

Application the Method of Jurisprudence "An Emergency Necessitates the Forbidden: In the Case of Re-Insurance by Takaful Companies in Malaysia

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Abstract

Re-takaful is a procedure or mechanism through an agreement that allows a direct takaful operator called 'cedant' to transfer or surrender some of the risks incurred to takaful operators or other re-takaful operators. However, not all re-takaful is carried out in the takaful industry as well to the lack of funds or capital of a re-takaful company. Hence, alternatively, re-takaful services in the insurance industry are used to cover the shortage inherent in re-takaful companies. The taking of reinsurance by Takaful companies in certain circumstances cannot be avoided even though reinsurance does not comply with Islamic law. The main goal of this study is to review the jurisprudence method "an emergency requires something prohibited" and apply it in reinsurance by Takaful Companies. The method known for sure is to see the extent to which reinsurance by the Takaful Company is allowed. This study uses qualitative methods through content analysis. The data were analyzed using descriptive and deductive methods. The result of finding that the "emergency requires something prohibited" method has been applied in reinsurance by Takaful companies when there is no re-takaful company that can provide services in a country based on its small number or lack of capacity to meet market requirements as a management risk to the company Takaful to perform its services. However, the determination of the state of emergency must be reviewed and certified by a Syariah advisor or regulatory body and the extent of the harm that occurs must be determined for the operation to comply with the requirements of Syariah and uphold the principles of justice.

Keywords: Darurat, Re-Insurans, Re-Takaful, Takaful.

Introduction

Re-takaful is a risk management mechanism that needs to be faced by takaful operators to achieve certain objectives and goals. Among the requirements of re-takaful is to ensure the

effectiveness of risk spreading. Through this process, the takaful and re-takaful market will be able to share the development and growth of the market and at the same time, it will protect takaful operators from excessive risk exposure on the liabilities they incur. In addition, re-takaful is required to provide additional capacity for takaful operators to accept larger and more complex risk participations that may exceed their financial and technical capabilities. Re-takaful has the effect of stabilizing or smoothing the flow of income and losses over one year, which is a relatively long period to create stability and resilience for takaful funds. Therefore, with the diversity and large amount of risk borne in their portfolio, the re-takaful operator can make a research study analysis because it has extensive knowledge and experience on risk. It can look from a different and more holistic or macro perspective, and in most cases, it can assess risk across several different jurisdictions. This unique information can be shared with takaful operators to ensure more efficient risk management. This in turn will help takaful operators to take advantage of available data to design new products, set contribution rates, and more importantly able to create a more comprehensive and competitive underwriting practice (Mustafa & Asmak, 2015).

Fiqh methods or "al-Qawaid al-Fiqhiyyah" can play an important role in determining a law even if it is not the main source of reference. This is because the method of fiqh is embodied from evidence from the main source of law as well. The Fiqh method is a simple principle that explains the basic legal concepts of Shariah and guides the jurists in making decisions when faced with various situations. This matter reflects Sharia as Islamic legislation that is universal (syumuliyah), flexible (murunah), and local (waqi'iyah) which can resolve any human problem whether in the field of worship, family or muamalat and finance which is constantly developing from time to time.

Islamic finance, especially Takaful services, is one of the sectors that is developing as an alternative to Insurance services that are prohibited in Islam because they conflict with Sharia principles because they involve usury, uncertainty (gharar), and gambling (maysir). Takaful is allowed because it is based on the Islamic law of mudarabah (profit sharing) and wakalah (agency) contracts. The elements of uncertainty in contract insurance that are prohibited under the Shariah principle of gharar are offset by tabarru' or free contributions from participants in Takaful schemes. The use of tabarru' allows takaful companies to offer insurance-like services that can be accepted by Sharia (Farooq, 2010; Thanasegaran, 2008). In terms of Takaful service operations, Takaful companies need to have risk management to accommodate the protection of Takaful participants as well as prevent Takaful operators from possible insolvency through re-takaful (re-Takaful). However, under certain circumstances is it allowed for a Takaful company to take reinsurance (Re-Insurance) from a reinsurance company that does not comply with Sharia? Thus, this study will review the method of jurisprudence in that an emergency requires something prohibited and its application in taking reinsurance by Takaful companies. The purpose of this identified method is to see to what extent reinsurance by Takaful companies is allowed.

The Method of Jurisprudence "Emergency Necessitates the Forbidden and Re-Takaful

According to Imam al-Suyuti and Ibn Nujaym, the method of "necessity necessitates something prohibited" (الضرورات تبيح المحظورات) is a branch of the fiqh method "harm should be eliminated" (الضَّرَرُ يُزَالُ). However, some contemporary scholars have suggested that since necessity is one of the two categories of hardship, it is more appropriate to consider it as a

consequence of the fiqh method "hardship gives birth to ease"). (al-Suyuti, 1983 & Ibn Nujaym, 1999). Urgency (الضرورة) according to al-Jurjani in terms of language is an inevitable event while in terms of terms, it means a situation in which a person fears destruction (halak) or extreme harm to one of the important things, whether it is related to him personally or to others, or whether his fear is a matter of certainty (yaqin) or supposition based on reliable evidence (dzan). (Jamil, 2003). The word mahzurat (المحظورات) in terms of language means what is forbidden by Allah and in terms of terms it is synonymous with the term haram meaning whatever is asked by Allah, with strict and binding demands, so that it is avoided. In this context, an emergency is "a special situation that obliges a person to perform certain prohibited actions to preserve the universal necessity (daruriyyat) mentioned above" (Laldin, 2013).

In the application to takaful law to take reinsurance, Takaful is an agreement of a group of individuals to mutually guarantee and help each other to meet certain needs that are agreed upon among them such as providing compensation for a disaster that befalls and other financial needs. This agreement involves the contribution of money contributions based on the concept of tabarru` (voluntary giving) by all takaful participants. A dedicated fund will be established as a source of financial assistance to any participant based on the terms and conditions agreed between them. In line with the concept of helping each other (ta`awun) and the need for Muslims to have a Shariah-based scheme as an alternative to conventional insurance, the takaful industry has grown rapidly into a viable industry that has been integrated into the mainstream of the country's financial system (BNM, 2010).

Re-takaful is one way for takaful companies to reduce the burden of risk incurred in protecting takaful participants. It refers to the sharing of risk between a takaful company and a takaful company (and re-takaful) or an insurance company and another conventional reinsurance company. With effective re-takaful arrangements in place, takaful companies can increase their capacity and stabilize their underwriting performance, as well as being able to protect takaful funds from significant financial burdens in the event of unexpected claims. Re-takaful arrangements are usually implemented in two main ways as follows:

1. Inward re-takaful is a takaful company accepting risks from takaful (and re-takaful) companies or other conventional insurance (and reinsurance) companies; and
2. Outward re-takaful (outward re-takaful) i.e. the takaful company distributes or gives the risk it underwrites to takaful (and re-takaful) companies or other conventional insurance (and reinsurance) companies (BNM, 2010).

The issue of takaful operators reinsuring with reinsurance companies has been highlighted by many researchers before such as Arbouna, al-Salus, al-Ghamidi, Buang, Mohd Hussin, and Hainsworth. Many sharia issues regarding this problem have been raised by them and in particular, related to the question of the need for takaful companies to re-insure with re-insurance companies due to the insufficient number of established re-takaful companies. (Asmak, et. al., 2011).

Research Methodology

This study uses a qualitative method through a content analysis approach to meet the goals and objectives of the research. This approach explains and examines the emergency method

that requires that is prohibited in taking re-insurance by Takaful companies. The data in this research was collected through documents consisting of primary and secondary sources. Primary sources consist of the Qur'an, the Sunnah, and the books of the Qur'an. Secondary sources are articles, journals, books, press reports, Bank Negara Malaysia (BNM) Syariah policy documents and resolutions, significant general reference sources, and interviews with 3 Syariah experts. The data is then analyzed using descriptive and deductive methods to produce a specific conclusion.

Application The Method of Jurisprudence "Emergency Necessitates the Forbidden In Re-Insurance By Takaful Companies

The method of jurisprudence "emergency necessitates the forbidden" is based on arguments from the Al-Quran, Sunnah, and legislation carried out by the Companions of the Prophet SAW. According to (Laldin, 2013), among the verses of the Al-Quran that explain this emergency is the word of Allah SWT: "And there is no reason for you, (that makes) you do not want to eat from (the slaughter of halal animals) that the name of Allah is mentioned when slaughtering it, even though Allah has explained to you one by one what He has prohibited for you, except what you have to eat it?" (Surah al-An'am: 119).

Allah SWT said: "So whoever is forced by hunger (to eat forbidden things) while he is not inclined to commit sin (then he may eat them) because verily Allah is Oft-Forgiving, Most Merciful" (Surah al-Maidah: 3)

Saidina Ali once advised Saidina Umar bin al-Khattab that a woman who confessed to adultery during the time of the caliph Umar ibn al-Khattab had a reason not to be subjected to the adultery penalty. The reason is that the imminent threat to his life due to thirst is sufficient to overcome the punishment of adultery. Concerning the issue of Takaful operators taking reinsurance with reinsurance companies, many Islamic scholars require it. According to Arbouna (2000), some scholars think that the legitimacy of takaful operators to place their risks with conventional reinsurers is based on the principle of emergency (emergency) or al-hajah (necessity) and al-maslaha al-`ammah (public interest). The requirement is based on the financial ability of existing takaful operators to meet all their losses according to the views of experts in the insurance industry. This means that reinsurance dealings between takaful operators and conventional reinsurers must be governed by the law of necessity, as defined in Islamic shari'a. One of the requirements is that the transaction itself must be completely unavoidable because it is rooted in the Islamic jurisprudence which reads "the need to give illegal acts legal" and "need to take over the rules of necessity whether in general or specific".

Shariah has also stipulated that this state of emergency must exist to enable takaful companies to take reinsurance with reinsurance companies, one of which is that the number of re-takaful companies is not sufficient to cover the number of takaful companies in the market. According to a study (Asmak, 2011), based on information from the International Cooperative and Mutual Insurance Federation (ICMIF), there are 171 takaful operators and 20 re-takaful companies around the world making the ratio of re-takaful companies to takaful operators 1: 8.55 i.e. one re-takaful company has to do re-takaful to more than 9 takaful companies.

In Malaysia, based on Bank Negara Malaysia (BNM) information, there are 15 takaful companies and 3 re-takaful companies operating, making the ratio of re-takaful companies to

takaful operators 1:5.33, which means that one re-takaful company must perform re-takaful to more than 5 takaful operators. (<https://www.bnm.gov.my/regulations/fsp-directory>, retrieved on 16 June 2024).

Table 2

Number of Takaful companies compared to Re-Takaful in Malaysia

| | Re-takaful Company | | takaful Company |
|----|---|-----|---|
| 1. | Malaysian Reinsurance Berhad | 1. | AIA Public Takaful Berhad |
| 2. | Münchener Rückversicherungs-Gesellschaft / Munich Re Re-takaful | 2. | AmMetLife Takaful Berhad |
| 3. | Swiss Re Asia Pte. Ltd. / Swiss Re Re-takaful | 3. | Etiqa Family Takaful Berhad |
| | | 4. | Etiqa General Takaful Berhad |
| | | 5. | FWD Takaful Berhad |
| | | 6. | Great Eastern Takaful Berhad |
| | | 7. | Hong Leong MSIG Takaful Berhad |
| | | 8. | Prudential BSN Takaful Berhad |
| | | 9. | Sun Life Malaysia Takaful Berhad |
| | | 10. | Syarikat Takaful Malaysia Am Berhad |
| | | 11. | Syarikat Takaful Malaysia Keluarga Berhad |
| | | 12. | Takaful Ikhlas Family Berhad |
| | | 13. | Takaful Ikhlas General Berhad |
| | | 14. | Zurich General Takaful Malaysia Berhad |
| | | 15. | Zurich Takaful Malaysia Berhad |

Source : (<https://www.bnm.gov.my/regulations/fsp-directory>, diambil pada 16 June 2024)

In addition, the capacity factor of the re-takaful company to accommodate re-takaful from the takaful company also needs to be taken into account before the takaful company takes reinsurance with the reinsurance company in terms of sufficient capital and a good rating. According to Abouzaid's (2007), study, six re-takaful companies can be considered as providing services, namely ASEAN Re-takaful International Limited (ARIL), BEST Re, Takaful Re, Hannover Re, Labuan RE and MNRB Re-takaful which has a total paid-up capital of US\$375 million except for BEST Re and ARIL, the rest are newcomers to the market but supported by experienced groups, whether global for example Hannover Re or regional for example Takaful Re, Labuan Re, and MNRB. All other re-takaful players are rated "BBB" and above except ARIL, and three are A-rated companies. He claimed that these companies can absorb almost 90% of the capacity required for takaful agreements and only in a few cases of takaful or cooperatives, existing re-takaful capacity cannot meet demand, and requires additional capacity from conventional reinsurance.

Therefore, the determination of the state of emergency for the takaful company to take reinsurance must be done through research and referring to the Shariah advisors at the Takaful institution or the regulatory party playing a role in providing guidelines for the state of emergency. Based on the author's interview with 3 Shariah advisors at several Islamic banking and financial institutions found that they also agreed on the necessity for Takaful companies

to take reinsurance from reinsurance companies based on the circumstances and situation at that time.

Shariah Expert 1 explained that: "This matter has already been resolved by BNM's MPS, which is that Takaful companies are allowed to take reinsurance from reinsurance companies, even when there is an emergency or *hajah* for the Takaful company as found in the Emergency and *Hajah* document policy issued by BNM." (Shariah Expert 1, interview on December 2, 2023)

Shariah Expert 2 gave the following feedback: "Determining the necessity for a Takaful company to take reinsurance from a reinsurance company is subject to the approval of the Shariah Committee of the takaful company itself. Meaning, this matter must be presented to the Shariah Committee to assess whether there is a need or not." (Shariah Expert 2, interview on December 3, 2023).

According to the opinion of Shariah experts 3: "Takaful companies are allowed to take reinsurance, but it doesn't mean they take all of it, on the contrary, they have to try to take re-takaful first and then cover the shortfall with reinsurance if there is no other way." (Shariah Expert 3, interview on December 4, 2023.)

In Malaysia, in the context of Islamic finance, the Shariah Advisory Council, Bank Negara Malaysia (MPS, BNM) established by Bank Negara Malaysia (BNM) is an authoritative body in determining every law related to Islamic finance so that the operation of each financial institution walk according to the rules of the law. MPS also acts as an advisor and the main point of reference for BNM and related parties on matters related to Islamic finance. The position of MPS and BNM as an authority is also recognized from the aspect of legal practice as stated in sections 51 to 58 of the National Bank Act 2009. Provisions in this section cover the establishment, function of appointing members as well as the position of BNM MPS decisions (Aishyah & Asmak, 2021).

Islamic financial institutions should ensure compliance with Sharia principles in all aspects whether in terms of products, instruments, operations, practices, and management. In the Islamic Financial Services Act 2013 section 28 (1), it has been established that an institution must ensure that the goals and all activities or operations carried out are Shariah-compliant. Compliance with the decision that has been set by MPS BNM is considered as complying with syariah according to section 28(2). If the opposite happens, individuals who fail to comply will be imprisoned for a period not exceeding 8 years or a fine not exceeding 25 million ringgit or both as stated in section 28 (5) (APKI, 2013).

Bank Negara Malaysia Sharia Supervisory Council after being consulted on the issue of accepting inflow re-takaful by takaful companies on a triitary or facultative basis from conventional insurance (and reinsurance) companies as well as the distribution of risk on outflow re-takaful to conventional insurance (and reinsurance) companies has decided that takaful companies do not allow to receive inflow re-takaful either contractually or facultatively from insurance companies and conventional reinsurance companies. Takaful companies are given the flexibility to distribute the risk through outflow re-takaful to insurance companies and conventional re-insurance companies, subject to the following conditions (BNM, 2010):

1. Priority must be given to takaful companies and re-takaful companies;
2. Absence of takaful companies and re-takaful companies whether domestic or foreign that are believed to be able to absorb the distributed risk; and
3. The strength of takaful companies and re-takaful companies whether domestic or foreign is not reliable.

The prohibition for takaful companies to accept inflow re-takaful from insurance companies and conventional reinsurance companies is based on the following considerations (BNM, 2010):

1. The original contract signed by the insurance company and the conventional reinsurance company conflicts with Syarak. If the takaful company receives inflow re-takaful from insurance companies and conventional re-insurance companies, the takaful company is seen as recognizing conventional insurance contracts that do not comply with Syarak;
2. Islam does not allow helping and helping each other in matters prohibited by Sharia.
3. Takaful companies need to avoid getting involved with the dubious matters found in conventional insurance activities.

However, takaful companies are allowed to distribute risks through outflow re-takaful to insurance companies and conventional re-insurance companies based on need (hajah), i.e. if there is no takaful company or re-takaful company that is believed to be able to absorb a takaful risk. (BNM, 2010) This is in line with the following fiqh method: The need to adopt emergency laws (al-Zarqa, 1989).

Ibnu `Asyur explains that daruriyyat refers to the basic things that need to be met for a community collectively and individually. If this daruriyyat is not fulfilled, the social system in a community cannot function. While hajah or hajiyyat refers to things that are needed by a community to achieve the benefits and function of community affairs in a better way. If this pilgrimage is not fulfilled, the function of the community will not fail, however, it will not be able to run properly. (Ashur, 2001).

Conclusion

The Fiqh method can be used as an important way to guide the application of Sharia principles in Islamic finance. It contributes to consistency, risk management, ethical governance, and educational efforts in the industry, ensuring Islamic financial practices are aligned with Shariah values and principles. The jurisprudential method of "necessity makes the prohibited permissible" reflects the recognition that, in the face of genuine necessity, Sharia can permit actions that would otherwise be prohibited. Based on this method, contemporary scholars require Takaful companies to take reinsurance from conventional reinsurance companies due to the existence of emergencies or the need for Takaful companies. This principle serves as a reminder of the dynamic and adaptable nature of Sharia in responding to the complexities of real-world situations.

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