the participant, the *wakālah* fee portion is deducted. The value of the payment is certain as agreed between the participant and the takaful operator.

ii. The remaining value of the payment is then allocated to the individual special account that is linked to the participant investment account and the *tabarru'* deduction for the takaful fund.

iii. In most cases, the *tabarru'* deduction is certain in terms of value. Any insufficient value of *tabarru'* fund to cover the claims by the participants will trigger the qard contract by the shareholder to the takaful fund and subsequently, in most cases, the repricing exercise.

iv. During the earlier years of the certificate, when the *wakālah* fee portion is larger than the *tabarruʿ* portion, and the investment account of the participant does not have sufficient value to be contributed to the takaful fund the issue of lapsation is triggered.

Sharīʿah Deliberation on the Implementation of No Lapse Provision

The implementation of the NLP is based on the concept of mutual consent (*al-tarāḍiyy*) by contracting parties. The concept of mutual consent is justified by the *sharīʿah* based on the principle: *al-muslimūn ʿalā shurūṭihim*; that Muslims are bound by mutually agreed terms. This principle is based on the Qur'an: "O you who believe, fulfil the terms of your contracts and agreements." This command to fulfil agreements and contracts stipulates that all terms that have been mutually agreed upon between the contracting parties must be fulfilled. Failure to fulfil an agreed condition may affect the validity of the contract which directly affects the objective of the contract.

Based on the fundamental of sanctity of the contract (*al- īfā' bi al-ʿuqūd*), the principle: *al-muslimūn ʿalā shurūṭihim* is agreed upon majority of the Muslim scholars, as stated by al-Ibn Rushd in *al-Bidāyah*, al-'Izz bin 'Abdul al-Salām in *Qawā'id al-Ahkām fī Masālih al-Anām*.

The conditions to be fulfilled, however, must not violate the *sharīʿah* principles as agreed by the scholars. A condition that is stated to violate the *sharīʿah* principles will cause the contract to be invalidated according to the majority of the scholars, while according to the Ḥanafī school the contract becomes voidable due to the existence of such a condition.

An important point to note, in the case of stipulating any terms and conditions to a contract is that the conditions must not bring harm to any of the contracting parties, especially for the weaker party of the contract, which in this case is the participant. Any conditions stipulated that potentially bring harm to the participants can be considered a violation of the *sharīʿah* principle.

In this regard, the stipulation of NLP is intended to sustain the coverage of the participant in case of the insufficient value of the certificate due to previously mentioned circumstances. It benefits the participant in the sense that the protection is guaranteed and it benefits the takaful operator in retaining the participant as its customer. It is a win-win situation in which both parties have benefited from the implementation of NLP; thus, it can be concluded that the NLP is considered non-violence to the *sharīʿah* principles, as it does not provide harm to the participant or to the takaful operator.

Issues in the Implementation of the No Lapse Provision Clause

Although it is agreeable that the implementation of NLP does not violate the *sharīʿah* principles, there are issues surrounding the implementation of the NLP by the takaful operator. These issues if not managed properly may trigger a bigger issue.

The treatment of debt owed by the participant to the takaful fund

The NLP will incidentally create a debt situation by the participant to the *tabarruʿ* fund. This is because, as illustrated earlier, the actual of *tabarruʿ* deduction, in the earlier years of inception of the certificate, may not be fully covered by the contribution payment, due to higher deduction for agency fees.

While the certificate is in force, if there is a debt created under the certificate, the debt is owed by the participant to the *Tabarru'* Fund. From the accounting perspective, *Tabarru'* Fund will recognise the debt as receivables.

Based on the indebtedness situation, the takaful operator will recover the debt from the participants. The followings are example of sources of payment of which the takaful operator will resort to in recovering the debt:

i. the cash value accumulated under the certificate, upon payment of subsequent takaful contributions; or

ii. the amount payable by the participant upon certificate revival; or

iii. the surrender value or maturity benefit, in the case when the certificate is surrendered or matured.

There is however a risk to the *Tabarru'* Fund not being able to recover the deferred amount should the affected takaful certificates have exceeded the revival period, or upon certificate-terminating events such as terminating claim payout, surrender or maturity, while still carrying the indebtedness. If the above scenarios occur, where the certificate does not have a sufficient amount to offset the debt, the Shareholder's Fund shall liable to make payment to the *Tabarru'* Fund for the debts created.

This situation has brought to the next discussion point that is the basis of the payment made by the shareholder fund to the takaful fund for the indebtedness situation created by the instances.

The compensation paid by the shareholder to takaful fund

In the sample of takaful operator studied, there is only one basis that grounded the implementaion of takaful operator in the compensation paid by the shareholder to takaful fund for the indebtedness situation created by the instances, and that is *hibah* (gift).

Hibah is a voluntary contract (*'aqd al-tabarru'*) where the giver voluntarily gives something to the beneficiary for any reason. It is a valid contract in *sharī'ah* and also an encouraged one based on the principle of maintaining relationship among friends and relatives. The Prophet Muḥammad (PBUH) has also reported to practice and praised those who practice *hibah* amongst His companions. The famous saying of the Prophet Muḥammad (PBUH) on this matter, "*Tahāddū taḥābbū* (give gifts and you will be loved)".

Based on the principle of *hibah*, the practice by the shareholder of the takaful company in the payment of debt by the participant to the takaful fund can be considered as compliant with *sharī'ah* principles.

Conclusion

The key takeaways from the above discussion are:

1. Customer retention is a vital business aspect in any takaful operation to maintain the sustainability of the takaful fund.

2. The value of the certificate may be insufficient to cover the actual amount of *tabarru'* deduction due to the following instances: 1- the lapse of payment by the participant; and 2- higher commission deduction in the earlier years of the certificate.

3. To retain the customer and to keep the certificate in-force so that the participants may enjoy the benefit of the takaful products, takaful operators have introduced no-lapse provisions (NLPs) for a certain period of time to the takaful participants.

4. NLPs are grounded on the principle of mutual agreement between the participant and the takaful operator that is non-violent to the *sharīʿah* contractual principles.

5. The NLP may incidentally create a debt situation for the participant in the *tabarruʿ* fund, and the debt amount needs to be established in terms of a mechanism of repayment of the debt. In this situation, the takaful operator is advised to establish clear guidelines in managing the debt repayment issues and the debt recovery process in case where the participant has inadvertently failed to settle the debt situation.

6. The proposed guidelines must also consider the issue of fairness to the takaful participants and the *tabarruʿ* fund, in which the incidental debt situation, in case of the earlier years of inception of the certificate where the deduction for the agency commission and fees is larger than the *tabarruʿ* deduction, is not caused by the participant himself. The mechanics of pricing competitiveness contribute to such situations.

7. An NLP can be considered as non-violent to *sharīʿah* principles.

8. As NLP is a necessary approach that deviates from the regular lapsation rules, the NLP would need to be disclosed and explained in the product documents, especially the product disclosure sheet (PDS).

GLOSSARY

ʿAlā Al-Fawr	Immediacy
ʿAlā Al-Tarākhī	Delay
ʿĀriyyah	Gratuitous loan
ʿAqd Al-Tabarruʿ	Voluntary contract
ʿUrf	Customary
ʿUrf Tijāriyy	The principle of customary practice amongst merchants
Adillah	The plural of Dalil, which means proofs and evidence
Akhdh	Take things
Akl Al-Māl Bi Al-Bāṭil	Devouring the property of others illegally
Al-ʿIfaʾ Bil-ʿUqud	Sanctity of the contract
Al-Ḥalf	Swearing
Al-Hibah	Gift
Al-Muslimūn ʿAlā Shurūṭihim	The principle of sanctity of contract
Al-Nikāḥ	The Islamic marriage contract
Al-Rahn	Pledge
Al-Ṣalāh ʿAlā Al-Janāzah	Offering a funeral prayer
Al-Salam	Advance sale
Al-Ṣarf	Currency exchange
Al-Tawliyah	Sale at cost
Badal Ḥajj	Substitute ḥajj

Bāṭil	Void
Bayʿ Al-Salam	Advance sale
Bayʿ Al-Ṣarf	Currency exchange
Daʿwah	The act of inviting or calling people to embrace Islam
Dalīl	Proof and evidence
Ḍamān	Liability/Guarantee
Ḍarūrah	Necessity
Faqd Al-ʿAql	Loss of reasoning
Farāʾiḍ	The Islamic Law of Succession
Fatwās	The plural of Fatwa, which means formal ruling or interpretation on a point of islamic law given by a qualified legal scholar
Fiqh	The in-depth understanding of the body os islamic law derived from its sources
Ghanīmah	Booty taken in battle in the form of weapons, horses, prisoners, and movable goods
Gharar	Uncertainty, ignorance and excessive speculation in a sale contract
Ghayr Lāzim	Non-binding
Ghulūl	Misappropriation
Ḥadīth	Corpus of the sayings or traditions of the Prophet Muḥammad (PBUH), revered by Muslims as a major source of religious law and moral guidance
Hadiyyah	Present
Ḥajj	The pilgrimage to Mecca prescribed as a religious duty for Muslims
Ḥarām	Prohibited
Hawālah	Transfer of debt from the transferor to the payor
Hibah Bi ʿIwaḍ	A gift whose giver stipulates that he expects compensation from the recipient

Hibah Ruqbah	Conditional gift
Hibah	To transfer possession of a tangible asset for free or without compensation
Hifz Al-Nafs	Preservation of life
Ḥusn Al-Ẓann	Good expectations
Iʿārah	A loan of a tangible asset
Ijāb	The offer
Ijārah	Leasing
Ijmāʿ	Unanimous consensus among the authoritative Islamic schol ars on an issue
Ijtihād	Reasoning or deduction based on authentic sources of Islamic Law
Iltizām	Commitment
Iltizām Bi Al-Tabarruʿ	Commitment to donate
Istiḥsān	To approve or to deem something preferable
Istinābah	Authorizing another person to do something as one's representative or delegate
Istiṣḥāb	Presumption
Istiṭāʿah	Possessing the means
ʿIwaḍ	Remuneration
Jāhiliyyah	The condition of ignorance, pre-Islamic period.
Juʿālah	Result-based wages contract
Kafālah	Guarantee
Kaffārah	Atonement
Kafīl	Guarantor
Khiyār	Option/The act of choosing; choosing whether to conclude the sale contract or cancel it
Khiyār Al-ʿAyb	Defect option
Khiyār Al-Istiḥqāq	Entitlement option
Khiyār Al-Kammiyyah	Quantity option

Khiyār Al-Majlis	Session option
Khiyār Al-Naqd	Cash price option
Khiyār Al-Naqīṣah	An Impairment option
Khiyār Al-Qabūl	Option of acceptance
Khiyār Al-Ru'yah	Inspection option
Khiyār Al-Sharṭ	Option of condition
Khiyār Al-Tadlīs	Option of deceit
Khiyār Al-Taghrīr	Option of fraud
Khiyār Al-Ta'khīr	Option of delay
Khiyār Al-Tarawwī	Option to reconsider
Khiyār Al-Tashhī	Option of desire
Khiyār Al-Tawliyyah	Option of at-cost sale
Khiyār Al-Ta'yīn	Appropriation option
Khiyār Faqd Al-Waṣf Al-Mashrūṭ	Option of losing the stipulated description
Khiyār Fawāt Waṣf Marghūb Fīh	Non-Conformity option
Khiyār Ijāzat 'Aqd Fuḍūlī	Option of permissible sale by an unauthorized person
Khiyār Iktilāf Al-Mutabāyi'ayn Fī Al-Thaman	Option of disagreement between the seller and the buyer on a price
Khiyār Kashf Al-Ḥāl	Discovery option/Option of status disclosure
Khiyār Khiyānah Murābaḥah	Treachery on murābaḥah option
Khiyār Li Al-'ajz 'an Thaman	Option for the inability to pay the price
Khiyār Li Al-Bā'i' li ẓuhūr ziyādat Al-Thaman Fī Al-Murābaḥah	Option for the seller because of increase in the price of murābaḥah

Khiyār Li Al-Imtināʿ Min Al-Wafāʾ Bi Al-Sharṭ Al-Ṣaḥīḥ	Option to refrain from fulfilling a correct condition
Khiyār Li Al-Khilf Fi Al-Ṣiffah Al-Mushtarī Li Ikhtilāṭ Al-Thamarah Al-Mabīʿah Bi Al-Mutajaddidah Qabl Al-Takhliyyah	Option for the buyer because of the sold fruit co-mingles with the renewed one before parting company
Khiyār Li Al-Taḥāluf Fīmā ʾIdhā Ittafaqā ʿAlā Ṣiḥḥat Al-ʿAqd	Option for oath pertaining to agreement of both parties on the validity of the contract
Khiyār Li Jahl Al-Ghāṣb Maʿa Al-Qudrah ʿAlā Intizāʿ Al-Maʿqūd Ālayh Min Al-Ghāṣib	Option for ignorance of usurpation with the ability to take back the subject matter from the usurper
Khiyār Li Jahl Kawn Al-Mabīʿ Muktarān ʾAw Mazrūʿan	The option for not knowing whether the thing sold is rented or planted
Khiyār Li Taghayyur Ṣiffah Mā Raʾāhu Qabl Al-ʿAqd	Option due to the change of attribute of what the buyer saw before the contract
Khiyār Li Taʿayyub Al-Thamarah Bi Tark Al-Bāʾiʿ Al-Saqiyy Baʿd Al-Takhliyyah	Option due to defective fruit by leaving the seller-waterer after parting company
Khiyār Li Ṭiryān Al-ʿajz ʿan Intizāʿihi Min Al-Ghāṣib	Option due to the inability to get back the subject matter from the usurper
Khiyār Tafarruq Al-Ṣafaqah	Option of separating the deal
Khiyār Tafrīq Ṣafaqah Bi Halāk Baʿḍ Mabīʿ	Option of Tafrīq Ṣafaqah (sale of two things in single transtion) with damaged some of the purchased item

Khiyār Taghrīr Fi'lī	Option of false act
Khiyār Takhbīr Al-Thaman	Option of informed price
Khiyār Ẓuhūr Al-Mabī' Musta'jaran 'Aw Marhūnan	Option because of the purchase is rented or collateralized
Khiyārāt	The plural of Khiyar, which means options
Khulu'	A separation between a husband and wife with a compensation (payment) given by the wife to her husband with the utterance of talak or khulu'
Lāzim	Binding
Lidhātih	Prohibited for itself
Lighayrih	Prohibited for an external factor
Ma'ḍūb	A state where a person is not capable to maintain his/her stability on a transportation without intense hardship
Majlis Al-'Aqd	Contracted session
Makrūh	Detestable
Māl	Property
Mandub	Recommended
Maqāṣid Al-Sharī'ah	Objectives of Islamic Law
Marhūn	Collateralized asset
Maṣlaḥah Mursalah	Consideration of public interest
Maṣlaḥah	Interest
Mu'āwaḍah	Contract of exchange; a contract in which something is given in exchange for something else
Mu'āmalāt	Commercial and civil acts or dealings under Islamic Law
Muḍārabah	Profit-sharing partnership
Mujtahid	Legal expert, or a jurist who expends great effort in deriving a legal opinion or interpreting the sources of the Islamic Law
Mujtahidūn	The plural of Mujtahid, which means legal expert, or a jurist who expends great effort in deriving a legal opinion or interpreting the sources of Islamic Law

Mukallaf	One held legally responsible for his/her acts
Muqallid	A person who entrusts another with the responsibility of research and understanding
Murūnah	Flexible
Musāqāt	Irrigation partnership
Mutashābihāt	Unclear matters between ḥalāl and ḥarām
Muwakkil	The principal
Muzāra'ah	Sharecropping
Nafādh	Concluding something and being done with it
Najash	Option of speculation
Naṣ	Either a Quranic verse or a clear, authentic, and explicit sunnah (practice or saying) of the Prophet (PBUH)
Nikāḥ	The Islamic marriage contract
Niyābah	Deputyship
Qabḍ	Possession
Qabūl	Acceptance
Qarḍ	Loan
Qismah	Division/Partition
Qiyās	Analogical reasoning, the fourth principal source of Islamic Law
Rahn Ḥukmī	Similar to Rahn Tasjīlī
Rahn Tasjīlī	Guarantee in the form of goods for debt, with the agreement that what is handed over to the guarantor is only valid proof of ownership, while the physical goods of the guarantee remain in the possession and use of the guarantor
Ribā	Interest obtained as a conditional excess of a loan

Ribawī	Transactions involving the six items contain the element of usury which is prohibited in Islam
Rukhṣah	Special dispensation from performing an obligatory act or from submitting to a prohibition, as a result of a mitigating circumstance
Rukn	A pillar
Ṣadaqah	A transfer of ownership during one's lifetime without compensation, seeking the pleasure of Allah
Shak	Doubt
Shara'	Laws of Islam
Sharī'ah	Islamic Law
Shirk	Ascribing a partner or rival to Allah
Shubuhāt	The plural of Shubhah, which means uncertain as to the ḥarām or ḥalāl of some things
Ṣulḥ Al-Mu'āwadāh	Mutual amicable solution
Ṣulḥ	Amicable solution
Sunnah	The documented and authenticated words, actions and tacit approval of the Prophet Muḥammad (PBUH)
Ta'āwun	Mutual assistance
Tabarru''	Donations/Contributions to the takaful risk fund
Takyīf Fiqhī	Fiqh adaptation
Takyīf	Adaptation
Talaqqī Al-Rukbān	Meeting caravans (before they reach the market)
Ta'līq	Tie up a marriage with a condition
Tarāḍiyy	Mutual consent
Taṣriyah	Leaving an animal unmilked before selling it
Udḥiyah	Sacrificial offering animal
Ujrah	Service for a fee
'Uqūd Al-Mu'āwaḍāt	Exchange contracts
'Uqūd Al-Tabarru'āt	Gratuitous contracts

Wa‘d	Promise
Wa‘d Mulzim	Unilateral binding promise
Wadī‘ah	Safekeeping
Wajh Al-Dalālāt	Forms of textual implication
Waqf	Endowment
Wakālah	A contract whereby a person authorizes another to do a certain well-defined legal action on his behalf
Wakālah Bi Al-Istithmār	Principal-investment agent
Wakālah Bi Al-Ujrah	The charge imposed upfront according to the percentage of contribution paid as participant appoints takaful operator to manage tabarru‘ fund
Waṣī	Executor and guardian
Waṣiyyah	A charitable transfer of wealth, either tangible property or usufruct, to be effective after the death of the donor

REFERENCES

Al-Qur'ān al-Karīm

ʿAlā'uddīn al-Bukhārī, A. A. (n.d.). *Kashf al-Asrār Sharḥ Uṣūl al-Bazdawī*. Beirut, Lubnan: Dār al-Kitāb al-Islamī.

ʿAlisyh, M. B. (1989). *Manḥ al-Jalīl Sharḥ Mukhtaṣar Khalīl*. Beirut, Lubnan: Dār al-Fikr.

Abū Dāwūd, S. B.-A. (2000). *Sunan Abī Dāwūd*. Cairo, Egypt: Jamʿiyyah al-Maknaz al-Islāmī.

Abū Dāwūd. (2009). *Sunan Abi Dāwūd*. Beirut: Dār al-Risālah al-ʿĀlamiyyah.

Abū Ghuddah, ʿAbd al-Sattār. (1985). *Al-Khiyār wa Atharuhu fī al-'Uqūd* (2nd.). Maṭbaʿah Maqhawī.

Affanah, Husamuddin bin Musa (2010). Book of Fatawa, *Sharṭ al-Jazā'i*. al-Maktabah al-Shāmilah *https://shamela.ws/book/10517/620#p5*

Ahmad Basri, I., & Ahmad Fadhil Hamdi, M. A. (2015). Absolute Assignment in the Takaful Industry: Shari'ah Contracts, Issues and Solutions. *Intellectual Discourse*, *23*(Special Issue), 507–528.

Aḥmad, I. H. (n.d.). *Musnad Aḥmad*.

Al-'Uthaymīn, M. b. (n.d.). *Al-Qawl al-Mufīd Sharḥ Kitāb al-Tawḥīd* (Vol. 3). Dār al-ʿĀsimah.

Al-Anṣārī, Z. bin M. (1997). *Tuḥfat al-Ṭullāb bi Sharḥ Matn Taḥrīr Tanqiḥ al-Lubāb fī Fiqh al-Imām al-Shāfiʿī*. Dār al-Kutub al-ʿIlmiyyah.

Al-Bahūtī, M. bin Y. (2008). *Kashāf al-Qināʿ ʻan Matan al-Iqnāʿ*. Wizārat al-ʿAdl fī al-Mamlakat al-ʿArabiyyah al-Suʿūdiyyah.

Al-Baʿlī, M. bin A. al-F. bin A. al-F. (2003). *Al-Muṭliʿ ʻalā al-Alfāẓ al-Muqniʿ*. Maktabah al-Sawādī li al-Tawzīʿ.

Al-Bukhārī, A. A.-M. (2001). *Ṣaḥīḥ al-Bukhārī*. Cairo, Egypt: Jam'iyyah al-Maknaz al-Islami.

Al-Bukhārī, M. bin I. (n.d.). *Ṣaḥīḥ al-Bukhārī*. Al-Maktabah al-Salafiyyah.

Al-Bukhārī, M. bin I. A. A. A. (n.d.). *Saḥīh al-Bukhārī*, 1st edition. Dār Ṭawq al-Najāh.

Al-Bukhārī, Muḥammad Bin Ismail (1987), *Saḥīh al-Bukhārī*, 3rd edition. Dār Ibn Kathīr, Beirut.

Al-Dāraquṭnī, A. al-H. A. bin U. bin A. bin M. bin M. bin al-N. bin D. al-B. (2004). *Sunan al-Dāraquṭnī*. Beirut: Mu'assasah al-Risālah.

Al-Dubyān, A. ʿUmar D. bin M. (n.d.). *Al-Muʿāmalāt al-Māliyyah Aṣālah wa Muʿāṣarah*. Maktabah al-Malik Fahd al-Waṭaniyyah.

Al-Dusūqī, M. bin A. (n.d.). *Ḥāshiyah al-Dusūqī ʻalā al-Sharḥ al-Kabīr*. Dār al-Fikr.

Al-Ghazzālī, A. H. (2005). *Ihyā' 'Ulūm al-Dīn*. Beirut, Lubnan: Dār Ibnu Hazm.

Al-Hamawī, A. B.-A.-H. (1985). *Ghamz 'Uyun al-Baṣāir fī Sharḥ al-Ashsbāh wa al-Naẓā'ir*. Beirut, Lubnan: Dār al-Kutub al-ʿIlmiyyah.

Ali, S. S. (2007). Islamic Capital Markets Products, Regulations and Development. In *Islamic Economic Studies* (Vol. 15).

Al-Kandahlawī, M. Y. (1975). *Al-Kawkab al-Durrī ʿalā Jāmiʿ al-Tirmidhī*. Laknhow: Nadwah al-ʿUlamaʾ.

Al-Kāsānī, A. B. bin M. (1986). *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*. Dār al-Kutub al-ʿIlmiyyah.

Al-Khaṭṭābī, S. b. (1932). *Maʿālim al-Sunan Sharḥ Sunan Abū Dāwūd*. (M. R. al-Thabbakh, Ed.) Halab: t.pt.

Al-Marāghī, A. M. (2006). *Tafsīr al-Marāghī*. Beirut, Lubnan: Dār al-Kutub al-Islāmiyyah.

Al-Mardawī. (n.d). *Al-Inṣāf fī Maʿrifah al-Rājiḥ min al-Rājiḥ*. Beirut, Lubnan: Dār Iḥyāʾ al-Turāth al-ʿArabī.

Al-Maruzī, I. b.-K. (2004). *Masāʾil al-Imām Aḥmad bin Ḥanbal wa Isḥāq Bin Rāhawayh bi Riwāyah Isḥāq bin Manṣūr al-Kusaj al-Marūzī*. Riyadh, Saudi Arabia: Dār al-Hijrah.

Al-Miṣrī, I. N. (1997). *Reliance of the Traveler: A Classic Manual of Islamic Sacred Law* (N. H. M. Keller (ed.)). Amana Publications.

Al-Nawawī, A. Z. M. al-D. Y. bin S. (2001). *Al-Majmūʾ Syarḥ al-Muhadhdhab maʿa Takmilah al-Subkī wa al-Muṭīʿī*. Beirut: Dār al-Fikr.

Al-Nawawī, A. Z. M. al-D. Y. bin S. (1991). *Rawḍat al-Ṭālibīn wa ʿUmdat al-Muftīn*. Beirut, Lubnan: al-Maktab al-Islāmī.

Al-Nawawī, A. Z. M. al-D. Y. bin S. (n.d). *Al-Majmūʾ Syarḥ al-Muhadhdhab*. Jeddah, Saudi Arabia: Maktabah al-Irsyad.

Al-Qaraḍāwī, Y. (2003). *The Lawful and The Prohibited in Islam (1st edn.)*. London: al-Birr Foundation.

Al-Rūyānī, ʿAbd al-Wāḥid bin Ismāʿīl. (2009). *Baḥr al-Muhadhdhab (fī Furūʿ al-Madhhab al-Shāfiʿī)*. Dār al-Kitāb al-ʿIlmiyyah.

Al-Ṣanʿānī, A. B. ʿAbd al-R. bin H. (2013). *Al-Muṣannaf*. Dār al-Taʾṣīl.

Al-Sarakhsī, M. ibn A. (2001). *Kitāb al-Mabsūt* (Vol. 13). Dār al-Kutub al-ʿIlmiyyah.

Al-Shāfiʿī, A. ʿAbdillah M. bin I. bin al-ʿAbbās bin ʿUthmān bin S. (1990). *al-Umm*. Beirut: Dar al-Maʿrifah.

Al-Shawkānī, M. B. (1993). *Nayl al-Awṭār*. Cairo, Egypt: Dār al-Ḥadīth.

Al-Shikh, S. b.- ʿ. (n.d.). *Sharḥ Matan al-Waraqāt li al-Juwaynī*.

Al-Shirbīnī, M. B.-K.-S. (2004). *Al-Iqnāʿ fī Ḥall Alfāẓ Abī Shujāʿ*. Beirut, Lubnan: Dār al-Kutub al-ʿIlmiyyah.

Al-Shirbīnī, M. bin A. al-K. (1994). *Mughnī al-Muḥtāj ilā Maʿrifat Maʿanī Alfāẓ al-Minhāj*. Dār al-Kitāb al-ʿIlmiyyah.

Al-Subkī, T. A.-H.-K. (n.d.). *Takmilah al-Majmūʿ*. Jeddah, Saudi Arabia: Maktabah al-Irshād.

Al-Suyūṭī, J. al-D. A. al-R. ibn A. B. ibn M. (1983). *Al-Ashbāh wa al-Naẓāʾir fi al-Furūʿ Fiqh al-Shāfiʿiyyah*. Beirut: Dār al-Kutub al-ʿIlmiyyah.

Al-Tirmidhī, A. I. (2000). *Sunan al-Tirmidhī*. Cairo, Egypt: Jamʿiyyah al-Maknaz al-Islamī.

Al-Wahhāb, M. B. (n.d). *Kashf al-Shubuhāt*. Saudi Arabia: Dār al-Īmān.

Al-Zarqānī, M. bin ʿAbd al-B. bin Y. (2003). *Sharḥ al-Zarqānī alā Muwaṭṭaʾ al-Imām Mālik*. Maktabah al-Thaqāfah al-Dīniyyah.

Al-Zaylāʿī, ʿUthmān bin ʿAlī. (n.d.). *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq wa Ḥāshiyah al-Shilbiyy*. Maṭbaʿah al-Kubrā al-ʾAmīriyyah.

Al-Zuḥaylī, Wahbah (n.d.). *Al-Fiqh al-Islāmī wa Adillatuhu*. Dār al-Fikr.

Al-Zuhaylī, Muḥammad Mustafa (2006). Islamic Legal Maxims and its Applications in Four Mazhabs (*al-Qawāʿid al-Fiqhiyyah wa Tatbiqātuha fī al-Madhāhib al-ʿArbaʿah*), Damshik: Dār al-Fikr.

Al-Zuḥaylī, Wahbah. (2007). Financial Transactions in Islamic Jurisprudence Second Edition. Dār al-Fikr.

Arbouna, M. B. (2004). Option Contracts and the Principles of Sale of Rights in *Sharīʿah* . In S. S. Ali & A. Ahmad (Eds.), *International Conference on Islamic Banking and Finance* (Issue 47).

Azman, I. (2009). Nomination and *Hibah* Issues in the Takaful Industry. *ISRA Shari'ah Conference on Takaful 2009 (ISC2009).*

Azrak, T. (2016). An Analysis of Reputational Risks in Islamic Banks in Malaysia and proposed Conceptual Framework. *Al-Shajarah, Journal of Islamic Thought and Civilization of IIUM*, Special Issue: Islamic Banking & Finance.

BNM. (2010). *Shariah Resolutions in Islamic Finance* (2nd ed.). Bank Negara Malaysia.

BNM. (2013a). Bai``Inah (Shariah Requirements and Optional Practices). *Islamic Banking and Takaful Department, December*, 1–20.

BNM. (2013b). Murabahah Policy Document. In *BNM/RH/STD 028-4*. Bank Negara Malaysia.

BNM. (2015a). Istisna` Policy Document. In *BNM/RH/PD 028-1*. Bank Negara Malaysia.

BNM. (2015b). Tawarruq Policy Document. In *BNM/RH/PD 028-8*. Bank Negara Malaysia.

BNM. (2018). Bai` al-Sarf (Currency Exchange) Policy Document. In *BNM/RH/PD 028–74*. Bank Negara Malaysia.

BNM. (2018). Rahn Policy Document. In *BNM/RH/PD 028-79*. Bank Negara Malaysia.

Demetriades, D. G., Effendi, I. H., & Tyser, C. R. (2000). *The Mejelle*. Islamic Book Trust.

Elahi, Y., & Aziz, M. I. A. (2011). Islamic Options (al-Khiyarat): Challenges and Opportunities. *2011 International Conference on Information and Finance*, *IPEDR*(2011), 101–104.

Financial Services Act, (2013). http://www.bnm.gov.my/index.php?ch=en_legislation&pg=en_legislation_act&ac=221&full=1&lang=en

Habib ur Rahman, M., Amanullah, M., & Mohiuddin, M. (2017). Khiyar Al-Majlis (Option of Withdrawal before Parting) in Sale Contract Contemporary Applications. *Turkish Journal of Islamic Economics*, *4*(2), 37–50. https://doi.org/10.26414/tujise.2017.4.2.37-50

Hairul Azlan, A. S. (2004). Al-Wakālah and Its Impact on The Growth and Performance of Takaful Companies: A Malaysian Case. The European Journal of Management and Public Policy, 3(1):82-117.

Ḥāmidī, D. A. (n.d). *Muḥaḍarāt fi Qawā'id Tafsīr al-Nuṣūṣ*. t.tp: t.pt.

Ḥusayn, Y. B.-W. (2001). *Rafʿ al-Ḥaraj fi al-Sharīʿah al-Islāmiyyah Dirāsah Uṣūliyyah Ta'ṣīliyyah*. Riyadh, Saudi Arabia: Maktabah al-Rushd.

Ibn ʿĀbidīn, I. (2000). *Ḥāsyiah Ibn Ābidīn Radd al-Mukḥtār ʿalā al-Durr al-Mukhtār*. Dimashq, Syria: Dār al-Thaqāfah wa al-Turāth.

Ibn ʿArafah, Muḥammad bin Muḥammad. (n.d) *al-Mukhtasar al-Fiqhī* 1st ed. Vol. 7. Mu'assasah Khalaf Aḥmad al-Khabtur.

Ibn ʿĀbidīn, M. A. bin ʿUmar. (1966). *Radd al-Mukhtār ʿalā al-Durr al-Mukhtār* (Vol. 6). Sharikah Maktabah wa Maṭbaʿah Muṣtafā al-Bābī al-Ḥalabī wa Awlāduhu.

Ibn Baṭṭāl, A. a.-H.-M. (2003). *Sharḥ Ṣaḥīḥ al-Bukhārī*. Riyadh, Saudi Arabia: Maktabah al-Rushd.

Ibn Daqīq al-ʿEid, Muḥammad bin Ali. (2003). *Sharḥ al-Arbaʿīn al-Nawawiyyah fī al-ʿAḥādith al-Ṣaḥīḥah al-Nabawiyyah*. Muassasah al-Rayyān.

Ibn Juzay, I. (1982). *Al-Qawāʿid al-Fiqhiyyah*. Libya: Dār al-ʿArabiyyah li al-Kutub.

Ibn Mājah, A. A. A. M. bin Y. al-Q. I. (2009). *Sunan Ibn Mājah*. Dār al-Risālah al-ʿĀlamiyyah.

Ibn Manẓūr, M. ibn al-M. (2000). Ikhtiyār. In *Lisān al-ʿArab*. Dār Sader.

Ibn Mufliḥ, M. bin M. bin M. (2003). *Kitāb al-Furūʿ wa maʿahu Taṣḥīḥ al-Furūʿ li ʿAlāʾ al-Dīn ʿAlī bin Sulaymān al-Mardāwī*. Muʾassasah al-Risālah.

Ibn Nujaym, Z. al-ʿĀbidīn I. (n.d.). *Al-Baḥr al-Rāiq Sharḥ Kanz al-Daqāiq*. Dār al-Kitāb al-Islāmī.

Ibn Qudāmah, A. M. ʿAbd A. bin A. bin M. (1997). *Al-Mughnī*. Dār ʿĀlam al-Kutub li al-Ṭibāʿah wa al-Nashr wa al-Tawzīʿ.

Ibn Qudamah. (1985). *al-Mughnī*. Beirut: Dār Ihyaʾ al-Turāth al-ʿArabiyy.

Ibn Rushd, A. al-W. M. bin A. (1988). *Al-Muqaddimāt al-Mumahhidāt*. Dār al-Gharb al-Islamī.

Ibn Rushd, A. al-W. M. bin A. (2004). *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. Dār al-Ḥadīth.

Ibn Rushd, M. (1997). *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. Beirūt: Dār al-Maʿrifah.

Ibn Taymiyyah, T. al-D. A. bin ʿAbd al-Ḥalīm. (n.d.). *Majmūʿ al-Fatāwā*. Maktabah al-Ṣafā.

Insuranceopedia. (2016). *Free Look Period*. https://www.insuranceopedia.com/definition/2046/free-look-period#:~:text=Insuranceopedia%20Explains%20Free%20Look%20Period%20Depending%20on%20the,period%20is%20required%20for%20policies%20offered%20via%20mail.

Insuranceopedia. (2022). *Absolute Assignment*. https://www.insuranceopedia.com/definition/551/absolute-assignment

Islamic Financial Services Act, (2013).

Jād Allāh, S. bin M. (2019). *Al-Ikhtiyārāt al-Fiqhiyyah li Shaykh al-Islām Ibn Taymiyyah ladā Talāmīdhuhu*. Dār ʿAṭāʾāt al-ʿIlm.

Jamal, M. A. (2010). *Takaful Agent Must Foster Public Understanding of Takaful*. Kuala Lumpur, Malaysia: IBFIM.

Jodi, K. H. M. & Hussain, F. Ch. (2017). *Bunuh Diri; Tekanan, Desakan atau Kecelaruan? Majalah Dakwah* (Mac/April): 56–58.

Kamali, M. H. (1997). Islamic Commercial Law: An Analysis of Options. *The American Journal of Islamic Social Sciences*, *14*(3), 17–37.

Karim, H. (1997). *Fiqh Mu'amalah*. Jakarta, Indonesia: Rajawali Pers.

Khairul Anuar, A. (2016). The Analysis of Some Principles of Muʿāmalāt and Their Application To Islamic Banking Products: An Approach To Risk Mitigation. *E-Proceedings IRSYAD 2016*.

Lane, E. W. (1968). Khiyār. In *An Arabic-English Lexicon*. Librarie du Liban.

M Quraish, S. (2002). *Tafsir al-Misbaḥ*. Jakarta, Indonesia: Perpustakaan Umum Iman Islam Jama.

M. Adib, Mohammad Majd Bakir, *https://www.investment-and-finance.net/islamic-finance/tutorials/uqud-lāzimah-and-uqud-ghair-lāzimah.html*

Md Husin, M. & Ab Rahman, A. (2016). Do Muslims Intend to Participate in Islamic Insurance?: Analysis from Theory of Planned Behaviour. *Journal of Islamic Accounting and Business Research*. doi:10.1108/JIABR-03-2014-0012

Mohd Murshidi, M. N., Suliaman, I., Ahmad, K., Deraman, F., Abdullah, M., Ahmad Shah, F., Yakub, M., Mohd, Z. Y., Abd Razzak, M. M., Meftah, J. T., Ariffin, S., Kasar, A. K., & Mohd Nor, M. R. (2013). The Rights of Khiyar (option) in the Issue of Consumerism in Malaysia. *Middle East Journal of Scientific Research*, *13*(2), 154–161. https://doi.org/10.5829/idosi.mejsr.2013.13.2.1766

Mubārak Āli Sayf, ʿAbd Allāh. (2013). *Thubūt Khiyār al-Sharṭ fī Kulli al-ʿUqūd*. Shabakah Al-Alūkah. https://www.alukah.net/*Sharīʿah*/0/59049/ثبوت-خيار-الشرط-في-كل-العقود/#_ftn23

Muḥammad al-Amīr. (n.d.). *Al-Iklīl Sharḥ Mukhtasar al-Khalīl*. Cairo, Egypt: Maktabah al-Qaherah.

MUI, D. (2008). Rahn Tasjily. In *Fatwa DSN MUI tentang Rahn Tasjily*. Dewan Syariah Nasional MUI.

Muslim, bin al-Ḥajjāj A. al-H. al-Q. (n.d.). *Ṣaḥīḥ Muslim*. Beirūt: Dār Iḥyāʾ al-Turāth al-ʿArabī.

Muslim, M. B.-H.-Q.-N. (2006). *Ṣaḥīḥ Muslim*. Riyadh, Saudi Arabia: Dar Thayyibah li al-Nasyr wa al-Tawzi.

MyInsuranceClub.Com. (2022a). *Absolute Assignment of a Life Insurance Policy*. MyInsuranceClub.Com Web Page. https://www.myinsuranceclub.com/guides/absolute-assignment-of-a-life-insurance-policy

MyInsuranceClub.Com. (2022b). *Conditional Assignment of a Life Insurance Policy*. MyInsuranceClub.Com Web Page. https://www.myinsuranceclub.com/guides/conditional-assignment-of-a-life-insurance-policy#:~:text=Conditional Assignment means that the Transfer of Rights,get transferred from the Assignor to the Assignee.

Nik Abdul Rahim Nik Abdul Ghani, Nurul Ilyana Muhd Adnan, Ahmad Dahlan Salleh, Salmy Edawati Yaacob, Rubayah Yaacob & Hendon Redzuan. (2018). Analisis Hukum Penggunaaan Dana Zakat Untuk Pembangunan Model Takaful Mikro. *Jurnal of Contemporary Islamic Law* Vol. 3 (2).

Obaidullah, M. (2001). Islamic Risk Management: Towards Greater Ethics and Efficiency. *International Journal of Islamic Financial Services*, *3*(4), 1–18.

Rahman, A. A., Ahmad, W. M. W., Mohamad, S. & Muhamad, R. 2012. *Insurability and Suicide: Sharīʿah Issues in Underwriting. Procedia - Social and Behavioral Sciences* 65(ICIBSoS): 593–601. doi:10.1016/j.sbspro.2012.11.170

Razali, Siti Salwani. (2008). *The Concept of Wa'ad in Islamic Financial Contract*. Islamic Banking, Accounting and Finance Conference (iBAF 2008). Faculty of Economics and Muamalat, Universiti Sains Islam Malaysia. *https://www.iefpedia.com/english/wp-content/uploads/2010/02/The-Concept-of-Waad-in-Islamic-Financial-Contract.pdf*

Saiful Azhar, R., Sanusi, M. M., & Mohd Yasin, N. (2000). The Role Of Khiyar Al-'Ayb In Al-Bay' Bithaman Ajil Financing. *International Journal of Islamic Financial Services*, *2*(3), 1–9.

Salamah, Y. A. al-R. S. 2003. *Aḥkām al-Istitāʿah fī al-Ḥajj fī Ḍaw' al-Mustajiddāt al-Muʿāṣirah*. Jamīʿah al-Najāḥ al-Wataniyyah.

Ṣāliḥ, A. b. (2007). *Taysīr al-ʿAllām Sharḥ ʿUmdat al-Aḥkām*. Saudi Arabia: Dār al-Mughnī.

Selim, M. (2013). *Providing Insurance Products by Issuing Sukuk with Joint Ownership and Risk Sharing*. 9th Asian Business Research Conference.

Sharifuddin, N., Padil, H. M., Rahim, A. R. A., Mazlan, M. A., Akahsah, N. M. & Hamid, S. S. S. (2020). *Pemansuhan Jenayah Cubaan Bunuh Diri di Bawah Seksyen 309 Kanun Keseksaan: Bersediakan Malaysia?* INSLA E-Proceedings. Nilai: USIM.

Takaful Ikhlas. (n.d.). *Ikhlas Preferred Term Takaful*. Takaful Ikhlas Berhad.

The Law Dictionary. (2022). *Legal Entity*. *https://thelawdictionary.org/?s=legal+entity*

Wizārat al-Awqāf wa al-Shuʾūn Al-Islāmiyyah. (1983). *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*. Wizārat al-Awqāf wa al-Shuʾūn al-Islāmiyyah.

World Health Organization. (2021). *Suicide Worldwide in 2019: Global Health Estimates. World Health Organization, Geneva*. Retrieved from https://apps.who.int/iris/rest/bitstreams/1350975/retrieve

https://asyrafuddin.com/2021/08/31/cara-hidupkanreinstate-polisi-takaful-yang-telah-lapsedlu

https://dorar.net/feqhia/3097/%D8%A7%D9%84%D9%81%D8%B5%D9%84-%D8%A7%D9%84%D8%AB%D8%A7%D9%86%D9%8A:-%D8%A7%D9%84%D9%86%D9%8A%D8%A7%D8%A8%D8%A9-%D8%B9%D9%86-%D8%A7%D9%84%D9%85%D9%8A%D8%AA

https://islamweb.net/ar/library/index.php?page=bookcontents&idfrom=4272&idto=4274&bk_no=14&ID=2797&msclkid=ca1367e1b4f211ecaebcba5d73cc6403

https://shamela.ws/book/587/373?msclkid=9ba598aab4f811ecbd1fd0bb2bd871ab

https://shamela.ws/book/9849/1277?msclkid=9ba5b153b4f811ecafcc659661b0241f

https://www.altafsir.com/Books/Al_Jalalain_Eng.pdf

https://www.ammetlifetakaful.com/Support/Certificate-Servicing-Process.aspx

https://www.islamweb.net/ar/fatwa/100554/%D8%AD%D9%83%D9%85-%D8%A7%D9%84%D9%88%D8%B5%D9%8A%D8%A9-%D8%A8%D8%A7%D9%84%D8%AD%D8%AC?msclkid=6e60b05cb4f711ecb918eb2b0f4699c8

https://www.takafulmalaysia.com.my/products/family/Documents/myterm/Takaful_myTerm_FAQ_ENG.pdf

CONTRIBUTOR'S PROFILE

Dr. Khairul Anuar Ahmad currently serves as senior lecturer at Universiti Islam Selangor (UIS). He holds a Bachelor's Degree in Shariah from University of Malaya and obtained his Master's Degree in Shariah from the same university. He then obtained his PhD in Islamic Banking and Finance from International Islamic University of Malaysia (IIUM). His specialised areas are *fiqh al-muʿāmalāt* (Islamic law of transaction) as well as Islamic economics and banking. Dr. Khairul Anuar was appointed as Shariah Committee of OCBC Al-Amin in April 2021 and currently the Chairman of Shariah Committee of OCBC Al-Amin since January 2022. He also serves as a Group Shariah Committee member of MNRB Holding Bhd, Shariah Adviser for Kopsya Angkasa Bhd, and Afsha Shariah Advisory Sdn Bhd. Dr. Khairul Anuar previously served as the Shariah Committee member of HSBC Amanah Berhad and FWD Takaful Bhd.

Mr. Rofaizal Ibhraim currently serves as a lecturer at Universiti Islam Selangor (UIS). He holds a Bachelor's Degree in Shariah law from the International University of Africa, Sudan and obtained his Master of Business Administration (Islamic Banking) degree from the National University of Malaysia. He is now pursuing his PhD at the same university. His specialised areas are sharīʿah, fiqh al-muʿāmalāt (Islamic law of transaction) as well as Islamic banking and finance. Prior to joining academia, he served as a Shariah officer at Aftaas Syariah Advisory Sdn Bhd and Kopsya Angkasa Bhd. Mr. Rofaizal was appointed as Shariah Committee of OCBC Al-Amin in October 2022. He is also serves Koponas Bhd, Kopsya Angkasa Bhd, and Afsha Shariah Advisory Sdn Bhd as a Shariah Adviser.

Dr Nik Abdul Rahim Nik Abdul Ghani is a senior lecturer at the Research Centre for Shariah, Faculty of Islamic Studies at Universiti Kebangsaan Malaysia (UKM). Dr Nik Abdul Rahim received his bachelor's degree in Shariah from Islamic University of Medina in 2003 and master's degree in Shariah from UKM in 2009. He then obtained his PhD in Islamic Finance from the International Centre for Education in Islamic Finance (INCEIF) in 2017. His specialised areas are sharīʿah, fiqh al-muʿāmalāt (Islamic law of transaction) as well as Islamic banking and finance. He was appointed as a member of the Maybank Islamic Berhad Shariah Committee in September 2020. Currently, he serves as a member of the Shariah Advisory Body of Syarikat Takaful Malaysia Keluarga Berhad, Jawatankuasa Perundingan Hukum Syarak Wilayah Persekutuan - Pejabat Mufti Wilayah Persekutuan, Syariah Advisory Panel of Wasiyyah Shoppe Berhad, and Shariah Committee of UKM.

Assoc. Prof. Dr. Ahmad Zaki Salleh is currently an associate professor and Deputy Dean (Research and Innovation) at the Faculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM). He received his first degree in Shariah from al-Albayt University, Jordan and a Master Degree and Ph.D in Fiqh and Usul Fiqh from International Islamic University Malaysia (IIUM). His areas of specialisation are fiqh al-muʿāmalāt, Islamic banking and takaful, and Islamic capital market. Previously, he was appointed as the Chairman of Shariah Committee for Bank Simpanan Nasional (BSN) (2011-2019) and Muamalat Expert Panel Member at Jabatan Kemajuan Islam Malaysia (JAKIM) (2016-2018). Currently, he serves as Shariah Committee member for PruBSN Takaful (2015-present), Shariah Consultant at International Islamic Finance & Insurance (IIFIN) (2011-present), and Member of the International Halal Foundation Academic Council (2016-present).

Assoc. Prof. Dr. Mohamad Zaharuddin Zakaria is currently an associate professor at Faculty of Shariah and Law, Universiti Sains Islam Malaysia (USIM). He obtained his first degree in Shariah and Judiciary from USIM, Master of Shariah Judiciary from University of Jordan and PhD in Fiqh and Usul Al-Fiqh (Shariah) from International Islamic University Malaysia (IIUM). His areas of interest are fiqh al-muʿāmalāt, Islamic banking and finance, Islamic capital market, Islamic wealth management, Islamic legal maxims, and Islamic jurisprudence. He was appointed as Shariah Committee member of BSN Malaysia since June 2016 and later has been appointed as the Chairman of Shariah Committee since June 2020.

INDEX

C

D

E

F

G

H

I

N

O

P

R

S

W

SELECTED SHARIAH CASE STUDIES
on Takaful Business and Operation in Malaysia

Selected Sharīah Case Studies on Takaful Business and Operation in Malaysia is an insightful exploration of the business and operations of takaful. Focusing on the Malaysian context, this book presents a collection of selected case studies that shed light on the sharī'ah issues concerning the business and operation which might not have been noted by some takaful players. To be sure, this book is aimed at a wider readership including industry and non-industry players as Islamic finance has much to offer to all, regardless of religious orientation or background.

The book is divided into ten chapters, wherein each chapter is structured in a uniform manner, with sections for introduction, concept, application, sharī'ah and operational issues, and conclusion. The writing style is structured in such a way as to facilitate the readers in distinguishing between different sections of a topic.

As a matter of fact, there are many small and big issues surrounding takaful industry in Malaysia. Nevertheless, due to time constraint, the authors managed to write ten topics or case studies namely Absolute Assignment in the Takaful Industry, The Application of Khiyār in the Free Look Period, Contribution from Non-Halal Occupation and Income in Takaful, Distribution of Takaful Products by Dual Agency from Sharīah Perspective, Takaful Coverage of Suicide, The Practice of Interim Coverage in the Takaful Industry, Reinstatement from the Sharī'ah Point of View, Discounted Contribution from the Sharī'ah Perspective, and The Practice of No Lapse Facility in the Takaful Industry. Each case study is presented in a clear and accessible format, with a brief overview of the situation, an analysis of the issues involved, discussion of the research outcomes, and area of further research. Throughout the book, the authors draw on their extensive knowledge and experience of the takaful industry, and provide a wealth of practical advice and guidance for practitioners, researchers, students of Islamic finance, and ordinary readers.

Selected Sharīah Case Studies on Takaful Business and Operation in Malaysia is an important and timely contribution to the literature on Islamic finance and takaful in particular. The book offers a unique and valuable perspective on the issues and challenges facing takaful operators regarding their business and operations and provides readers with a deep understanding of the principles and practices of this important and rapidly growing industry.

e ISBN 978-629-7518-15-2

9 786297 518152

PENERBIT KUIS
KOLEJ UNIVERSITI ISLAM ANTARABANGSA SELANGOR