DOES DARURAH CONCEPT STILL A DISPENSATION TO TAKAFUL OPERATORS IN MALAYSIA?

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Abstract

The Shariah compliant insurance embedded with Shariah principles emerged as the solution for the Muslims who have been avoiding conventional insurance as it is haram (unlawful) to the Muslims. The unlawful is applicable not only to conventional insurance but also to reinsurance. However, the Takaful operators in Malaysia need to depend on reTakaful operators to ensure the continuity of the Takaful operators in the long term by spreading the risk to reTakaful operators. However, lack of reTakaful operators in the market, left Takaful operators with the dilemma of having reinsure on a conventional basis in meeting the market demands, Hence, the Shariah Supervisory board, Central Bank of Malaysia has given a temporary dispensation to Takaful operators to reinsure on reTakaful conventional basis. The arrangement of Takaful operators on the conventional reinsurance is based on the principle of darura. Recently, more licenses issued by Central Bank of Malaysia to companies to operate re-Takaful business. This paper therefore intends to discuss whether “darurah” is still holds some ground in reTakaful.

Keywords: Darurah, Reinsurance, ReTakaful, Takaful

1. INTRODUCTION

Insurance is an important mechanism whereby individual or business transfer some of their uncertainty of risk to insurer. However, due to the existence of Islamically unacceptable elements in its operation such as riba, gharar and maysir, conventional insurance is considered haram (unlawful) to the Muslims community. Hence, Takaful has become the alternative method of providing insurance services that is deemed acceptable for Muslims as it is free from the element of riba, maysir and gharar. Takaful is based on the principle of Tabarru’ (donation/charity) and the distribution is based on ta’wun (solidarity and mutual assistance).

Both insurance and Takaful has technical similarities hence, both need reinsurance facilities, which in the case of Takaful must be provided by reTakaful operators/companies. In the early stage of Takaful business, reinsurance facilities for takaful companies were predominately provided by reinsurance companies due to the unavoidable circumstances or darura of which there are inadequate number of reTakaful operators in Malaysia and worldwide.

2. REINSURANCE VERSUS RETAKAFUL

Ab Rahman (2009), defined reinsurance as a form of insurance and it means insuring again (by the insurer) of a risk already insured. Ab Rahman, Wan Ahmad & Buang (2011), defined reinsurance as the shifting by the primary insurer, called the ceding company, a part of the risk it assumes to another company, called the
reinsurer. Reinsurance can simply be defined as the insuring again by an insurance company (Edward et al. 2014, 136) of which the risk by the policyholders is insured again by the insurer. In other words, reinsurance is actually an insurance for an insurance company.

Sula (2004) defined reTakaful as a mutual process between a bearer company (ceding company) or Takaful operator with reinsurer (reinsurer or reTakaful company), where there is mutual consent process (mutually agree) risks and requirements set forth in contract. IBFIM (2009, 102) described the meaning of reTakaful as one of risk management tools used by the Takaful operator to share part of the risk in the fund to the Takaful operator or other reTakaful company. Based on the meaning of the term, then found that reTakaful is a Takaful company that processing reTakaful mechanism of risk in a given time, whether in part or whole to reTakaful companies to share the loss suffered Takaful operators at a time by using the conditions in line with the principles of Shariah.

Reinsurance of takaful business under Islamic principles is known a ‘retakaful’. Retakaful enhances takaful activity by distributing the risks. It is mainly for covering common loss. It also ensures that Takaful funds manage to meet the indemnity obligations of the insured and operations (Billah 2007). Retakaful protects a primary Takaful operator against unanticipated or extraordinary losses. The reason for its introduction is similar to the takaful scheme, which is to introduce an acceptable alternative to reinsurance from Islamic point of view. Retakaful assists the takaful operators in managing their risk by increasing their capacity in handling the takaful transaction and contract. By reinsuring with reTakaful, the Takaful operator can spread and share their risk with other operators or companies (Engku Ali & Odierno 2008). Although Takaful companies are obliged to comply with all Shariah requirements, which includes insuring with Takaful companies, some Takaful operators reinsure their Takaful with conventional reinsurance companies.

The Shariah Advisors of the Takaful operators allow this practice based on the reason that ReTakaful alternatives are not yet available or very limited to fulfil the functions of reinsurance. The use of reinsurance was dictated by the lack of reTakaful capacity and the necessity to protect the policyholders and shareholders’ fund (El-Gamal 2006). This was in addition to the small numbers of Takaful operators and limited size of their funds as in case of Malaysia. Takaful operators had therefore reinsured with conventional insurance and conventional reinsurance companies. It was further explained that it was as a result of the limited funds that the Takaful operators had to pay to the participants when they made claims for their losses (Yusof 2006). This is further complicated by the lack of reTakaful companies that are capitalised to the levels required by insurers, particularly the lack of ‘A’ rated reTakaful companies. The legal basis for adopting such a summarised in a maxim which says in Arabic: “al-durarub tubih al-mahzurat” or necessities render unlawful acts lawful.

3. DARURAH (DOCTRINE OF NECESSITY)

Darurah is an indispensable necessity, without which may cause severe hardship such as a loss of life or damage to property. The use of this principle is subject to certain conditions. The permission to use reinsurers is effective only when there is no practical Shariah compliant alternative or their capabilities are limited (Abouzaid 2007). The situation also includes when the financial capacity of the existing takaful
operators is inadequate to meet all their losses based on the views of the experts in the insurance industry. The availability of reinsurance arrangements and their capacity are important to the overall rating assessment. While there are over 250 takaful companies in the world today, the number of reTakaful operators does not match with this number in proportionate acceptable ratio. The scarcity of Islamic-compliant reinsurers could have implications in the Takaful operators’ financial strength ratings. The scarcity of reTakaful companies exposes a Takaful company to the concentration of related risks, or where adequate treaty limits may not be available, this either restricts the size of business that may be written or forces the company to retain greater risk on the net account.

As we know the participants in insurance pay contribution which is then passed by Shariah – compliant insurance to the conventional reinsurers. The funds of the Islamic investment product and those of the financial institution in which Shariah provisions are not observed must be completely segregated. Even if the reinsurance is placed with conventional reinsurance as a ‘doctrine of necessity’, the funds of investors who are very diligent and anxious to earn income from only according to Shariah should not be mingled with those of conventional investors who are not observant of the Shariah. Yaquby (2009) raised a very important point, he said that conventional financial institution’s Articles of Association do not mandate compliance with the tenets of Shariah reinsurance window, or fund that often claims their transactions and dealing fully complying with the provisions of the Shariah. But when subjected to scrutiny and examination, this proves otherwise.

Shariah-compliant insurance companies are required to reinsure their risks with Shariah-compliant reinsurer for instance on reTakaful basis. According to the Islamic Banking and Insurance Encyclopedia (IIBI London 1998) due to the merger reinsurance capacity of retakaful operators, latitude has been granted by Shariah Advisors to cede primary Takaful premiums to conventional re-insurers. Such dispensation is understood to be for a temporary period and lay down the challenge to Takaful and reTakaful operators alike to work towards for a swift resolution of these anomalies.

Islamic insurance and investment report mentioned that Reinsurance of Takaful business on Shariah principles has been an area of much debate. Reinsurance on Shariah principles is known as reTakaful. The problem has been as mentioned the lack of Takaful companies in the market. This has left the Takaful companies with a dilemma of having to reinsure on conventional basis, contrary to the customer’s preference of seeking cover on Shariah principles. The Shariah scholars have allowed dispensation to Takaful operators to reinsure on conventional basis so long as there was no retakaful alternative available. Takaful companies therefore actively promote co-insurance. A number of large conventional reinsurance companies from Muslim countries take on retrocession but still there is a lack of capacity within the Takaful industry worldwide. The Takaful company should not purchase reinsurance form companies that are not Shariah compliant and efforts should be made to establish companies which would provide adequate reTakaful.

4. PERMISSIBLE VIEW OF MUSLIMS SCHOLARS

The general idea of Takaful adopts the concept 'aqilah' during the Prophet’s (SAW) time. Aqilah is nothing but payment of blood money or diyyah under the Arab tribal custom (Engku Rabiah & Hassan Scott 2008). During the ancient periods, Arab
tribes followed a practice called ‘aqilah’. For example, if any associate of the tribes was murdered by a member of another tribe, the heir of the victim would be paid an amount of blood money as indemnity by the close kin of the murderer. Those close kin of the killer known as ‘aqilah’ and they are supposed to pay blood money (Billah, 2003).

The practice of ‘aqilah’ during the early Arab tribes shows the evidence of the arrangement of financial contribution on behalf of the murderer to pay indemnity to the heir of the victim. Such willingness is to create monetary contribution that should be equivalent to the premium in insurance practice. On the other hand, the compensation re-cooped under at ‘aqilah’ should be equivalent to the compensation of present insurance practices as it is a type of financial security for the heir against an unpredictable death of the prey or victim.

With regards to reTakaful, Shariah Advisory Council has resolved in 2005 the following:

i. A Takaful company is not allowed to accept inward reTakaful whether on treaty or facultative basis from a conventional insurance company and reinsurance company.

ii. A Takaful company is given the flexibility to distribute its risks based on outward reTakaful to conventional insurance company and reinsurance company subject to the following conditions:

   a. Priority shall be given to a Takaful company and reTakaful company.
   b. Non-existence of a Takaful company and reTakaful company, either locally or internationally, that is viewed as capable to absorb the distributed risks.
   c. The strength of the Takaful company and reTakaful company, either locally or internationally, is doubtful.

The basis of the above rulings are:-

i. The initial contract concluded by a conventional insurance company and a reinsurance company is inconsistent with the Shariah.

ii. If a Takaful company or a reTakaful company accept inward reTakaful from a conventional insurance company or reinsurance company, the Takaful company is perceived to recognise the conventional insurance contract which is not Shariah compliant;

iii. Islam does not allow mutual helping and assisting in matters that are forbidden by Shariah as stated in the following verse of Allah SWT:

   وَتَعَاوَنُواْ عَلَى ٱلْبِرِّ وَٱلْتَّقَوَى وَلَتَعَاوَنُواْ عَلَى ٱلإِثْمِ وَٱلْعُدُوْنَ
   “...help one another in furthering virtue and God consciousness, and not in what is wicked and sinful...” (al-Maidah: 2)

iv. A takaful company shall avoid from any involvement in syubhah matters which are practised in the conventional insurance activities

   However, a takaful company is allowed to distribute its risks via outward reTakaful to a conventional insurance company and a reinsurance company on the
basis of needs (*hajah*), that is, in case there is no Takaful company or reTakaful company that is viewed as capable to absorb certain Takaful risks. This is in line with the following fiqh maxim:

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الحاجة تزل منزلة الضرورة
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“Needs take the rule of necessities”

Qardhawi (2008) stated that that prioritizing *darurah* (necessities) over *hujiyat* (needs) and *tahsiniyyat* (embelishment) is utmost important, and this is applied in the case of reTakaful to insurance companies due to difficulties in ceding capacity to other Takaful operators.

5. CURRENT PRACTICES OF RETAKAFUL IN MALAYSIA

Reinsurance companies in Malaysia do not face any problems ceding the insurance business as they are many reinsurance based companies comprising of all insurance companies locally and internationally. This situation is in contrast to Takaful operators. The Takaful operators are facing difficulties in ceding out their Takaful business particularly the risks that involved high capacity. The interview conducted by the researchers with the authority; Malaysian National Reinsurance Berhad has supported this statement. Although, Islamic Financial Services Act 2013 has been gazetted as an act to provide guidelines for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities and the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with Shariah and for related, consequential or incidental matters, but it still does not solve the issues on reTakaful.

CONCLUSIONS

Shariah-compliant insurance companies are required to reinsure their risks with Shariah-compliant reinsurer for instance on reTakaful basis. However, a Takaful companies are granted to cede their risks to insurance companies in the event of capacity deficiency provided the capacity of all takaful operators has been exhausted.

REFERENCES


