A JURISTIC EVALUATION OF THE APPLICATION OF *JĪ`ALAH* (REWARD CONTRACT) AS THE UNDERLYING BASIS FOR JUSTIFYING SURPLUS SHARING PRACTICE

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Abstract

The majority of Muslim scholars argue that the commercial insurance contract is inconsistent with Shari`a law on the grounds that it is a mu`awada, financial exchange contract, which is overwhelmed by forbidden elements such as gharar, uncertainty, riba, interest, and maysir, gambling. As an alternative, a Shari`a-compliant insurance scheme, known as takaful, was introduced in the late 1970s that operates mainly on the principles of tabarru`, voluntary donation, and ta`awun, mutual co-operation. Yet, since most of the initiators of this valid scheme are mainly joint-stock or public limited companies, it appears that the original concept of takaful was later affected by a similar profit-seeking element found in commercial insurance. This paper therefore sets out to examine those issues particularly which relates to the practice of surplus sharing by takaful operators in Malaysia. It argues that since the practice is theoretically underlain by a financial exchange contract namely jī`ala (reward) it could possibly affect the validity of the whole takaful arrangement. This is especially relevant, as the scheme is no longer considered as a purely tabarru` arrangement and thus subject to the normal rules and conditions for a valid contract such as being free from the above-mentioned forbidden elements. This research is mainly qualitative and relies greatly upon investigation into the classical and contemporary sources of Islamic law, particularly from the works of major Sunni schools, namely Hanafi, Maliki, Shafi`i and Hanbali. The study is also based on a fieldwork method, since it involves observations on surplus sharing policies of several takaful operators in Malaysia. The conclusion is that if the conditions attached to the contract oh jī`ala were fully met, then the practice of surplus sharing by takaful operators may be permitted. In this it opens the door to future research in this area.

*Keywords*: *Takaful, surplus-sharing, jī`ala/`ala, tabarru`

Introduction

The majority of the literature found on the subject of *takaful* tends to greatly emphasise the mutual aspect of this Shari`a-compliant risk management technique. Despite being plausibly established, the element of mutuality appears to represent only half of the overall *takaful* structure, i.e. the contractual relationship amongst the participants only. Another half of the structure, which is also called the ‘second-tier’, seems to revolve around the contractual relationship between the participants and the *takaful* operator. As identified by many scholars, the contracts that govern this relationship are deemed to be more commercial in nature, unlike tabarru` and ta`awun. Those contracts which include *mudaraba*, partnership, *wakala bi ajr*, paid agency, and *jī`ala*, reward, are widely used by the operators through their business models in order to legally secure their income and profits (Kamaruzaman Noordin, 2012). Yet the practical application of the above contracts might sometimes turn out to be inconsistent with the original specifications as outlined by the scholars. This
paper aims to extensively evaluate the application of the contract of ji`ala by takaful operators in Malaysia to justify their entitlement to a share of any underwriting surplus under the label of performance fees.

The Meaning of Ji`ala

Ji`ala, which is also pronounced ju`ala or ja`ala, comes from the word al-ju`l, which literally means a reward given to someone for his or her work (Nazih Hammad, 1987). Technically, ji`ala is defined by the Malikis as the commitment from a person to give an identified reward/remuneration to another for working for him either within a specified time frame or as long as it provides benefit to the former. The Shafi`is, on the other hand, define ji`ala as a commitment to give an identified `iwd, compensation, against a specified and known assignment, or unknown if the task cannot be easily determined. Similarly, the Hanbalis define ji`ala as a designation given to mal ma`lum, a known/identified property offered to any person who works for the ja`il, offeror, on some tasks, which is permissible even if the task is unknown, or within a period of time even if the actual period is unknown (Wizara al-Awqaf wa al-Shu`un al-Islamiyya, 1989). AAOIFI in its Shari`a Standard No (15) identifies ji`ala as “a contract in which one of the parties (the Ja`il) offers specified compensation (the Ju`l) to anyone (the `Amil) who will achieve a determined result in a known or unknown period” (AAOIFI, 2007).

From the above definitions, it can be concluded that ji`ala is a contract whereby one party called the ja`il, offeror/rewarder, pronounces his commitment to pay an identified and specified amount of reward (termed ju`l) to any person (known as `amil, worker) who performs and successfully completed a particular task in which the amount of work involved and its duration can either be clearly specified or otherwise. In the context of takaful, the application of this contract entails the participants (or the takaful fund) voluntarily offering the takaful operator a certain amount of reward in the form of performance-related fees if the latter manages to generate profit in investing the takaful fund and/or achieve a positive fund balance (a surplus) at the end of the financial year. Alternatively, the reward can also be seen as pro-actively sought or demanded by the operator for achieving the above results. This is in addition to the wakala fee, which is paid earlier by the participants to compensate for the agency work rendered by the operator.

The Legitimacy of Ji`ala

According to the majority of fiqih scholars, the contract of ji`ala is valid and permissible based on direct legal texts from the Qur`an and prophetic traditions as well as through the ijma`, consensus of the scholars and legal reasoning (AAOIFI, 2007). As for the Qur`an, the evidence is in the story of Prophet Yusuf and his brother after the announcement of the loss of the King’s great beaker. In Sura Yusuf (12) verse 72 the Qur`an says: “They said: We miss the great beaker of the King; for him who produces it is (the reward of) a camel-load; I will be bound by it.” It is obvious in this verse that a reward of a camel-load of grain, which is equivalent to one wasq or 60 sa` (Wizara al-Awqaf wa al-Shu`un al-Islamiyya, 1989), has been offered to anyone who finds and returns the King’s cup, regardless of how it is done. This type of ji`ala appears to be directed to the public at large and is aimed at returning lost property.

As for the hadith, the Prophet is reported to have permitted the contract for returning lost property or a runaway slave. He also decreed that anyone who finds any runaway slave in
the Holy Lands (i.e. Mecca and Medina) should be rewarded with ten dirhams, or if outside the Holy Land with a dinar (Abdullah Alwi Hassan, 2007). Another hadith which indicates the permissibility of ji’ala is in the following report from Abu Sa’id al-Khudri:

Some of the companions of the Prophet went on a journey till they reached some of the Arab tribes (at night). They asked the latter to treat them as their guests but they refused. The chief of that tribe was then bitten by a snake (or stung by a scorpion) and they tried their best to cure him but in vain … They went to the group of the companions and said … “Have you got anything (useful)?” One of them replied, “Yes, by Allah! I can recite a ruqya [invocation], but as you have refused to accept us as your guests, I will not recite the invocation for you unless you fix for us some wages for it.” They agreed to pay them a flock of sheep. One of them then went and recited Sura al-Fatiha … and puffed over the chief who became all right … They paid them what they agreed to pay. Some of them suggested dividing their earnings amongst themselves, but the one who performed the recitation said, “Do not divide them till we go to the Prophet and narrate the whole story to him, and wait for his order.” Allah’s Apostle asked, “How did you come to know that Sura al-Fatiha was recited as invocation?” Then he added, “You have done the right thing. Divide and assign a share for me as well.” (Muslim ibn al-Hajjaj ibn Muslim al-Qushairi, 1978)

This particular hadith indicates that ji’ala can also be stipulated initially by the ‘amil (not by the ja’il as indicated by the earlier text) in order for him to perform a required task. Consequently, the task in this case is deemed as specifically assigned to a particular ‘amil as opposed to the public at large. It is also obvious that this hadith shows the type of ji’ala which aims to produce or achieve something new, i.e. the cure for an illness as opposed to finding something missing, indicated by the above legal texts.

With regard to ijma‘, there is unanimity amongst the Muslim jurists that ji’ala is in essence a legitimate contract. However, some jurists, particularly the Hanafis, restrict its permissibility to the task of finding and returning a runaway slave only (Abu Bakr ibn Mas‘ud al-Kasani, n.d.). As for legal reasoning, there is a general need for ji’ala in the case of acts that cannot be performed by a person himself and nor can he find someone who will volunteer for him. Additionally, it is suitable for cases in which the contract of ijara is not suitable, like the return of lost property from an unknown location (AAOIFI, 2007).

Legal Opinions with Regards to Surplus Entitlement and Distribution

In general, the practice of distributing surplus in the takaful industry is greatly influenced by several legal rulings issued on the ownership of the surplus itself. Since the surplus is basically derived from an unused portion of the participants’ contributions, it can be easily understood why surplus is commonly judged as the property of the participants but not of the operators or shareholders. Yet since the contributions are normally paid on the basis of tabarru‘, some may also argue that the surplus is actually detached from the participants’ ownership. Consequently, the distribution of surplus to the participants as well as to the operators may be deemed appropriate by certain jurisdictions but not others. At present, there are at least three rulings issued by Shari‘a scholars concerning this matter. **Surplus Belongs neither to the Participants nor to the Operator**
At one end of a continuum, some scholars are of the opinion that both the participants and the shareholders (or operators) may have no rightful claim to the *takaful* surplus. This ruling is apparently made on the basis that the participants’ contributions are considered to be pure *tabarru*’. According to Ma’sum Billah, the term *tabarru*’ is similar to *sadaqa*, charity, or *hiba*, gift, whereby it is unlawful for the donor to seek any benefit from the donated property after it is given away (Mohd. Ma’sum Billah, 2007). Since the participants have relinquished their rights to the amount contributed to the Risk Fund (PRF), any surplus that arises therein should go to charity instead (Zainal Abidin Mohd. Kassim, 2007). The shareholders, as mere trustees of the fund, obviously cannot make any claim (to the surplus) on any grounds.

This view has recently been shared by Soualhi, who maintains that the participants’ contribution is to be considered as pure *hiba*, hence will render the amount donated to be no longer under their ownership. He further argues that the reliance on the contract of *hiba bi shart al-`iwad*, conditional gift for a consideration, cannot also render the surplus belonging to the participant (Younes Soualhi, 2009; 11). The author, however, has proven that the latter contract is actually good for establishing the participant’s entitlement not only towards making claims but also for sharing in the surplus (Kamaruzaman Noordin, 2013; 70-111). Yet Soualhi emphasises that the absence of a rightful ownership of the surplus does not necessarily mean that it cannot be distributed. In fact, he appears to encourage the distribution of surplus to both the participants and the operator based on the use of general principles of law (i.e. *maslaha*, public interest, and `urf, customary practices) provided that the parameters of equitable surplus distribution are carefully observed. Some of the suggested parameters which are meant for both the participants and the operators are listed as follows (Younes Soualhi, 2009; 14-15):

(1) The ratio of surplus distribution is to be decided by both *takaful* operators and the participants or their representatives in the administrative board;

(2) The *takaful* operator may or may not share in the underwriting surplus depending on the model adopted, which should be approved by the respective *Shari’a* board;

(3) It is permissible for a *takaful* operator to dispose of the underwriting surplus with the prior approval of the participants;

(4) The ratio of surplus sharing may not necessarily have a numerical equivalence, such as 50:50, in order to have an equitable surplus distribution. The *maslaha*, `urf, and `adala, justice, must be the main *Shari’a* principles that help determine such ratios;

(5) It is permissible to adopt different surplus distribution ratios according to the different lines of products; and

(6) It is permissible to state in the policy that the ratio of surplus distribution may be reduced as a result of the default record of the participants.
Surplus Belongs Exclusively to the Participants

In the middle of the continuum, several verdicts have been endorsed confirming that the participants are the only rightful owner of the surplus, since it is the fa'id, remainder, of the participants’ contributions that are not put to use (Mohammed Burhan Arbouna, 2008). Hence, the surplus may only be validly distributed amongst themselves. The shareholders do not have any rights to the PRF’s excess, as it belongs collectively to the participants. Apparently, this ruling is consistent with the general assumption made on the legal status of the PRF itself (i.e. as shaksiyya i’tabariyya, legal personality), in which it technically belongs to the participants as a group but not to the operator (AAOIFI, 2007). One of the important verdicts made to this effect can perhaps be inferred from the AAOIFI’s Shari’a Standard No. 26 regarding Islamic insurance. Item 5/5 of the Standard maintains that surplus can only be used for the benefit of the participants.

The adopted rules may comprise disposal of the surplus in a way that serves the cause of common interest of the participants, such as accumulation of reserves, reduction of the contribution, charitable donations and partial/full distribution of the surplus among the participants. The managing company is not entitled to any share of the surplus. (AAOIFI, 2007).

Similarly, in Pakistan, it is stated in the Takaful Rules 2005 that any surplus should only be distributed amongst the policyholders. Under sub-rule (2) of rule 10 it is stated that “the income of the Shareholders Fund shall not be determined with reference to the surplus in the Takaful Fund” (i.e. PRF). Furthermore, under sub-rule (5) of rule 14, the participants’ exclusive entitlement towards the surplus is affirmed.

The rest of the surplus shall be distributed to participants in proportion to the contributions to the PTF (i.e. PRF) net of any risk related claims, which they may have received during the intervaluation period (Government of Pakistan, Ministry of Commerce; 2005).

This particular view appears to be held by most Shari’a scholars in the Middle Eastern region and obviously Pakistan due to the specific rules mentioned above. Yet some scholars in other parts of the world, including Malaysia (where the distribution of surplus to the shareholders is pronounced lawful by BNM), may also find the above resolution very convincing. In fact, it could be said that most contemporary scholars and experts in the field of Islamic finance concur with above ruling. According to Ayub, based on the ongoing scholastic discussions and studies, many scholars feel that the entire underwriting surplus should only belong to the participants, while the operator should get wakala fees and/or share in the mudaraba profit (Muhammad Ayub, 2008). Mohd. Kasim, on the other hand, argues that it may seem weird that the policyholders have to split any surplus with the shareholders whilst any deficit in the risk pool (i.e. PRF) is borne solely by the former (Zainal Abidin Mohd. Kassim, 2007; 50). In addition, Abdul Wahab, K. Lewis and Hassan argue that the practice of sharing surplus with the shareholders is unacceptable and may render takaful almost the same as conventional insurance (other than investment in Shari’a - compliant instruments).

Sharing in underwriting surplus is something that does not appear to be in line with the concept of mutual assistance and hiring of the professional expertise of a risk manager, although it may be argued that it is meant to provide an
incentive to the operator to better manage the risk … The view of most prominent Shari‘a scholars in this regard is also that any sharing in surplus by way of incentive is not permissible. (Abdul Wahab Abdul Rahim, Mervyn K. L. and M. Kabir Hassan, 2007)

Nevertheless, the shareholders may not be prevented from taking the surplus in order to recover the amount of *gard hasan*, benevolent loan facility, extended to the PRF in the case of deficit. The former may also hold a portion of the surplus as a contingency reserve over and above the technical provisions. In addition, they may invest the surplus (with the permission of the participants) and in exchange may earn additional income either in the form of a percentage of the investment profit or a fixed fee (Engku Rabiah Adawiah Engku Ali and Hassan Scott P. Odiero, 2008).

**Surplus is Judged to be Claimable by Both the Participants and the Operator**

At the other end of the continuum, some Shari‘a scholars permit the shareholders to share in the underwriting surplus with the participants (Engku Rabiah Adawiah Engku Ali and Hassan Scott P. Odiero, 2008). This ruling appears to be concluded by the majority of scholars in Malaysia and Bahrain, as exemplified by the common practice of the operators therein whereby they are allowed to acquire a certain proportion of the surplus, if any, either directly (under the notion of surplus sharing) or indirectly (under the notion of a performance fee). As for the Malaysian case, it was discovered earlier that six out of eight *takaful* operators have been permitted by their Shari‘a Boards to transfer certain percentages from the PRF surplus to the Shareholders’ Fund. This is not surprising, since the practice is basically deemed valid by the *BNM*. In 2007, the Shari‘a Advisory Council of *BNM* made a resolution that the distribution of surplus to the participants and the shareholders from the *tabarru* fund (i.e. PRF) for both General and Family *Takaful* schemes is permissible from the Shari‘a perspective. It is argued that this decision is based on two underlying premises, as follows (Press Release of Bank Negara, 25th September, 2007):

1. The *takaful* contract is mainly established on the Shari‘a principles of *tabarru*, donation, and *ta‘awun*, mutual co-operation; and
2. The permissibility to charge a ‘performance fee’ by the *takaful* company.

It seems that the first premise tends to justify the allocation of surplus amongst the policyholders based on the underlying contract of *tabarru* and *ta‘awun*. As shown earlier, this contract (particularly in its specific form of *hiba bi shart ‘iwad*) has indeed offered strong justification for the participants to receive the surplus in the form of permissible *ruja* or mere *hiba* from the Fund (Kamaruzaman Noordin, 2013; 70-111). The latter premise, on the other hand, can perhaps be substantiated by the use of the *ji‘ala* contract, as suggested by some takaful personnel during the interview. Nevertheless, neither the operators nor *BNM* have formally indicated the use of this particular contract (in writing) in support of the above performance fee. The suitability of using *ji‘ala* for the above purpose will be examined in the coming section. In *BNM*’s latest guidelines entitled “Guidelines on Takaful Operational Framework”, the resolution to allow the operators to acquire a fraction of the PRF surplus (under the performance fee) is further enhanced by specifying the following requirements which need to be observed by the operators, (*BNM*, May 2011)

1. The performance fee can be taken only if the participants’ portion of the PRF
surplus is also paid or accrued to the participants;

(2) The total amount of remuneration from the PRF payable to takaful operators shall not exceed the amount of surplus paid or accrued to the participants;

(3) There is no outstanding qard due to the shareholders’ fund at the point where surplus is determined; and

(4) The performance fee is in line with the takaful operator’s policy on the management of surplus.

In conclusion, it appears to the researcher that the third resolution is more sensible than the first two rulings. It is suggested that the participants (collectively) will continue to become the rightful owners of the PRF and hence its surplus based on the fact that the PRF is a legal personality (although not fully) that represents the rights and liabilities of the participants as a group. Even if the PRF were to be considered as a separate entity without the participants’ ownership, it could not deny the latter’s entitlement to the surplus based on the provision of permissible raju, as suggested earlier. Alternatively, an arrangement could be made by the operator (as the appointed manager of the PRF) which results in the distribution of surplus to the participants under the notion of hiba from the PRF.

Similarly, the lack of ownership on part of the operators with regards to the Fund will not necessarily prevent them from getting a fraction of the surplus. In fact, the operators as the administrator of the PRF may legally acquire any amount of the surplus so long as it is consented to and approved by its rightful owner (i.e. the participants or the Fund itself as a separate legal personality). Perhaps this can be achieved through the application of certain appropriate contracts (such as ji’ala for instance), which necessitate the owner to allocate a fraction of the surplus to the operators or shareholders under certain conditions. This is thought to be consistent with the following hadith narrated by Imam al Bukhari: “Muslims are bound by the conditions they stipulate to each other, except when those conditions prohibit what is permissible, or permit what is prohibited.” (Muhammad Dhihi, 1981). Therefore, it is perhaps erroneous to propose the non-distributable feature of surplus to the shareholders as an absolute standard for the entire takaful industry.

It is suggested that the above matter should be evaluated on a case-by-case basis, since different operators may adopt different business models, hence different sets of contracts. Arbouna seems to concur with this approach, as he argues that the decision about whether or not to allow the shareholders to share in the surplus is not a fixed rule or principle. While the practice may be unacceptable under a particular rule, the sharing of surplus with the shareholders may be justified under some other Shari’i principles (or contracts) (Mohammed Burhan Arbouna, 2008). For example, the sharing of surplus (termed profit) under the modified mudaraba model appears to be inappropriate, since it would lead to the grave alteration of the definition and recognition of mudaraba profit. On the other hand, the surplus attributable to shareholders under the wakala model might be justified under the contract of ji’ala, as it is commonly maintained by takaful operators in Malaysia (Kamaruzaman Noordin, 2013; 156-202). The legitimacy of this claim will be evaluated in the next section.

In should be noted, however, that since the business models and the corresponding contracts were actually designed and proposed by takaful operators without direct involvement from
the participants (or their representatives in the administrative board), certain parameters must be established in order for the surplus to be appropriately and justifiably allocated to the shareholders. This set of guidelines is also crucial to ensure that the practice is disengaged completely from forbidden elements that could invalidate any contract, particularly gharar, jahala and injustice/unfairness. The rule of gharar is thought to be applicable to the practice of surplus distribution, since it is mainly based upon mu‘awada-type contracts (such as ji‘ala and mudaraba) rather than tabarru‘. The practice may also invoke the issue of unfairness, since in most cases the share of surplus attributable to the operator is considered as a ‘performance fee’ that needs to be borne by the participants or PRF, despite the fact that the former has already been remunerated by the latter via wakala fees. Perhaps what Soualhi and BNM have suggested earlier can constitute the basis of the parameters regardless of the specific contract chosen to underlie the practice of surplus allocation to the shareholders. The specific parameters for the application of the ji‘ala contract will be presented in the forthcoming section subsequent to the evaluation of the contract’s legitimacy for the above-mentioned practice.
Analysis of the Suitability of Applying Ji’ala as the Basis for Distributing Surplus to the Shareholders

Basically, the legal ruling on the non-distributable feature of surplus to the takaful companies/shareholders tends to revolve around the issue of rightful ownership with regards to the surplus itself (‘Ali Muhyi al-Din al-Qarradaghi, 2005 and Mohammed Burhan Arbouna, 2008). As stated earlier, even though the argument (which considers surplus as the exclusive property of the participants) seems to be well-founded, it may not prevent the surplus from being legally distributed to the shareholders, particularly when the matter is consented to by the owner via the conclusion of a specific contract (such as ji’ala). Another rationale for the above ruling seems to focus on the fact that the practice eliminates the mutual and co-operative aspect of takaful and thus may render it equivalent to forbidden commercial insurance; (Abdul Wahab Abdul Rahim, Mervyn and M. Kabir Hassan, 2007; 377 and 383), or much worse than that, as the former is not liable for the fund’s deficit (Zainal Abidin Mohd. Kassim, 2007; 50). Again, this argument appears to be unconvincing, since takaful is not purely a mutual or co-operative entity but rather a hybrid of a mutual and commercial form of undertaking.

Only a few authors have directly argued that the practice is incompatible based on the inappropriate application of certain specific contracts such as mudaraba and ji’ala. Of these two contracts, the argument against applying mudaraba to allocate surplus to the shareholders seems to be more convincing. This is true especially when the practice necessitates grave adjustments to be made to the very definition as well as recognition of mudaraba profit (Kamaruzaman Noordin, 2012; 156-202). The critics of the application of ji’ala for the above practice, on the other hand, appear to be less convincing. For example, Shubayli argues that even though the ji’ala contract is a good basis for charging an investment performance fee, it may not be validly applied to the distribution of surplus, since it would transform the takaful arrangement into a mu’awada contract with an unknown return (Yusuf ’Abd Allah al- Shubayli, 2008). However, based on the previous discussions, it has been shown that ji’ala is considered valid even though the promised reward or return constitutes part of uncertain realised results (Kamaruzaman Noordin, 2012; 70-111). The suitability of ji’ala as a basis for distributing surplus to the shareholders will be further analysed in the following section.

Prior to that, it is perhaps right to suggest that the form of ji’ala contract applied to the takaful set-up seems to be consistent with the hadith reported by Abu Sa’id al-Khudri mentioned earlier. To be specific, the contract entails the operator (as the ‘amil) to proactively ask for a reward from the participants (as the ja’il) in the form of a performance fee should the former succeed in registering a surplus in the PRF at the end of the financial year. Put differently, the reward offer in this case does not initially come from the ja’il but is rather instigated by the ‘amil, hence it is deemed to be directed to a specified ‘amil instead of the general public and subjected to the completion of the task of registering a favourable financial condition. Based on these features, the following evaluations can be conducted.

The Nature of the Task Undertaken by the Operator in Registering a Surplus to the PRF

As indicated earlier, the majority of takaful operators in Malaysia regard their managerial
efforts which result in the availability of a PRF surplus as a form of task that should be rewarded under the contract of ji’ala. Hence, it is perhaps important to initially decide on the type of task involved in the realisation of a surplus, whether it is of a majhul, unknown, or ma’lum, known/identified nature. By referring to the definition of surplus, it is suggested that the task is more inclined towards the majhul side rather than ma’lum for several reasons. First, the derivation of a surplus is actually contributed to by a combination of factors, whereby the two major factors are: (1) a considerable amount of contributions collected from a large number of participants (residing in geographically-dispersed locations); and (2) fewer expenses (i.e. claims, benefit, re- takaful, provisions and other direct expenses) are allowed to be deducted from the contributions collected.

It could be said that the amount of work to be put in by a particular operator to achieve the former is unknown. The operator may need to hire or appoint a large number of agents, establish branches or agencies on a national scale and/or spend heavily on marketing and advertising in order to penetrate a particular market and create demand for takaful products. Similarly, the exact amount of work needed to achieve the latter aspect of surplus realisation is also unknown. Perhaps it is more uncertain then the former. For example, the operator may have to thoroughly investigate each and every claim application before making any payment to the affected participants to ensure that no fraudulent claims or excessive payments are approved that could diminish the balance in the PRF. The operator may also have to spend a lot of time and effort devising strategies to reduce the level of claims-related expenses charged to the PRF so that a surplus may prevail.

Secondly, since the possibility of the realisation of a surplus itself is uncertain, the tasks undertaken by the operator to that effect are of a conveniently uncertain or unknown nature. The operator may have to put into practice several measures and procedures, as indicated above, yet the possibility of registering a PRF deficit cannot be totally disregarded. For example, even though the operator has managed to register a considerable amount of contributions to the PRF, it cannot guarantee that the amount will be sufficient to meet all the claims incurred in any particular financial year simply because the occurrence of an insured event is out of the operator’s control. If the situation of deficit actually materialises, the operator is likely to spend more time and effort formulating new plans and strategies that will result in a surplus in the forthcoming financial year. Based on the above explanation, it is perhaps right to say that the type of task involved in creating a surplus in the PRF is indeed of a majhul, uncertain nature, rather than ma’lum, identified or certain. Hence, the assignment of this task through the contract of ji’ala appears to be appropriate.

The Level of Effort Involved in Creating a Surplus in the PRF

It is stated by fiqh scholars that the ja’il must be able to show that the completion of any task assigned through the ji’ala contract involved some kind of effort in order to justify the payment of the reward. As far as the surplus attributable to the shareholders is concerned, some scholars might say that this type of reward payment is unnecessary. This is because the related tasks undertaken by the operator (in creating a surplus) are already remunerated through wakala fees consistent with the operator’s role as a paid agent in the takaful operation (Abdul Wahab Abdul Rahim, Mervyn and M. Kabir Hassan, 2007; 383). Put differently, the assignment of tasks to achieve a PRF surplus through ji’ala seems irrelevant, because it is considered as part of the operator’s employment obligation under the contract of wakala bi ajr, concluded earlier. Hence, the payment of a performance fee (for achieving a surplus) would be deemed unfair to the participants, since it might necessitate the
participants (or PRF) to pay twice for the same set of tasks commissioned to the operator.

The proponents of the performance fee, on the other hand, maintain that the level and pattern of surplus achieved in the PRF is a good reflection of the *takaful* operator’s performance in underwriting, assets and claims management (Press Release of Bank Negara, 25th September, 2007). Perhaps such a good performance tends to indicate the level of effort which has been made by the operators (in creating a surplus in the PRF) that is over and above the minimum required standard. Yet there seems to be no further clarification from the proponents of the details of the specific tasks or effort undertaken by the operator as the `*amil` which could be distinguished from the general tasks undertaken as a paid agent.

Based on the survey conducted, it appears that most operators in Malaysia tend to be complacent with the above brief justification and do not attempt to elaborate in detail upon the concluded tasks or effort which entitles them to a portion of the surplus on top of the *wakala* fees. Perhaps this is acceptable, since the task assigned through the *ji`ala* is actually the realisation of the PRF surplus, a task which is not specifically mentioned in the operators’ terms of employment under the *wakala* contract. Hence, the need to identify the specific tasks involved in the realisation of a surplus is perhaps insignificant, because it could validly remain unknown. Nevertheless, the identification of these specific tasks is needed to further substantiate the operators’ entitlement to the surplus, especially when the issue of double-charging the participants is raised.

It is suggested by the author that the realisation of a surplus in the PRF does involve some specific effort from the operator which can be differentiated from the general tasks assigned to it through the *wakala bi ajr* contract. Since the availability of a surplus is a function of the amount credited into the PRF being greater than its corresponding outflow (in any particular financial year), some of the tasks or effort which may be seen as specifically assigned or undertaken via the *ji`ala* contract are suggested:

1. The marketing effort undertaken by the operator to ensure that a large number of participants from all over the country join the *takaful* schemes so that the earned contributions are big enough to meet all claims and other related expenses, apart from ensuring that the law of large numbers functions as it should. The marketing strategies adopted may include the appointment of a considerable number of agents, the establishment of branches or agencies on a national scale, and/or the use of mass media to promote the schemes effectively.

2. Carrying out due diligence checks at various stages of the *takaful* operations, including the underwriting process and the handling of claims. The application of this extra precautionary process in the underwriting stage is thought to be crucial in countering the effect of adverse selection by accepting a particular risk at the correct rate of contribution payment. Performing the due diligence process in the processing of claim is even more important, because it directly results in the elimination of fraudulent claims and excessive payouts that would unnecessarily diminish the fund’s solvency and the possibility of realising a surplus. Even though both tasks (i.e. underwriting and claims management) are generally considered to be the operators’ employment obligations under the contract of paid agency, the due diligence commitment to the
realisation of a surplus could be deemed as an extra effort from the operator above the minimum required standard.

The Specification of the Reward Offered/Demanded

In general, the reward stated in the ji’ala contract must be clearly specified in its type and quantum to avoid gharar and jahala. Yet the specification of a reward in the form of a percentage or portion of the realised result has also been shown to be acceptable and will not nullify the contract due to the above elements. As far as the performance fee is concerned, it is obvious that the surplus attributable to the shareholders (as a reward) is stipulated in the form of a percentage of the PRF surplus realised in any particular financial year. As indicated by the author in a case study (Kamaruzaman Noordin, 2012; 110-155), the percentage of surplus required by the operators in Malaysia (as a performance fee) varies from one operator to another. While Takaful Ikhas Sendirian Berhad’s (TISB) perceived rate of performance fee is found to be the lowest (at 36 per cent), HSBC Amanah Takaful Sendirian Berhad’s (HATSB) required share of the surplus at 80 per cent is judged to be the highest. The remainder of the operators appear to require 50 per cent of the surplus as their reward.

It has been discovered that all the operators, except TISB, clearly specify the above percentages in written documents accessible to the participants such as proposal forms (normally stated in the declaration and authorisation section), product disclosure sheets and product certificates. On the other hand, the only accessible information provided by TISB regarding the above fee is found in the diagram of its business model. The model, however, simply indicates that the company will charge a ‘surplus administration fee’ to the realised surplus without giving any detail of the percentage. This lack of specification might render the surplus acquired by TISB invalid due to gharar. Nonetheless, the problem can be easily solved if the company makes the percentage known to the participants in line with other takaful operators.

Regardless of the above observation, Shubayli recently argued that the application of ji’ala as a basis for the above practice seems to be inappropriate, since it makes the reward contingent upon the availability of a surplus, which is obviously uncertain during the conclusion of the contract. Notwithstanding that, he acknowledges that some scholars do allow the practice provided that the reward is limited to a third or less of the surplus (Yusuf `Abd Allah al-Shubayli, 2008; 10). It appears to the author that the above argument is weak considering that stipulating a reward in the form of a portion of a lost item (which is found) and a certain percentage of a successfully collected debt are considered valid by many scholars (particularly the Hanbalis and the Malikis). In both cases, the reward is also contingent upon the availability of a lost property or collected debt, which is obviously uncertain when the contract is concluded.

What is more important is that the reward in the above cases is deliverable so long as the required result is attained by the `amil. Therefore, it is perhaps irrelevant to differentiate between the two types of reward (i.e. stipulated as a portion of the realised result or otherwise), because their delivery can be made possible at the successful accomplishment of the assigned task. Moreover, AAOIFI (despite its disapproval of the distribution of a surplus to the shareholders) appears to suggest that uncertainty is tolerated regarding the exact amount of the reward as a result of stipulating the reward as a percentage of an output to be known in the future. This is mainly because the uncertainty (about the exact amount of
remuneration) is only temporary and the knowledge of the amount in the future (i.e. when the task is accomplished) will leave no room for dispute (AAOIFI, 2007). As for the suggestion by some scholars that the performance fee should be limited to up to 30 per cent of the surplus, it is perhaps acceptable in view of the wakala fee which is received by the operators upfront. Furthermore, stipulating that the operator should receive more than half the surplus would be deemed unfair by the participants (who own the PRF collectively), especially when the actual amount of surplus distributed to the latter is much less than the remainder of the surplus attributable to them (Kamaruzaman Noordin, 2012; 110-155). This limit is also found to be consistent with the earlier opinions of the Hanbalis and Malikis who suggest that up to one third and one fourth of the found item and the collected debt respectively should be the reward.

In relation to the above issue, Soualhi seems to disagree with the practice of TISB, which purposely names the surplus attributable to the shareholders account the ‘surplus administration fee’ instead of the performance fee. He argues that the Shari’a Committee of Dallah al Baraka would disagree with the charging of an administration fee from the surplus, because the administration fee, unlike the performance fee, must be known and paid upfront, regardless of whether or not there is a surplus (Younes Soualhi, 2009: 14-15). Nevertheless, based on an interview conducted with TISB personnel, the above concern can perhaps be disregarded, since the administration fee is actually parallel with the concept of a performance fee, at least in General Takaful schemes (Wan Jemizan Wan Deraman, 4th September 2009). It could be said the above issue is insignificant, since it merely involves technical jargon. The real issue which seems to be overlooked by Soualhi is the fact that TISB fails to publicly declare the deduction of the fee from the PRF surplus, as indicated earlier.

The Permission Granted from the Participants to Perform the Task

It is suggested by fiqh scholars that the ‘amil is entitled to the reward only if the execution of a particular task is endorsed and consented to by the ja’il. Otherwise, the latter is not liable to pay any reward to the former, even if he is famously known for his reward-seeking behaviour (i.e. engages in certain activities for the sake of being remunerated instead of doing it voluntarily). This is thought to be consistent with ruling of the fidulii, uncommissioned agent, whereby a person whose affair has unknowingly been discharged by another may, at his discretion, approve or disapprove of the latter’s act.

As for the share of the surplus attributable to the shareholders as a reward, the majority of takaful operators appear to have received the participants’ permission prior to the execution of the task of creating a surplus in the PRF. The permission is indirectly granted by the participants when they consciously provide their signature on the ‘declaration and authorisation’ section of the takaful proposal form, which amongst other things seeks their approval to allocate a certain portion of the surplus, if any, to the operators as an incentive for managing the fund wisely, resulting in the realisation of a surplus. In other words, every participant who joins any of the takaful schemes is deemed to indirectly give his or her approval to the execution of the task when he or she signs the proposal form. Even if the above clause (i.e. asking for the participant’s approval) is not stated in the proposal form, it might not affect the operator’s entitlement to the surplus, since the participant could be aware
of the performance fee through other sources such as the operator’s product disclosure sheet and/or product certificates. Nonetheless, it is suggested that the operators must ensure that they provide this information in the proposal forms, since it is the most accessible and the most effective means of conveying the above message.

**Suggested Shari’a Parameters for Distributing Surplus to the Shareholders**

Based on the above discussion, it appears that even though ji’ala is basically appropriate to underlie the practice of allocating surplus to the shareholders, it cannot guarantee that the actual practice by the operators is absolutely consistent with the basic requirements of the contract. Three main issues have been identified by the author regarding the practice of takaful operators in Malaysia (Kamaruzaman Noordin, 2012; 238-240). Those issues are: (1) failure to clearly specify the required rate of the performance fee to the participants; (2) inconsistency between the declared percentage of performance fee with the actual acquired amount from the surplus recorded; and (3) the relatively ‘overpriced’ performance fee charged to the PRF surplus. From these three, the first two issues are likely to cause the acquired share of the surplus to be judged invalid due to the incidence of gharar. The third issue, on the other hand, might not render the acquired surplus invalid. Yet it may be deemed unfair by the participants and might eventually lead to dispute. To resolve the above issues it is highly recommended that every operator involved in the above practice should carefully observe the following suggested Shari’a parameters. These parameters, however, are not meant to disregard other parameters already set by the actuaries and other relevant parties such as BNM. In fact, some of the suggested parameters may actually coincide with what has been underlined by BNM. The suggested parameters are:

1. Every operator must ensure that the participants are aware of and agree with the performance fee chargeable to the PRF surplus. This could be achieved through the insertion of a clear statement or clause (regarding the matter) in the declaration and authorisation section of the takaful proposal form where every participant is expected to produce his/her signature. In addition, the operator should also spread the information regarding this fee in its published or unpublished (e.g. online) marketing materials such as product disclosure sheets, product certificates and brochures. Seeking the participants’ approval is crucial, since they are collectively judged to be the rightful owner of the Fund, hence any surplus therein.

2. The operator must ensure that the actual amount of surplus transferred to the shareholders’ account as a performance fee should not exceed the clearly announced percentage and must be based on the actual surplus recorded in the PRF during a particular financial year. The company shall have no rights to claim the previous years’ surpluses, which are retained in the PRF as reserves for the purpose of paying the current performance fee.

3. The surplus may only be validly distributed to the shareholders as a performance fee (and perhaps to the participants as well) when there is no outstanding qard due to the shareholders’ fund at the point where a PRF surplus is realised. Otherwise, the entire surplus amount should be dedicated to pay the outstanding qard unless perceived to be inappropriate by the actuary due to unfavourable reserve conditions. It is
very likely that the payment of a performance fee prior to the full settlement of *qard* will be associated with *riba*, since it entails possible benefit which follows the loan granted to the PRF.

4. The total amount of surplus allocated to the shareholders’ fund should not exceed the amount of surplus attributable to the participants. It is suggested that the ceiling rate for the fee is set at 30 per cent of the realised surplus. This is believed to be more reasonable considering the fact that the operator is also eligible to the payment of *wakala* fees, and the actual surplus payment normally received by the individual participants is much less than that (due to the allocation for reserves). Moreover, this rate will clearly indicate that the participants, who collectively own the PRF, are more eligible for the surplus than the shareholders.

5. All necessary deductions from/charged to the Fund, including taxation on the surplus and the payment of *mudaraba* profit (if any), should be made before and not after the amount of surplus attributable/distributable to both the shareholders and the participants is actually derived. This is to ensure that the shareholders will get their portion of the payment from the net surplus after taxation but not before, as currently practiced by the operators. Obviously, this will be seen as more equitable by the participants, since they do not have to bear the taxation on the surplus (which could diminish their actual surplus entitlement) on their own.

6. Any changes made to the rate of the performance fee chargeable to the PRF surplus must also be notified to the participants in order to avoid the incidence of *gharar* and possible conflict or dispute.

**Conclusion**

To conclude the discussion, it can be suggested that the contract of *ji’ala* may appropriately be applied by *takaful* operators to justify their entitlement to performance-related fees (particularly upon the realisation of a PRF surplus) provided that all of its specifications are carefully observed. Before deeper analysis with regards to the above issue has been instigated, it has been shown that a surplus is indeed distributable not only to the participants but also to the operators (hence shareholders) even though they may not be considered as the rightful owner of the realised surplus. The distribution of surplus to the participants appears to be less controversial, since they (as a group) are commonly judged to be the rightful owner of the Risk Fund and hence any surplus therein. On the other hand, the distribution of surplus to the operators is justified only if it is consented to and approved by the owner of the surplus, i.e. the participants, under certain conditions. Obviously, this could be achieved through the conclusion of specific contracts that underline the rights and liabilities of both parties.

* Ji’ala is argued to be one contracts that could be used as a basis for allocating the surplus to the operators. Under this contract, a portion of the surplus distributable to the operators is considered as a reward or incentive from the participants for successfully accomplishing the task of registering a surplus to the PRF. However, since the operator is already being appointed as a paid agent to manage and invest the entire *takaful* operation, some people might view the above task as irrelevant to the *ji’ala* contract. Nevertheless, the author
suggests that the task is actually relevant to be remunerated via ji’ala considering the level of effort put in by the operator and the fact that the task is not specifically mentioned in the terms of employment of the operator under the wakala contract. However, the application of ji’ala by the operator is susceptible to faults and errors that might render a performance fee invalid. This is true especially when the contract is classified under the mu’awada category and thus subject to the rules of gharar. In order to avoid the above consequences, the author suggests some parameters to be observed by the operators. It is also hoped that the parameters will make the practice more equitable to both parties.

References


Wan Jemizan Wan Deraman. (4th September, 2009). Assistant Vice President Shari`a Compliance at TISB. Interview was held at TISB Head Office in Petaling Jaya, Selangor.


