



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

# Legal Aspects of Islamic Finance

LAB4112

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- Takaful products
- Legal and syariah issues

# Takaful Business

- 1. Family Solidarity Business:
- Long terms mudharabah/wakalah contract which provide cover mutual aid among participants, expressed in the form of financial benefits paid in family takaful fund should any of its members be inflicted by a tragedy.
- 2. General business .
- Short term basis. Protection in the form of mutual help to compensate members of any financial loss arising out of material damage to personal property and belongings.

# Differences of Family Takaful and Life Insurance

FT	LI
Mudharabah	Muawadhah
Trustee	Nominee
Dividend	Insured money + interest
Share of profit	Payment out of assured premium
Insurable interest- not relevant	Insurable interest is a requirement

# Family Solidarity Business

- 1. Individual Plan
- A. Family Takaful Plan- long term fund for the bereaved family's sustenance in the event of policy holder's untimely death or to help the policy holders in case of mishaps such as permanent disability.
- B. FT for education- to finance future higher education in the event of the policy holder's untimely death.

- C. Takaful Mortgage- to redeem the mortgage in the event of policy holder's untimely death.
- D. EPF Takaful Annuity Scheme-takaful contribution from the EPF's account.
- E. Takaful Plan Siswa-
- F-Takaful Waqf Plan-
- G. Takaful Sihat Plan- plan to cover financial aid to critical illness.
- H. Takaful Keyman plan- to cover a firm for loss of earnings brought by the death of a key officer.

- I. Takaful Maasyi Plan- annuity programme.
- J. Takaful Dana Kerja-long term saving.
- K. Takaful Ziarah-saving once in a five years- can withdraw to plan holidays.
- L. Takaful Hawa- financial benefits- cancer.
- M- Takaful Umrah and Haj

# Group Plan- FSB

- A. Group FT Plan- group of persons under single takaful certificate. Injury and death.
- B. GFT Credit Facility- to protect interest in credit facility in which they grant to their clients in the event of non-payment due to death or permanent disability of their clients.
- C. Group Medical Takaful Plan- to cover medical expenses.



# General Business

- Fire Takaful Scheme
- House Owners and Householders' takaful scheme.
- Motor Takaful Scheme
- Accident Takaful Scheme
- Engineering Takaful Scheme.

# Legal Documentation

- Subscription Form
- A cover note or a statement of accounting-
- Policy of insurance.
- Ijab and Qabul
- Consideration
- Legal capacity
- Non existence of unlawful element.

# Issue on Al Tabarru'

- The SAC tabarru as a contract of gratuity or charity, i.e., to relinquish a portion of the contribution as a donation to fulfill the obligation of mutual help by allowing it to be used to pay claims submitted by eligible claimants.
- This type of contract is valid and enforceable in Islamic commercial law for no consideration, in contrast to an exchange contract, in which both parties must give something in return for what they receive.

## Cont...

- 2 pillars of tabarru: 1. the absence of counter-value and 2. the intention to perform a charitable act.
- Maliki: hibah bi thawab (a gift with expected compensation),
- Shafie, Hanbali: hibah bi shart al-iwad (a gift with stipulated counter-value). when the gift and compensation have been exchanged, hibah bi shart al-iwad is no longer a charitable (tabarru) contract; rather, it becomes a muawadhah (exchange) contract.

## Cont...

- If takaful is considered an exchange contract, all the issues of riba, gharar and jahalah will reemerge.
- Opponent: it is not al tabarru but contract of exchange
  - Issue on gharar is there
  - Al ibratu bi al maani la bi al alfaz (one should look at the end result and not at its wording)
- Answer:
- (*iltizam bi al tabarru* (self imposed donation):  
Maliki' s view

# Issues on Guaranteed Benefit

- Existing Takaful models restrict TO from providing guaranteed benefit to participants eg. cash dividend payouts, cash surrender value, survival value.
- To have a guaranteed benefit scheme, even out of the participants' investment fund, would be tantamount to a violation of the Shariah.
- Stipulation of a guarantee in any form would change the mudarabah contract into a qard (loan), and the legal status of the entrepreneur as an agent (wakil) and a trustee (amin) would change into a debtor who guarantees the principal.

# Issues on Mudharabah

- Takaful contract based on mudharabah. Each terms and conditions must be made known to the participants.

# Issues on Age of Majority

- S 64- below 18 have no capacity to enter into a contract of takaful.
- Insurance Act- above 10 and below 16-can enter into contract + written consent of parent.
- In Islam 18 is not an age of majority. Need to depart from the strict Islamic concept.



## Issues on Doctrine of Utmost Good Faith

- There is no requirement of doctrine of utmost good faith under the TA.
- Insurance Contract- There must be “utmost good faith”. Hence impose the same duty of disclosure upon parties to contract.
- In Islam contract of mudharabah requires parties to be truthful, honest and sincere.

# Issues on Warranties

- The TA does not mention the rule on strict application of the law relating to warranties.
- Effect: Takaful contract can be avoided by the takaful co. if a wrong answer is given in the proposal form when the participants believes it to be correct.
- IFSA 2013- Specific provision on warranties.

# Issues on Nomination

- SAC- Nominee as the beneficiary- Hibah
- National Fatwa Council- Nominee as the administrator- Estate- Faraid

# Issues on Insurable Risk

- Insurable risk
- Def: Chance of loss, the possibility of loss or uncertainty concerning the occurrence of a loss.
- Two types of risk Pure Risk and Speculative Risk. Only pure risk is insurable. Reason: would resemble wagering practice.
- Conventional Insurance is concerned with the economic problems created by pure risk. Eg. Accident = may suffer a loss.
- Speculative Risk: where either profit or loss is possible. Eg shares of common stock.

## Should the takaful be confined to Pure Risk?

- All types of risks are insurable under takaful contract:-
  - 1. Takaful is based on brotherhood, solidarity and mutual assistance.
  - 2. Al-tabarru concept- all types of risks are acceptable.
  - 3. Speculative risk is not identical to gambling. Eg. Taxi driver who is driving his car with danger of accident. Pure Risk- Accident :Speculative Risk- loss of future gain.

# Insurable Interest

- Def: Interest an individual must have in insurance coverage carried by someone else.
- Legal perspective: the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter of the insurance whether that be a life or property or a liability to which he might be exposed.
- The absence of this requirement under conventional insurance will render the contract illegal, void and simply unenforceable.

## Requirement under the Insurance Act 1996

- S 152 of the Insurance Act 1996- Requirement of Insurable Interest.
- Exception to employer-employee relationship.
- The requirement of II specifies that the insured must lose financially if a loss occurs or must incur some harm if the loss takes place.

# Objective of Insurable Interest

- 1. to determine the motive for purchasing insurance and in the assignment of a beneficiary in a life insurance policy.
- 2. to avoid gambling or wagering practices.



## Eg.

- “A” pays premium on behalf of his wife and names her as beneficiaries= The insurance co. recognizes it coz in the event of unexpected death, the family would suffer an economic loss.
- “A” pays premium of insurance for another party let say his best friend, if that person names him as the beneficiaries. The insurance co will not issue the policy.

# Whether the principle of insurable interest is relevant in takaful?

- Insurable Interest is needed
- Insurable Interest is Irrelevant
- IFSA 2013 on Insurable interest.

# Insurable Interest is Irrelevant

- The requirement of II is not relevant under Takaful not because of to determine the motive for purchasing insurance and in the assignment of a beneficiary in a life insurance policy and to avoid gambling or wagering practices but:-

# Reasons

- 1. The TA 1984 does not require this principle in family takaful or general takaful.
- 2. The nature of family takaful makes this element irrelevant as a participant participates in this scheme only for the benefit of himself and his family. He cannot do so for the purpose of benefiting or on behalf of the 3rd party.

## Cont..

- 3. Ab initio irrelevant coz the participant cum insured could not have any interest on his life.
- 4. The principle of takaful: takaful contract must be concluded between the participants themselves, a party who is neither insured or insurer is not eligible to participate in the contract.

# Insurable Interest is Needed

- Known as ‘Permissible Takaful Interest’.
- In practice, insurable interest is applicable in insurance or *takaful* of life, property, and goods. This is so because they form the subject matter of insurance and *takaful* contracts.
- 1. Takaful on Property
- 2. Takaful One’s Own Life
- 3. Takaful Another’s Life

# Takaful on Property

- In takaful on property, the participants' property will be valued to determine the amount of contribution he has to make the takaful fund. Prior to that, his insurable interest in the property will be assessed to ensure that he has legal ownership over the property, thus making him interested in the safety of such property rather than interested in its destruction.

# Takaful of one's own life

- A person insures one's own life for the sake of a nominee's benefit, whereby they will get some takaful benefit in case of one's death. It is irrefutable that one has an insurable interest in one's own life and health, as any normal person will attempt to preserve this and avoid putting himself in jeopardy.
- However, it is also strengthened by the term in takaful contract which disallows a participant of his or her nominee from acquiring takaful benefit if the death is due to suicide or self-inflicted harm.



# Takaful Over Another's Life

- Takaful over another's life may come from various parties. The purposes also may differ due to the circumstances of the parties involved.
- One may consider insuring the life of one's child under an education plan for the child's future benefit or security, insuring one's spouse for the security of future maintenance, insuring the life of one's employee to secure continuing productivity, insuring the life of a debtor or tenant to secure debt or rent settlement which will be lost due to the death of the insured.