



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

Legal Aspects of Islamic Finance

LAB4112

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Contents

- Takaful Act 1984
- IFSA 2013

Takaful Act 1984

- S 4 of the TA- takaful operators only
- 1. Company 2. Cooperatives Society.
- In order to carry on takaful business the TO must:-
 - 1. registered under the Act.
 - 2. Maintains a surplus of assets over liabilities of not less than the amount prescribed from time to time.
 - 3. made deposit with the Accountant General a value of not less than the amount prescribed by the minister

Cont...

- S8- DG responsible for registration S10- DG may impose conditions for registration.
- S 8(5)- Vital Section- DG must be satisfied that the aims and operations –syariah principles.
- The AOA to establish SSC.
- S 16- TO shall establish and maintain a takaful fund in respect of each classes of takaful business.

Maintains a surplus of assets over liabilities

- Takaful (Surplus of Assets over liabilities) Regulations 1985.
- Family Solidarity Business- RM5 million
- Takaful Business- RM10 million.

Made deposit with the Accountant General

- Takaful Statutory Deposits Regulations 1985.
- Not less than RM300,000.00
- TO must pay annual registration fee to BNM.
- FSB or GB- RM2500.00
- FSB and GB- RM5000.00

IFSA 2013

- IFSA 2013 and Takaful
- For stability
- More power to BNM
- To protect consumers
- To strengthen shariah governance
- Heavy penalty

Scope of IFSA 2013 and Takaful

- 1. Prudential Matters and Corporate Governance
- 2. Shariah Governance
- 3. Business Conduct and Consumer Protection

Definition

- **‘Retakaful’** now also covers arrangement between head office and branch
- **‘Senior officer’** is statutorily defined and covers everyone having authority and responsibility for planning, directing or controlling the activities of a TO; excluding the Shariah Committee
- **‘Shariah Committee’** is formally required – with governance framework, statutory duties and privileges similar to actuaries and auditors (no longer just a Syariah advisory body)

Definition

- **‘Takaful certificates’** are expanded; whereby issuing a takaful certificate shall be construed as entering into a contract of takaful, whether or not a formal contract has been issued
- **‘Takaful contribution’**, which was mentioned only once in the TA, is now extensively mentioned and regulated under the IFSA

Legal Form

- International takaful business (by international takaful operator), which is previously governed under Part IIA of the Takaful Act, continues to exist under the IFSA – no such business or operator under the FSA for conventional insurers
- All takaful operators have to separate family takaful and general takaful businesses within 5 years from Appointed Date
- All takaful operators have to be a ‘public’ company within 12 months from Appointed Date

Takaful Certificate

- S. 140, IFSA – Schedule 8 sets out provisions relating to takaful certificates

Pre-Contractual Duty of Disclosure

- **S. 141, IFSA – Schedule 9** : Sets out the pre-contractual duty of disclosure and representations for contracts of takaful in Part 2, and the remedies for misrepresentations relating to contracts of takaful in Part 3
- Breach of duty of disclosure under paragraph 11 of Schedule 9 is punishable with imprisonment not exceeding five years or fine not exceeding ten million ringgit or both.

**Note that Schedule 9 explicitly states that it does not have retrospective effect*

Payment of Takaful Benefits

- **S. 142, IFS – Schedule 10**
- sets out provisions for the payment of takaful benefits upon death of a takaful participant under a family takaful certificate, or personal accident takaful certificate issued in respect of a contract of takaful entered into by the takaful participant upon his life

Scope of Business

- A licensed takaful operator shall not carry on both family takaful business and general takaful business, except that it may carry on the general takaful business relating to medical by reason of disease or sickness or medical expenses subject to such requirements and conditions as may be specified by BNM – s.16, IFSA

Cont...

- A transition period of five years from the time the IFSA comes into operation is allowed- separate family takaful business and general takaful business to comply with this – s.286, IFSA.
- Only licensed professional retakaful operator can carry on both family takaful business and general takaful business

Cont..

- Any breach of the above may be liable to imprisonment not exceeding eight years or a fine not exceeding twenty-five million ringgit or to both.
- Except with the prior written approval of BNM, a licensed takaful operator shall not carry on annuity certain business, financial guarantee takaful business or credit guarantee takaful business – s.15(4), IFSA
- Must be a public company – s. 21,

Winding-Up

- Division 3 sub 2 (ss. 212 - 218), IFSA – In the winding up of a Licensed takaful operator:
- the valuation of its assets and liabilities, of the shareholders' fund and takaful fund, including liabilities in respect of takaful certificates, shall be on a basis determined by BNM and excludes the application of the law relating to bankruptcy or insolvency.
- termination of all takaful certificates issued by a licensed takaful operator is effective from the date of the winding up order and sets out the items which a takaful participant can claim as a debt due to him.

Cont...

- a liquidator of a licensed takaful operator which is being wound up shall pay in good faith to any of its claimants without requiring strict proof of debt of such claims to facilitate payment.
- issuance of a takaful certificate by a director, officer, agent or contributory, past or present, of a licensed takaful operator which is being wound up after its cessation of takaful business is prohibited.

Cont..

- the liquidator of a family takaful operator is empowered to carry on its existing family takaful business with a view to its transfer as a going concern to another takaful operator.
- provisions relating to the priority of payment in winding up of a licensed takaful operator are to be followed.

Due Regard to SC Decision

- BoD to have regard to interest of takaful participants; have due regard to any decision of the Shariah committee on any Shariah issue relating to the carrying on of business, affairs or activities of the institution
- Potential conflict of interest between majority shareholder and takaful participants

Civil Actions

- Civil actions can be brought by any persons or institutions or by BNM on their behalf against any persons who contravenes or is in breach of the IFSA provisions.

Statutory Duties

- 1. Shariah Compliance
- 2. Reporting Duties

Shari'ah Compliance and Reporting Duties

- s.28, IFSA)
- (3) Where an institution becomes aware that it is carrying on any of its business, affair or activity in a manner which is not in compliance with Shariah or the advice of its Shariah committee or the advice or ruling of the SAC, the institution shall —
 - (a) immediately notify BNM and its Shariah committee of the fact;
 - (b) immediately cease from carrying on such business, affair or activity and from taking on any other similar business, affair or activity;
- and
 - (c) within 30 days of becoming aware of such noncompliance or such further period as may be specified by BNM, submit to BNM a plan on the rectification of the non-compliance.

Takaful Specific Provision

- Policies
- Business

Single license

- Single licensed takaful business. S 16 of the IFSA requires takaful operator to separate its family business with general takaful business. (5 years to split both business, family business and general takaful business into separate entities).

Takaful fund

- S 94 prohibits a licensed takaful operator from making any withdrawal from a takaful fund, whether from the surplus, or otherwise, of that takaful fund unless all the conditions set out is fulfilled.
- S 91 makes it mandatory for takaful operator to separate takaful fund and shareholders' fund.
- S 95 makes *qard* or loan provision is compulsory to every takaful operator in the event of deficit of the risk fund.

Policies

- Sch 9: “consumer takaful contract” means a contract of takaful entered into, varied or renewed by an individual wholly for purposes **unrelated** to the individual’s trade, business or profession.

Warranties and representations (para.10, Sch.9)

- *“Any representation made before a consumer takaful contract was entered into, varied or renewed shall not be converted into a warranty by means of any provision of the consumer takaful contract or of any terms of the variation or of any other contract, whether by declaring the representation to form the basis of the contract or otherwise.”*
- **Abolishes the ‘basis of contract’ clause in consumer takaful contracts.**
- **Takaful operators can no longer argue that an inaccurate answer constitutes a breach of warranty to render a consumer takaful contract void from its inception.**
- **Therefore, takaful operators can only void a consumer takaful contract on grounds of misrepresentation.**

Cont..

- **Non-Consumer takaful: Basis of Contract Clause-Void**
- **Consumer Takaful:**
 - **Misrepresentation: reckless-contract void and no refund of contribution**
 - **Innocent: Contract void and refund the contribution.**

Duty to Disclosure

Party	Non-consumer takaful contracts	Consumer takaful contracts
Takaful Operator	<p>Duty to not: Make misleading or false statements, •fraudulently or otherwise; • Fraudulently conceal a material fact; or In the case of takaful agents,use •unauthorised sales brochures</p>	Same
	<p>Duty to clearly inform a proposer in writing of the proposer's pre-contractual duty of disclosure, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed</p>	<p>Onus is on insurer to ask a consumer to answer specific questions</p>

Prohibited Business

- List of prohibited business conduct (Schedule 7)
- Engaging in conduct that is misleading or deceptive in relation to the nature, features, terms or price of financial service or product
- Inducing financial consumer to an act or omit to do an act in relation to financial service or product by
Making misleading, false or deceptive statements;
Dishonestly concealing or omitting material facts;
Recklessly making any statement, illustration, promise, forecast or comparison which is misleading, false or deceptive.

Cont...

- Exerting undue pressure, influence or using or threatening to use harassment, coercion, or physical force in relation to the provision of or payment for financial service or product.
- Demanding payments for unsolicited financial services or products unless the financial consumer has communicated his acceptance of the offer either orally or in writing.

Cont....

- Exerting undue pressure on, or coercing, financial consumer to acquire financial service or product as a condition for acquiring another financial service or product.
- Colluding to fix or control the features or terms of financial service or product to the detriment of financial consumer, except for tariff or contribution rates or policy terms approved by BNM.