THE IMPLEMENTATION OF TABARRU` AND TA`AWUN CONTRACTS IN THE TAKAFUL MODELS

Kamaruzaman Noordin

ABSTRACT
A majority of Muslim scholars argue that a Shari`a-compliant insurance scheme, known as takaful, should operate mainly on the principles of tabarru` (voluntary donation) and ta`awun (mutual co-operation). Some scholars suggest a more specific contract which includes hiba, hiba bi shart`i wad, al-nahd, waqf and sadaqa to represent the above-mentioned generic terms. This chapter analyses these contracts in order to determine the most suitable one that corresponds to the takaful model. The theory of contracts in Islamic law in relation to the business models adopted by takaful operators in Malaysia is applied. Findings suggest certain practices need further deliberation as the current modus operandi raises some fiqh issues regarding the incompatibility of certain specific contracts if they were chosen to underlie the mutual dimension of takaful schemes.

Keywords: Takaful, tabarru`, hiba, nahd
INTRODUCTION

In general, a majority of Muslim scholars appear to suggest that *takaful* ought to be founded, specifically, on the basis of co-operative insurance due to its conformity with the principles of Islamic law. This stand could be inferred from several legal resolutions made on the subject of conventional insurance, including the first global fatwa issued in 1985 by the Council of the Islamic Fiqh Academy under the auspices of the Organisation of Islamic Conference (OIC) (Engku Ali and Scott P. Odierno, 2008). Conversely, Muslehuddin and Moghaizel tend to view that pure mutual structure is the only valid foundation for Islamic insurance (Moghaizel, 1990; Muslehuddin, 1966). There are also some other scholars who seem to suggest that both the co-operative and mutual insurance are a valid basis for *takaful*. This could perhaps be inferred from the indiscriminate usage of both terms by the respective scholars as if they were interchangeable.

Obviously, both categories of insurance uphold similar virtues, namely, the spirit of mutual help, mutual responsibility and mutual protection from losses amongst its members. This is mainly derived from the fact that the members who join the schemes are themselves the insured, the insurer and the owners of the company. Perhaps these virtues are more salient and important to the scholars rather than the operational definition of either mutual or co-operative insurance when proposing them as the basis for *takaful*. Therefore, the question of whether *takaful* should be specifically based on the structural framework of co-operative or mutual insurance is probably irrelevant as long as the above qualities of mutual help, responsibility and protection can be well established. In other words, the substance of the latter (i.e. the achievement of a social goal) is more important than its form.

THE MUTUAL AND CO-OPERATIVE ASPECTS OF THE TAKAFUL ARRANGEMENT

The above proposition can be supported by the fact that almost all modern *takaful* companies these days are neither of a pure mutual nor of a pure co-operative form (El-Gamal, 2006). Despite some claims made of the existence of a purely co-operative *takaful* entity, particularly in Sudan, it has in reality received initial capital from non-participants or outside shareholders and thus cannot be considered as a genuine co-operative type (Muhammad, 2006). Moreover, according to Islamic Finance Services Board (IFSB), a *takaful* undertaking is typically a “hybrid of a mutual and a commercial form of company” (IFSB, 2009). Hence, it could be suggested that the co-operative or mutual structure may not be the only means to render insurance permissible under the Islamic law. Instead, it seems that the realization of the virtue of mutual assistance/aid, regardless of how it is organizationally structured, would make insurance permissible in Islam. More importantly, the whole structure of the *takaful* undertaking must also conform to the law of *Shari`a* completely (al-Qarra Daghi, 2005).

In relation to the above, the next big question is how to ensure that such a virtue would certainly be established in the Islamic insurance or *takaful* arrangement
while at the same time conforming to the rules of Shari‘a? How should the notion of pure mutuality be manifested and realized? The answer can probably be found in a particular contract that is supposed to govern this type of financial transaction. In fact, all types of modern Islamic financial products and services are expected to conform to the Islamic law of contract, in which its principles are built upon from numerous rules and conditions of a collection of contracts called ‘uqud musamma, nominate contracts (Buang, 2000). These rather classical contracts are largely treated by many practitioners as the most reliable foundation for any financial product to be built upon, since they are supported by textual sources (i.e. al-Qur’an and hadith). Furthermore, these contracts have been systematically formulated by classical scholars (based on the above sources) to an extent that may prevent them from being associated with the prohibited elements such as gharar, riba and maysir.

Regarding the above matter, the Islamic Fiqh Academy’s resolution in 1985 clearly proposed the contract of tabarru’, voluntary contribution, as well as ta’awun, co-operation, to govern the participants’ relationship in the takaful undertaking. Yet it appears that scholastic discussions of the mutual aspect of takaful largely concentrate on the former rather than on the latter. Perhaps this situation results from the fact that tabarru is generally viewed as one of the established categories of contracts under the theory of contracts in Islamic law. Ta’awun, on the other hand, might be seen by many as a broad principle or concept rather than an established contract. Nonetheless, Yusuf ‘Abdullah al-Shubayli maintains that ta’awun is in fact an independent contract upon which takaful should be built. He seems to reject the idea of tabarru’ as the underlying contract for takaful (al-Shubayli, 2008). The researcher is, however, of the opinion that both tabarru’ and ta’awun actually fit within the mutual framework of takaful. The subsequent sections will clarify and further analyse this particular issue in greater detail.

In short, the originally proposed contracts of tabarru’ and ta’awun are believed to render insurance permissible from the precepts of Shari‘a due to their capacity to uphold and maintain both the qualities of mutuality and co-operation. Besides, it is held by many contemporary jurists that tabarru’ (and perhaps ta’awun) contracts, unlike mu‘awada, commutative contracts, would mean that takaful is unaffected by the rules of gharar, riba, and maysir. Nevertheless, tabarru’ and ta’awun might not be the only contracts that correspond with the above qualities. Other contracts might also be found suitable to serve for the above purpose. Moreover, the adoption of both contracts might turn out to be inappropriate due to changes or modifications made to the operational aspects of takaful. The meaning of tabarru’ and its specific implementation in the takaful undertaking are discussed in detail in the next section before its suitability is further analysed.

THE CONCEPT OF TABARRU’

The word tabarru’ comes from the root word (verb) bara‘a’ or baru‘a, which means to excel, be proficient or skilful (Ibn Manzur, n.d.). From this thulathi, a tri-literal verb,
Islamic Economics, Banking and Finance: Concepts and Critical Issues

comes khumasi, the quinary-derived verb tabarra'ā, which means to volunteer, contribute or donate (Ba‘albaki & Ba‘albaki, 2007). Literally, tabarra` (as a verbal noun to the quinary-derived verb) could be defined as tatawwu`, which means voluntariness or volunteering (Hammad, 2008). It could also mean `atiyya or i`ta, donation or contribution, and minha, gift or present (Ba‘albaki & Ba‘albaki, 2007). When someone volunteers or donates, he or she is willing to do or give something without any consideration or conditions (Hammad, 2008).

Technically, tabarru` as a general contract could be described as extending or offering one’s possession to another (either in its physical form or its benefit/usufruct) without consideration, mostly as an act of philanthropy or courtesy, either with an immediate effect or to take place in the future. It consists of several specific nominate contracts, which include hiba, gift/bestow/blessing; wasiyya, bequest; waqf, endowment; `ariya, lending for gratuitous use (Hammad, 2008); kafala, guarantee; qard, benevolent loan; hawala, assignment of debt (Ayub, 2007); sadaqa, alms/charity; i`fa, waiver; ibra, discount (Bakar, 2009); wadi`a, safekeeping; and wakala, agency (Wizara al-Awqaf, 1987). However, according to the Mausu‘a Fiqhiyya, the tabarru` contract is yet to be defined by the fiqh scholars. The above definition is perhaps deduced from the definitions given to the above-mentioned nominate contracts which fall under the same category. In other words, tabarru` may be defined based on the mahiya, shared characteristics or substance of these contracts, which is gratuitous in character.

From the perspective of the counter value on exchange, genuine tabarru` contracts could be seen as the opposite of mu`awada, commutative or compensatory contracts (al-`Imrani, 2006). Technically, commutative contracts can be defined as contracts which involve the exchange or swapping of two `iwad, considerations or counter values such as bay`, sale, ijara, lease and salam. In these contracts, the ownership of any property or its usufruct will transfer from one party to another only if the recipient gives something in return (i.e. compensation or remuneration). This is different from pure tabarru` or ghayr mu`awada contracts in which the transfer of ownership would have effect without any consideration or return (Ayub, 2007). As far as the transfer of ownership is concerned, it is apparent that the former is built on the basis of establishing mutual rights and obligations for the parties to the contract, whereas the latter is based on sincere support, blessing and kindness from one party to another (Hammad, 2008). Accordingly, it is not unexpected that both categories have different legal consequences. While fulfilling the mu`awada contract is without a doubt obligatory, the parties to tabarru` contracts, on the other hand, are generally not enforced to fulfil their pledge.

From the above definition, it is perhaps right to say that a contract of tabarru` is a generic name given to several particular or specific contracts which are obviously unilateral, gratuitous or non-commutative in their character. However, it is worth mentioning here that in some cases, those specific contracts may not necessarily remain under the pure tabarru` notion. It is generally argued that any tabarru` contract may
also be regarded as mu‘awada if the element of “return” is brought in via the agreement of the parties to the contracts. For example, the majority of Muslim jurists tend to consider hiba bi shart al-‘iwas or hiba al-thawab, gift with reward, as a sale contract which is obviously commutative. However, as will be explained later, the application of hiba bi shart ‘iwas to the takaful operation would not easily alter its tabarru’ character (al-Qarra Daghi, 2005). Other instances of this kind of tabarru’ include ‘ariya, borrowing with a fee, wadi‘a, safekeeping with a fee, wakala bi ajr, agency with a fee and kafala bi annr al-madin, debt guarantee with the provision of reimbursement (Wizara al-Awqaf, 1987). Perhaps it could be suggested that tabarru’ can be classified as either pure or modified without necessarily subjecting it completely to the rules of mu‘awada.

**ISSUES IN THE APPLICATION OF TABARRU’ IN THE TAKAFUL CONTRACT**

In the takaful industry, the term tabarru’ is predominantly used in policy wording as well as the relevant rules and guidelines. This situation also applies in academia with regard to the subject of takaful. According to Bakar, there is no obvious reason for this, apart from its relative convenience for both the regulators and the industry (Bakar, 2009). This statement could be challenged, since the usage of this general term is apparently influenced by global fatwas, which generally propose tabarru’ along with ta’awun as the foundation for establishing Islamic insurance. As mentioned earlier, the application of tabarru’, which is apparently inspired by the practice of co-operative or mutual insurance, eliminates the illegal elements associated with the operation of commercial insurance (i.e. gharar, riba and maysir). Perhaps there was no real need to elaborate such a contract in detail back then due to the early stage of takaful development. It is assumed that the concept would inevitably undergo several improvements and further exploration as takaful progresses over time. Too much concentration on the technical aspects at this early stage might be deemed unnecessary.

Accordingly, tabarru’ generally implies that a participant is willing to contribute some money gratuitously to a takaful fund for the benefit of other participants without any consideration or return. In reality, however, this it apparently inconsistent with the takaful set-up, since it is assumed that every participant is ready to make a donation only if he or she (or their beneficiaries) is promised to receive benefits from the fund in the form of compensation (during the occurrence of certain risks or events) as well as a refund when the fund records a surplus. Even though it cannot be denied that some individuals may join a takaful scheme for a genuine tabarru’ reason, the fact that takaful is operated similarly as co-operative or mutual insurance will in some way blur the pure tabarru’ status. Needless to say, the notion of tabarru’, which is applied to the takaful structure, is not as pure and simple a contract as it is supposed to be. It appears that the contract of takaful, as far as the first tier is concerned, can probably be classified as tabarru’ at the beginning but mu‘awada at the end. In other words, the participant’s contribution will be considered as tabarru’ so long as he or she does not get any form of return, but may turn out to be a compensatory contract at the end if he or she makes a claim or receives his or her share of the surplus. This type of classification
is originally highlighted in the *fiqh* literature to address some forms of contracts such as *qard*, benevolent loan, and *kafala*, debt guarantee (Wizara al-Awqaf, 1987).

Regardless of whether it is pure *tabarru* or *tabarru* that ends with *mu`awada*, it is perhaps crucial at the outset to explore and analyse contemporary scholastic discussions regarding the specific form of *tabarru* which seems to correspond well to the operational aspects of *takaful* pertaining to mutuality (i.e. making voluntary contributions, receiving compensation and sharing the surplus). To reiterate, *tabarru*, as a generic term, may be represented by different types of contracts such as *hiba*, *hiba bi shart al-`iwad*, *sadaqa*, *waqf* and many more. More importantly, each and every one has its own salient features (i.e. objectives, pillars and conditions), and thus might have different legal consequences to the *takaful* arrangement. In other words, some contracts might be deemed as compatible with some aspects of *takaful* while some others might not.

By observing recent *takaful* documents and other published or unpublished articles, it appears that not much effort has been put into determining the specific *tabarru* contract(s) as well as its legal implications in the *takaful* arrangement. Most of the literature seems to be complacent in the usage of the generic term instead of the exact one. Furthermore, it tends to shy away from discussing the details or requirements of such contracts. For example, the Accounting and Auditing Organisation for the Islamic Financial Institutions (AAOIFI) and the Islamic Financial Services Board (IFSB), the two most recognized bodies in the Islamic finance industry, generally state that the participants’ contributions are mere *tabarru*, donations, or *iltizam bi al-tabarru*, commitment to donate. Excerpts from their published standards and guidelines are as follows:

Islamic insurance is based on the commitment of the participants to make donations for the sake of their own interest. (AAOIFI [a], 2008)

This standard shall apply to the contributions made on the basis of donation by the policyholders relating to general insurance. The standard shall also apply to the portion of contributions made on the basis of donation by the policyholders relating to insurance on persons (takaful). (AAOIFI [b], 2008)

. . . In a takaful arrangement the participants contribute a sum of money as *tabarru* commitment into a common fund that will be used mutually to assist the members against a specified type of loss or damage. (IFSB, 2009)

Tabarru’ commitment is a type of Islamic financial transaction that is fundamental to takaful schemes. It is the amount contributed by each takaful participant to fulfill obligations of mutual help and to pay claims submitted by eligible claimants. (IFSB, 2009)

Some might say that *iltizam bi al-tabarru* is actually the more specific type of *tabarru* which corresponds well to the nature of the contribution paid by the participant. The researcher chooses to disagree, since the effect of *iltizam bi al-tabarru* is only
limited in establishing the participant’s exclusive rights towards his contributions before they are finally withdrawn for the purpose of helping other participants on the basis of tabarru’. It appears as if the participant was depositing his money to the takaful operator on the basis of wadi’a, safekeeping, and further instructing the latter to donate the whole amount or part of it when certain unfortunate events occur. Since the participant’s contribution will eventually end up being donated to others on the basis of tabarru’, the question of the specific type of tabarru’ involved in the arrangement prevails.

In addition to these two authoritative institutions, most authors on the subject of takaful, including researchers such as Fadi Moghaizel, Aly Khorshid and Asem Samih Ahmad, seem to follow a similar trend by leaving out discussion of the details of the tabarru’ contract. Perhaps some of them deliberately skip the details of the tabarru’ contract to simplify the subject under discussion, which is already complicated by at least three other contracts signifying different business models, namely, mudaraba, wakala and waqf. It is also suspected that some others do it unintentionally, since they do not realize that tabarru’, which is widely translated as donation, is a generic term that may be represented by several specific contracts, as previously stated.

Nevertheless, a few contemporary scholars, including ‘Ali Muhyi al-Din al-Qarra Daghi, Mohd. Daud Bakar, Mohd. Ma’sum Billah, Muhammad Ayub and Younes Soualhi, have recently endeavoured to discuss the suitability of certain specific tabarru’ contracts that correspond to the three main aspects of takaful relating to the notion of mutuality (i.e. making a donation into the takaful fund, receiving compensation and sharing the underwriting surplus). They appear to suggest several contracts, namely, hiba bi shart al-‘iwad or hiba al-thawab, nihd or nahd, sadaqah and waqf. Nevertheless, it should be noted here that apart from al-Qarra Daghi, most authors discuss the topic only briefly. Moreover, they seem to have different thoughts regarding the subject; some propose it, while some others tend to oppose it.

It appears to the author that the first two contracts (i.e. hiba bi shart al-‘iwad and al-nahd) are the most widely accepted and applied contracts by current takaful operators, particularly in Malaysia. Both contracts also appear to be strongly suggested by al-Qarra Daghi. Waqf, which is proposed by Ayub (2007), despite being obviously applied in some countries, particularly in Pakistan and South Africa, is only relevant to the charitable act of the shareholders, not the participants, in order to furnish the takaful fund with a separate legal personality. Moreover, the application of waqf to the participants’ donation can seriously affect the solvency of the takaful fund since only the profits from the investment, but not waqf capital itself, may be used for the purpose of paying compensation. On the other hand, sadaqa, which is proposed by Bakar (2009), seems to be inappropriate due to the fact that it is performed genuinely for the sake of Allah as an act of worship (to get His rewards or to cool His wrath in the hereafter) but not for worldly motives (Hammad, 2008). For the above reasons, only the contract of hiba bi shart ‘iwad and al-nahd will be analysed in this chapter in order to determine their agreement with the mutual aspect of the takaful undertaking.
It should be noted here that some other specific contracts under the heading of tabarru’, such as wasiyya, ‘ariya, kafala, qard, hawala, i’fa, ibra’ and wadi’a, will not be discussed in this chapter due to their obvious incompatibility with the takaful modus operandi, particularly with regard to the act of paying contributions by the participants and their subsequent entitlement to compensation and surplus-sharing.

THE SPECIFICATION OF THE TABARRU’ ASPECT BASED ON HIBA BI SYART AL-‘IWAD

Amongst the contemporary scholars who appear to strongly propose that this particular contract is the foundation for takaful are ‘Ali Muhyi al-Din al-Qarra Daghi and Mohd. Daud Bakar. In fact, it is argued by al-Qarra Daghi that the majority of the fiqh scholars seem to concur with this view (al-Qarra Daghi, 2005). Based on the characterization of this particular contract, the takaful participants are deemed as giving some amount of money to a specific fund, which is considered as shakhsiyya i’tibariyya, legal personality, with the condition that the former would benefit from the fund in the form of a claim and to a certain extent surplus-sharing. However, the suitability of using this particular contract (as a foundation) is questioned by Younes Soualhi, particularly with regard to the practice of surplus-sharing (Soualhi, 2009).

Hiba bi shart al-‘iwad or hiba al-thawab, a conditional gift for a consideration, refers to a hiba contract whereby the wahib, giver, is willing to give away something in exchange for something, from the mauhub lahu, recipient, or other parties. As mentioned earlier, the participant’s contribution in every takaful scheme seems to fit into this kind of hiba. Needless to say, a participant who subscribes to a takaful scheme appears to make his or her contribution conditional upon receiving benefits from the takaful fund in the form of compensation (during the occurrence of certain risks or events) and, to a certain extent, surplus-sharing. However, as will be explained later, the provision of surplus-sharing is perhaps inappropriate to be regarded as one of the benefits under the notion of ‘iwad or thawab. It seems to be more justified under the heading of permissible riju’, retraction of hiba.

In general, Muslim jurists are of the opinion that hiba in its original form does not require the recipient to provide replacement or counter value for any gift received from the giver. However, if the giver clearly stipulates his or her condition for some sort of exchange, it should not be disregarded by the receiver, since it may be considered as a valid condition. From the perspective of the Islamic law of contracts, the insertion of shurut, conditions, into any contract is always a two-sided debate. According to Buang, earlier jurists, excluding the Hanbalis, tend to disallow the insertion of conditions in the contract sigha, expression. However, later jurists, almost in every school of law, appear to validate such affixation so long as the basic rules and requirements of the contract (termed muqtada al-‘aqd) are not violated, apart from being beneficial to the contracting parties (Buang, 2000; Wizara al-Awqaf, 1987).
This general rule of thumb also applies to the *hiba* contract. Consequently, any condition which contradicts the basic requirements as well as legal effects of *hiba*, such as stipulating the recipient not to use or give away the gift, is deemed as null and void. The *hiba* itself, nevertheless, may still be valid according to the Hanafis, Shafi’is and Hanbalis. The Malikis, on the other hand, view both the condition and contract as void (al-Kasani, n.d.). From the above instances, the legal effects of *hiba* seem to be denied, where the recipient who has legal entitlement/ownership towards the gift has been hampered from freely dealing with the given object.

As far as the *hiba bi shart al-`iwad* is concerned, the majority of Muslim scholars tend to view it as a permissible form of *shurut* inserted into the contract of *hiba* (Wizara al-Awqaf, 1987). They obviously base their decision on a *hadith* from the Prophet, narrated by Abu Huraira, which says: “The donor holds an exclusive right of ownership over his *hiba*, provided he is not rewarded for it” (al-Qarra Daghi, 2005). It appears, from the second part of the *hadith*, that seeking a return from an honourable act of giving is not an offence, after all. The first part, on the other hand, tends to signify the permissibility of *ruju`,* retraction of *hiba*, if the reward or return is not fully satisfied by the giver. From the context of *takaful*, this aspect of expecting a return should perhaps be seen as more acceptable and would easily fit within the framework of a valid *hiba*. If a giver could legally ask a recipient (which is normally a different person) to give him or her something else in return, the *takaful* participant should be seen as permitted to do the same. This is mainly because the recipient in the latter case is the *takaful* fund, a separate entity which in principle belongs to the group of participants. In other words, the contributions (treated as *hiba*) are actually given to the fund for the sake of the givers themselves. Accordingly, the legal ownership of the fund rests with the participants collectively and is not transferred to other parties as with the former case.

Despite this general permissibility, there are some other issues which could affect the validity of *hiba bi shart al-`iwad* and perhaps the suitability of using it as a basis for *takaful* operation. These issues are discussed below.

**THE JURISTIC CHARACTERIZATION OF HIBA BI SYART AL-`IWAD – BETWEEN BAY` AND HIBA**

One of the key issues which could affect the legal ruling on various aspects of *hiba bi shart al-`iwad* is perhaps the categorization of the contract, known as *takyif fiqh*, juristic characterization, proposed by the Muslim jurists. There are at least three different juristic characterizations for *hiba bi shart al-`iwad*. The first characterization, which is held by the Malikis, Shafi’is, Hanbalis and Zufar, tends to equate the contract with the contract of sale and accordingly will subject it to the latter’s rules and conditions (Ibn Qudamah, 1405H). The second view, on the other hand, appears to characterize the contract as a hybrid between the contract of sale and a gift. To be more specific, the contract is considered to be *hiba* at the beginning but may
turn out to be *bay* at the end, particularly when both the gift and its *`iwad*, return, have been delivered and accepted by the receiver and giver, respectively. This latter juristic basis appears to be proposed by Abu Hanifah, Abu Yusof and Muhammad. In general, it could be said that this characterization has the same ultimate legal consequences as the first one, since it is strongly believed that the contract would be disputed or even terminated by the giver if the *`iwad* failed to be delivered. In other words, the application of the rules and conditions of the sale contract is eminent in both cases.

The third opinion, which is said to be held by Ahmad Ibn Hanbal, tends to consider *hiba bi shart al-`iwad* as being subdued by the general law of *hiba* but not *bay* in particular (Wizara al-Awqaf, 1987). He appears to suggest that *hiba* can sometimes be purely *tabarru*’, gratuitous, and sometimes stipulated with *`iwad* without necessarily depriving its true form. In short, this final juristic characterization would obviously bring about different legal consequences to the contract in question as compared with the previous juristic basis. While the latter, without a doubt, is subjected to the prohibition of *gharar* and *riba*, the former, on the other hand, may find strong reasons not to be subjected to it.

If the *tabarru*’ aspect of *takaful* were to be based on *hiba bi shart al-`iwad* and the first two juristic characterizations were accepted, it may create a serious problem to the whole *takaful* system at first sight. To be more specific, since the contract is considered as equivalent to a sale contract and subsequently subjected to its rules and conditions, *takaful* may be deemed as invalid due to its potential association with *gharar* and *riba*. *Gharar* could possibly be associated with the contract, as the participants appear not to have clear knowledge with regard to the end result – whether or not they will get compensation. Even if they were assured of getting a reimbursement, the difference between the amount contributed and the amount received, as well as the timing involved, would trigger another problem, i.e. *riba* in both its forms: *al-fadl* and *al-nasi’a*. Due to these serious implications, some scholars tend to reject the application of *hiba bi shart al-`iwad* in the *takaful* undertaking (Marjan Muhammad, 2010).

However, the above concern appears to be unjustified when deeper analysis is conducted. As rightly argued by al-Qarra Daghi, the nature of *takaful* is quite distant from a pure commutative contract such as *bay*. Even though the element of bilateral exchange (akin to sales) seems to exist in *takaful*, it is perhaps more inclined towards charity and co-operation rather than the standard form of *hiba bi shart al-`iwad* itself (al-Qarra Daghi, 2005). To be more specific, there is no real bilateral exchange between two different parties in the first tier of the *takaful* arrangement as usually found in any bilateral contract, including the above-mentioned contract. In fact, the compensation payable to the participants (as an exchange for their contribution) is awarded by the *takaful* fund, a legal personality that belongs entirely to the same group of participants. There is no real involvement from another party (i.e. company) in the transaction except as an appointed representative to manage the fund on behalf
of the participants. Based on these reasons, it could be suggested that *hiba bi shart al-`iwad* in the *takaful* set-up would probably suit the juristic characterization of *hiba*, as proposed by Ahmad, rather than the contract of sales. In wider terms, the perceived *mu`awada* element in *takaful*, as far as the first tier is concerned, would not deprive its true essence of *tabarru*.

**THE CERTAINTY OF `IWAD, RETURN – BETWEEN MA`LUM AND MAJHUL**

Most of the scholars who validate the contract stipulate that the intended `*i*wad, reward/return, must be made known and defined (*ma`lum* and *mu`ayyan*) by the giver to the recipient. Otherwise, if the `*i*wad is majhul, unknown or indefinite, the affixation of the condition or the *hiba* itself would be invalid (Wizara al-Awqaf, 1987). This conclusion is apparently analogised with the condition of a valid sale contract, whereby the subject matter (i.e. the object and the price) should not be associated with the elements of *jahala* and *gharar*. This is not surprising, since the majority of scholars, excluding Ahmad Ibn Hanbal, consider *hiba bi shart `iwad* as a type of sale contract, or at least will be finally concluded as one. Conversely, Ahmad, who views the contract as being more inclined towards *hiba*, maintains that an undefined `*i*wad would not invalid the *hiba* contract or the condition fixed to it as long as the *wahib* is content with the replacement or return (Wizara al-Awqaf, 1987).

In *takaful*, it appears that the benefits or return (in the form of compensation) cannot be precisely determined, though obviously deliverable by the *takaful* fund (as the receiver). This is due to the nature of claim payments, which obviously depend on certain conditions. Apart from being payable only upon the occurrence of certain events, the actual amount of compensation received by each participant is also dependent on the severity of the risks. Nevertheless, it can be said that the projected figures of these benefits have been specified or made known to the participants via specific formulations/tables detailed in the policy. Thus, the researcher is of the opinion that the `*i*wad in the case of *takaful* is not totally majhul, unknown, so that it might render the condition or the whole contract invalid. Furthermore, as explained earlier, the strict analogy of the *takaful* contract (which is deemed as *hiba bi shart al-`iwad*) to the contract of sale, which is under the *mu`awada* category, seems to be inappropriate. Hence, the perceived “uncertainty” with regard to the `*i*wad should be tolerated to suit the contract’s general categorization as *tabarru*.

**`IWAD FROM THE SAME MAUHUB, GIVEN OBJECT OR PART THEREOF**

It is generally argued by the classical jurists, especially the Hanafis, that `*i*wad (from the *mauhub lahu*, receiver) should not be the same material or item which is originally given by the *wahib*, giver, or part thereof (Wizara al-Awqaf, 1987). Put differently,
`iwd should be something different from the gift or otherwise it will not be considered as valid. From the perspective of a giver, it is perhaps senseless to give something and then ask the receiver to give it back, either wholly or partially, as the `iwd. The giver would be better off keeping the item in the first place rather than giving it to someone while hoping to get it back. What is normally intended by the giver is apparently something different, considering the fact that he or she can always retract the gift if the `iwd is unsatisfactory.

At first sight, this condition seems to affect the operational aspect of takaful since the compensation payable to the participant might actually comprise some or the full amount of money contributed earlier by the latter to the takaful fund. In other words, he or she might get in return (as `iwd) the very same object of gift. Nevertheless, in reality this may not happen at all. In fact, each contribution made by a single participant to the takaful fund will be mixed with contributions from other members. Needless to say, it is perhaps impossible to determine exactly whose contribution would be used by the takaful fund to compensate few unfortunate members. Besides, it could be said that the original characteristic of the individual gift changes immediately after it is credited to the fund, thus renders the above issue irrelevant. To further substantiate this point, it is almost certain that the amount of compensation received by any participant would not be the same as his or her overall contributions. It could be more or less than the original amount contributed, though in most cases the former is common. Also, compensation may not necessarily be restricted to the form of cash money. For example, in a motor takaful policy, most compensation involving covered perils such as damage due to accidents or vandalism is in the form of repair services by the appointed repairers or garages. Thus, no cash money is ever paid to the participants.

Another concern which appears to be related to this particular subtopic is the practice of surplus-sharing by the participants. It is argued by Younes Soualhi that the practice is wrongly justified by some scholars, including al-Qarra Daghi, based on the provision of `iwd on the conditional hiba contract (Soualhi, 2009). It appears that some scholars who hold this view tend to consider the right of getting compensation and sharing an underwriting surplus as benefits that might correspond to the notion of `iwd (Bakar, 2009). Soualhi further maintains that the justification of surplus-sharing based on the provision of `iwd is inappropriate due to the fact that the latter should be something different from mauhub, gift (i.e. participants’ contribution) and not a part thereof.

As previously mentioned, the issue of homogeneity between the `iwd and mauhub is perhaps irrelevant in this case. Besides, al-Qarra Daghi appears not to straightforwardly vindicate the practice of surplus-sharing amongst the participants through to the permissibility of `iwd, as claimed by Soualhi. Instead, he seems to consider the practice as disparate from the concept of prohibited ruju’, retraction of hiba, and very much similar to the contract of al-nahd (al-Qarra Daghi, 2005). It is worth mentioning here that the notion of `iwd and ruju’ are two different concepts. Based on the hadith
mentioned earlier, one who has yet to be rewarded by the receiver of his or her gift may validly retract the gift at his or her option. Thus, it appears that it is more appropriate to view the practice of surplus-sharing from the perspective of permissible *ruju* rather than *`iwad*.

**RUJU`, RETRACTION OF HIBA AND THE PRACTICE OF SURPLUS-SHARING AMONGST THE PARTICIPANTS**

The retraction of *hiba* is generally validated by the majority of Muslim jurists if the gift has yet to be physically possessed by the receiver. However, if the gift is already in the hand of the receiver, most tend to invalidate its retraction, except in the case of a father who retracts his gift to his child (Wizara al-Awqaf, 1987). Only the Hanafis seem to validate the retraction of the latter category, provided that it is mutually consented to by both the giver and receiver and not subjected to *mawani*, prohibitions of retraction. Nevertheless, the act is considered *karahtyya tanzih*, abomination. Apparently, the different legal rulings pertaining to this matter result from different sets of legal texts being held by the scholars. The Hanafis obviously base their ruling on the hadith mentioned earlier, which indicates the permissibility of *hiba* retraction in the case of dissatisfaction with the *`iwad*. The rest of the scholars, on the other hand, appear to base their ruling on other *ahadith* that clearly prohibits the act of *ruju*. One of the *ahadith* states that “He who retracts his *hiba* is like the one who swallows what he vomits” (Bukhari, 1981). Despite the apparent conflict between these two *ahadith*, both actually complement one another. In other words, *ruju* could be considered permissible or prohibited depending on the context. As rightly argued by Ibn Qayyim, the permissible *ruju* is obviously associated with *hiba bi shart `iwad* (where the *`iwad* is unsatisfactory or has yet to be delivered), while the prohibited one refers to a pure or genuine *hiba* (where the *`iwad* is not sought after) (Ibn Qayyim, 1973).

As far as the practice of surplus-sharing amongst the participants is concerned, the researcher is of the opinion that it might be justified under the provision of permissible *ruju*, retraction of *hiba*. Based on the former *hadith*, it is apparent that the giver could retract his gift provided he is not rewarded for it. In the context of *takaful*, any participant who does not make any claim could be considered as having yet to receive the *`iwad* or reward/return. Thus, he or she could possibly retract his or her contributions or part thereof (if any) from the *takaful* fund under the notion of surplus-sharing. On the other hand, the participants who have already made claims (thus received their *`iwad*) would not be allowed to do this, since it constitutes one of the *mawani*.

Soualhi appears to disagree with the above justification since he maintains that the above *hadith* only signifies conditional retraction of the same gift, not an excess or part of it (Soualhi, 2009). His argument, however, seems to be loosely founded. Logically, if the entire object of *hiba* could be validly retracted, the retraction of only a fraction of it should be seen as more permissible. Additionally, the Hanafis maintain that the object of *hiba* which has been partially consumed would not prohibit the rest of it to be retracted by the giver (Wizara al-Awqaf, 1987).
Regarding this matter, al-Qarra Daghi maintains that the practice of surplus-sharing is actually not similar to the concept of prohibited *ruju*. It is more appropriate to be considered as returning the *takaful* fund surplus to the members who jointly established and owned the fund. In spite of that, he appears to suggest that the practice, and even the compensation payable to the participants, could be analogised to the element of retraction of the gift, stipulated in two variants of the *hiba* contract known as *`umra* and *ruqba* (al-Qarra Daghi, 2005). Even though the methods involved in retrieving the gift are different in both cases, the end result is obviously the same, i.e. the return of the gift to the giver (Suruhanjaya Sekuriti, 2006). *`Umra* is a temporary *hiba* contract, whereby the right to the given object is contingent upon the life of either the giver or the receiver. If the receiver dies, the gift will be returned to the giver. On the other hand, if the giver dies, the gift will be returned to his heirs (Hammad, 2008). *Ruqba* is quite similar to *`umra* whereby the gift will be returned to the giver if the receiver dies earlier than the former. However, if the giver dies before the receiver, the latter will retain his or her right to the gift (Wizara al-Awqaf, 1987). In both cases, it appears that the giver could possibly regain his or her gift after a period of time. In short, the element of retraction of the gift should not be seen as totally forbidden, especially in the contract of *hiba bi shart al-`iwad*, where the hadith clearly permits such an act.

In conclusion, it can be suggested that the contract of *hiba bi shart `iwad* is fully compatible with the operational aspects of *takaful* pertaining to mutuality. Based on this contract, the participants could either benefit from their contributions to the *takaful* fund under the provision of `*iwad* or share the fund surplus, if any, under the provision of permissible *ruju*. Even though the contract has been argued by some as being more inclined towards *mu`awada* rather than *tabarru*, the specific application of *hiba bi shart al-`iwad* in the *takaful* set-up perhaps would diminish its association with *mu`awada*, particularly the contract of sales. The main reason for this is the fact that the *takaful* fund (as the receiver of the gift) is collectively established and owned by the participants rather than the *takaful* company. Thus, it would be seen as a scheme of mutual help and co-operation. Alternatively, since the *takaful* fund itself is considered to be *shakhsiyya i`tibariyya*, the decision to pay compensation and surplus to the participants out of the fund could be well justified under the notion of pure *hiba* by the former.

**THE SPECIFICATION OF TABARRU` ASPECT BASED ON AL-NAHD OR AL-NIHD AND MUSHARAKA TA`AWUNIYYA**

It is argued by al-Qarra Daghi that he is the first ever person to suggest the juristic characterization of *al-nahd* to *takaful* operations (al-Qarra Daghi, 2005). This particular concept has also been highlighted by Muhammad Baltaji in his attempt to establish valid legal foundations for the element of co-operation found in co-operative insurance (Baltaji, 2008). Additionally, the recent OIC Fiqh Academy Conference on Islamic Insurance (held in April 2010) seems to accept *al-nahd* as valid grounds for *takaful* mutuality. Nevertheless, the conference is apparently suggesting a rather
practical term for *al-nahd*, which is *musharaka ta`awuniyya*, co-operative partnership, to determine the relationship amongst the participants (Marjan Muhammad, 2010). Perhaps both *al-nahd* and *musharaka ta`awuniyya* have shared characteristics which correspond to the mutual aspect of *takaful*. This is not, however, to suggest that both terms could be used interchangeably. The connection between *al-nahd* and *musharaka ta`awuniyya* will be dealt with later in this chapter.

In general, *al-nahd* or *al-nihd* is the practice of ancient Muslims with regard to the providing and sharing of food or meals during their journey to holy battles or in times of famine. It is literally and technically defined as an equal contribution made by each and every member of a group to the overall expenditure of the group (specifically in terms of providing food supplies) during a journey (Ibn Hajar, 1939; Ibn Manzur, n.d.). The practice of *al-nahd* is supported by several hadith reported by al-Bukhari in a specific chapter called *shirka fi al-ta`am wa al-nahd wa al-`urud*, partnership in food, *al-nahd* and *al-`urud*. Amongst the hadith included in this particular chapter are the following (Bukhari, 1981):

**Narrated by Wahab bin Kisan:** Jabir bin Abdullah said, “Allah Apostle sent an army towards the east coast and appointed Abu `Ubaida bin al-Jarrah as their chief, and the army is consisted of three hundred men including myself. We marched on till we reached a place where our food was about to finish. Abu `Ubaida ordered us to collect all the journey food and it was collected. My (our) food was dates. Abu `Ubaida keep on giving us our daily ration in small amount from it, till it was exhausted. The share of everyone of us used to be one date only.” I said, “How could one date benefit you?” Jabir replied, “We come to know its value when even that too finished. . . . “

**Narrated by Salama:** Once the journey food diminished and the people were reduced to poverty . . . Allah’s Apostle ordered `Umar, “Call upon the people to bring what has remained of their food.” A leather sheet was spread and all the journey food was collected and heaped over it. Allah Apostle stood up and invoked Allah to bless it, and then directed all the people to come with their utensils and they started taking from it till all of them got what was sufficient for them.

**Narrated by Abu Musa:** The Prophet said, “When the people of Ash`ari tribe ran short of food during the holy battles, or the food of their families in Medina ran short, they would collect all their remaining food in one sheet and distribute it amongst themselves equally by measuring it with a bowl. So, these people are from me, and I am from them.”

From these hadith, the characteristics of *al-nahd* can be outlined as follows:

1. It is practiced during hard times either in the time of *safr*, journey, especially in pursuit of holy war (as indicated by all three hadith above) or *hadr*, settled in a city (as indicated by the last hadith). According to Ibnu Hajar, *al-nahd* was
originally exercised during a group journey but later extended to hadr, as shown in the hadith of the Ash'ari tribe (Ibn Hajar, 1939).

2. Each individual is expected to contribute whatever food remains with them to a common pool and may receive, in return, an equal portion of the food gathered (as demonstrated by the first and third hadith) or an unequal quantity (as indicated by the second hadith). There seems to be no indication from the hadith that necessitates the contribution to be of equal quantity. Regarding this, Ibnu Hajar argues that al-nahd is not strictly subjected to the notion of equality except in the distribution of food. Yet the different circumstances of each group member may permit them to consume the food disproportionately. He further quotes Ibnu al-Tin’s statement which says that each member’s right to the collected food is equal; however, he or she may acquire the food unequally based on custom practice. In spite of this, it appears that al-nahd is more often described as a practice whereby each member contributes equally to provide the supply needed for a journey, but may not necessarily receive an equal portion of it during the journey (Baltaji, 2008).

3. Despite the apparent inequality between what is contributed and what is received in return, the practice is not subjected to the rules of prohibited riba and gharar, even if the types of food involved in the practice are categorized as one of the ribawi items such as dates (as indicated by the first hadith). According to Baltaji, the main reason for this permissibility is based on the fact that the practice is built upon the spirit of mutual co-operation, far from any association with the element of business and profiteering. In general, the law of riba and gharar is waived in transactions aimed for the former but not the latter (Baltaji, 2008). Additionally, the last sentence of the third hadith, i.e. “... these people are from me, and I am from them” clearly indicates the full compatibility of this practice with Shari`a law.

In short, it could be said that the essence of al-nahd is mutual co-operation amongst the members of a group or community during difficult times in order to sustain the group’s survival in the future. This objective is obviously achieved through the act of every group member who mutually contributes according to his or her ability to form a pool of resources (food supply). These resources are then redistributed to each and every member so that everyone has enough, if not an equal supply, to continue living. In general, this practice seems to suit the operational aspect of takaful pertaining to mutuality. This particular topic is discussed in more detail in the following section.

THE APPLICATION OF AL-NAHD TO THE PRACTICE OF TAKAFUL

Based on the elaboration given above, it seems that the practice of al-nahd can be established as the basis for the takaful operation pertaining to the aspect of mutuality. According to al-Qarra Daghi, there is no doubt that al-nahd completely matches the framework of takaful. He claims that the practice is actually a variant of hiba bi shart al-`iwad, which is compatible with the takaful operation (al-Qarra Daghi, 2005).
The researcher is, however, of the opinion that *al-nahd* (in its exact form and practice) does not entirely match the operational aspect of *takaful*. However, it does have some broad similarities with the latter which could be used to substantiate the justification of *takaful* to a certain extent.

In general, both *al-nahd* and *takaful*, without a doubt, are considered as a means to avoid (or perhaps manage) problems or risks through the establishment of mutual help and co-operation amongst a group of people. As mentioned earlier, this type of transaction, unlike any profit-oriented venture, is proved to be completely lawful and further unaffected by the rules of *riba* and *gharar*. Nevertheless, it should be noted that the scope of risks in both systems appears to differ substantially. While the risk in *al-nahd* seems to be restricted only to food shortage (mainly during a journey), the risks in the *takaful* set-up are far more complicated and diverse. It could range from a huge risk such as the loss of a human life due to critical illness to a smaller one such as the theft of an old motorcycle kept in a garage.

Another dimension of *al-nahd* which seems to correspond to the practice of *takaful* is the fact that the former involves the contribution of a certain amount (of an object) in return for an uncertain amount (of an object) (Baltaji, 2008). To be specific, a person in both cases might receive more or less than the original amount contributed. Nonetheless, the disparity between what is received and what is given will not render both *al-nahd* and *takaful* invalid under the rules of *gharar* and *riba*. By examining this in more detail, it seems that some differences emerge between the practice of *al-nahd* and *takaful* with regard to this aspect. In the former, it is almost certain that every single person who contributed to the stock of food (for a particular journey) will get their portion throughout the journey, regardless of its quantity. In *takaful*, however, it is certain that some participants will not get anything from their contributions due to the expiration of their policies without experiencing any risk or unfortunate event.

The third and final characteristic of *al-nahd* which is claimed to be consistent with *takaful* practice is the returning of any remaining stock (of food) to the group members after the journey ends (AAOIFI [a], 2008; al-Qarra Daghi, 2005). This particular feature is currently used by many scholars and regulators to justify the participants’ exclusive right towards the distribution of any underwriting surplus during a particular financial year. Interestingly, this feature seems to be unfamiliar in the practice of *al-nahd*, since there is no indication from any hadith or classical literature, including from Ibnu Hajar, which substantiates this aspect. This fact was first realized by Soualhi when he criticized the AAOIFI’s justification of limiting surplus-sharing to the participants based on this aspect of *al-nahd* (Soualhi, 2009). His view is that the surplus could also be validly shared with the *takaful* operators. Perhaps al-Qarra Daghi is responsible for adding the feature of redistributing any remaining food to the practice of *al-nahd*. Since the feature is merely an assumption instead of a solid fact, it is perhaps erroneous to justify the practice of surplus-sharing in *takaful* based...
on it. Put differently, the connection between takaful and al-nahd with regard to this aspect (returning the surplus) is most likely a supposition if not non-existent.

In conclusion, the application of al-nahd to the takaful operation seems to be relevant at the conceptual level, whereby the former’s general characteristics are seen to coincide with the latter. At the practical level, however, it appears that al-nahd might not be suitable to underlie the mutual aspect of takaful. This is mainly due to the fact that al-nahd, unlike other nominate contracts, refers to a specific practice of ancient Muslims in providing and sharing food during a journey or food shortage. Perhaps, the practice of al-nahd itself is underlain by other specific types of contract. Regarding this, al-Qarra Daghí’s earlier statement which links al-nahd with hiba bi shart `iwad may sound sensible. Logically, any act that involves giving something while expecting to get something in return may fit into the definition of the hiba bi shart `iwad. Thus, the actual connection between takaful and al-nahd probably refers to the former’s relation to hiba bi shart `iwad and not al-nahd itself. Another dimension which could strongly relate al-nahd to takaful is considering the former as a variant of ta`awun, co-operation, or musharaka ta`awuniyya, a co-operative partnership contract. This topic will be discussed next.

THE POSSIBLE CONNECTION BETWEEN AL-NAHD AND TA `AWUN OR MUSHRAKA TA `AWUNIYYA

As previously mentioned, the mutual aspect of takaful could also be established through the contract of ta`awun, co-operation, in addition to the contract of tabarru`. According to al-Shubayli, takaful should only be considered as a ta`awun contract rather than tabarru`. He argues that tabarru` is inappropriate to the practice of takaful due to its intolerance to the element of `iwad, return. However, as indicated earlier, tabarru` proves to be more flexible in terms of stipulating some sort of return, as exemplified by the contract of hiba bi shart `iwad. Thus, it could be said that both tabarru` and ta`awun are compatible with the mutual aspect of takaful.

The contract of ta`awun is defined by al-Shubayli as the joining of two or more persons to form a partnership that share together any possible gain and loss. This contract is distant from two other categories of contract, namely, mu`awada and tabarru`. While the former is seen as entailing the gain for someone at the expense of another, the latter is perceived as a unilateral contract that merely brings about a loss (al-Shubayli, 2008). Perhaps ta`awun is positioned somewhere between mu`awada and tabarru`. He further argues that ta`awun can be arranged to achieve a profit, such as in the case of a business-oriented partnership, as well for reducing the burden of providing enough supply for a journey, as reflected in the hadith of the Ash`ari tribe. This latter instance appears to fit into the definition of al-nahd. As a result, al-nahd can be seen as a specific practice that is underlain by a more general ta`awun contract. Based on this fact, an earlier claim that views al-nahd as the suitable foundation for takaful operations perhaps
refers to the ta’awun contract rather al-nahd in its practical form. Put differently, ta’awun may be considered as an independent contract that could be applied to several transactions including al-nahd and takaful. Similar to tabarru’, the essence of ta’awun renders any arrangement based on it not to be subjected to the rules of gharar and riba.

Another possible underlying contract for the practice of al-nahd is perhaps musharaka ta’awuniyya. This idea can be deduced from the recent OIC Fiqh Academy conference whereby the contract of musharaka ta’awuniyya was proposed as an alternative juristic basis for takaful operations (Marjan Muhammad, 2010). Even though the conference did not clearly spell out the connection between al-nahd and musharaka ta’awuniyya, its reliance on the above-mentioned hadith regarding the former, in support for the latter, speaks for itself. To be precise, the narrations on Abu `Ubaida al-Jarrah and the Ash’ari tribe were submitted as textual evidence in support of the above contract. Therefore, it could be suggested that the earlier argument for applying al-nahd to takaful operations is perhaps referring to musharaka ta’awuniyya rather than al-nahd in its practical form.

Basically, the contract appears to be similar to the ta’awun contract except that it is combined with another contract, namely, musharaka or shirka, partnership. Perhaps musharaka ta’awuniyya is a new variant of the ta’awun contract. Although musharaka is normally associated with partnership in business (where the element of profit is expected), its combination with ta’awun perhaps associates the new contract with the notion of mutuality far more than its commercial character. Besides, the term shirka, partnership, is proved not to be alien to the notion of mutual help, as highlighted by Bukhari. It is obvious that the hadith on al-nahd were compiled under the chapter of shirka fi al-ta’am, partnership in food, in his Sahih. Possibly, the idea of musharaka ta’awuniyya is also influenced by this particular chapter of Sahih Bukhari.

The contract of musharaka ta’awuniyya is argued to be compatible with the operational aspects of takaful based on several justifications, listed below (Marjan Muhammad, 2010):

1. Paying contributions to the takaful fund through musharaka ta’awuniyya is a contract based on the agreement and consent of the participants, and it combines the two elements of safeguarding property and mutual co-operation.
2. It is an independent contract which is collective and co-operative in nature and has its own rulings. Rulings which relate to a sales contract, for instance, are not applicable to this new contract.
3. The contract of partnership combined with the concept of ta’awuniyya will ensure that the indemnification is given upon necessity and will eliminate the intention of gaining profit among contractual parties.
4. The distribution of the surplus amongst the participants is easier, as the contract is based on a clear partnership whereby the profit or loss is shared according to their proportion.
CONCLUSION

The resolutions made on the permissibility of mutual and co-operative insurance are mainly based on their qualities, which are distant from commercial or capitalist forms of insurance. It is obvious that both types of insurance, despite being technically different, are purely organized along the notion of solidarity, co-operation and mutual assistance, which results in the consideration of the participants as both the insured and the insurer to the schemes. In other words, the participants in both insuring bodies are seen as willing to help one another based upon the golden principle of “bear ye one another’s burden”. The main feature of Islamic insurance, currently known as takaful, is supposed to be based upon this same notion of mutuality.

Nevertheless, this is not necessarily to suggest that takaful should only be established according to the structural framework of co-operative or mutual insurance. What is more important in the takaful set-up is to ensure the realization of the virtue of mutual assistance (apart from its conformity to the rules of Shari’ah), regardless of how it is organizationally structured. This statement can be supported by the fact that almost all modern takaful companies these days are neither of a pure mutual or co-operative form. Moreover, a takaful undertaking is commonly described as a hybrid of a mutual and a commercial form of company.

Perhaps the most effective and reliable means to ensure the achievement of the above objectives is through the assignment of suitable contract(s) to govern the takaful undertaking. It appears that the contracts of tabarru’ and ta’awun are strongly proposed by the majority of Muslim scholars to underlie this particular transaction. By relying on these contracts, takaful will not be subjected to the rules of gharar and riba, which are both strictly forbidden in the mu`awada category, particularly sales. Since both contracts, especially tabarru’, are technically generic contracts which can be represented by several specific contracts of similar characteristics, the quest to find the most suitable one has been instigated.

It appears that hiba bi shart al-`iwad and al-nahd have been suggested by many scholars as the most suitable candidates to represent the tabarru’ notion in takaful. In spite of being analogised with the contract of sale by many scholars, hiba bi shart `iwad is proposed by the researcher to be still preserved under the tabarru’ domain. Thus, its application to the takaful operation would not raise the issues of gharar and riba. Moreover, hiba bi shart `iwad is deemed to be fully compatible with the idea of mutuality. To be more specific, by applying this contract to the takaful set-up, every participant has a rightful claim to the risk fund under the provision of `iwad, as well the underwriting surplus (if any) under the notion of permissible ruju’.

Al-nahd, on the other hand, may not be fully compatible with the takaful operation due to the fact that al-nahd, unlike other nominate contracts, refers to a specific practice of ancient Muslims to provide and share food during a journey or food shortage.
The Implementation of Tabarru` and Ta`awun Contracts in the Takaful Models

The claims made about the suitability of al-nahd as the foundation of takaful operations perhaps refer to the former’s possible underlying contract that is hiba bi shart `iwad. The modus operandi of al-nahd, which involves the giving of something while expecting to receive something in return, seems to fit with the definition of hiba bi shart `iwad. Another dimension which could strongly relate al-nahd to takaful is considering the former as a variant of ta`awun or musharaka ta`awuniyya. Both contracts are argued to be independent and could be applied to many other transactions apart from al-nahd. As a result, the notion of mutuality in takaful is obviously achieved through tabarru` and ta`awun contracts.

FOOD FOR THOUGHT

• Since most takaful schemes nowadays are operated by commercial entities rather than by pure mutual or co-operative organization, how can it be ensured that the element of profit-seeking will not overshadow the essence of tabarru`?

• Could other types of tabarru` contracts such as sadaqa and waqf be adopted to suit the mutual dimension of takaful despite their apparent compatibility with its current modus operandi?

REFERENCES


