



A Study on the Implementation of Dual Contracts of *Tabarru'* and *Tijarah* on *Shari'ah* Insurance Industries in Indonesia

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Abstract

This article examines the legal issues associated with the application of the dual contract system, *tabarru'* and *tijarah*, in *Shari'ah* insurance industries in Indonesia. This qualitative study used secondary data. It is linked up with clauses and conditions of the contract used by Islamic insurance industries in Indonesia. This method is used for the purpose to examine the legal reasoning regarding the application of the contracts of *tabarru'* and *tijarah* in Islamic insurance products. The research approach to the problems is normative-juridical. It is a method employed to figure out the legal problems based on secondary data. This study found that the application of Islamic insurance contracts was not created a separation between the returns obtained from the sectors *tabarru'* with *tijarah*. This shows that the dualism of *tabarru'* and *tijarah* contracts in *Shari'ah* insurance in Indonesia is not in line with the basic principles of *Shari'ah* engagement.

Keywords: *Takafol*, *Shari'ah* insurance in Indonesia, *tabarru'*, *tijarah*.

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1. Introduction

Economic activity in the form of capital investment requires a commitment to forego a number of funds or other resources committed at the present time in the hope of obtaining a number of advantages in the future (Jones, 1996). The expected return from the economic activities cannot be ascertained. An entrepreneur could even get losses his capital. In another word, business activity will always be associated with the risk of uncertainty in the future.

Insurance began to be applied by the trading community in Mesopotamia, in about 4,000 B.C. However, the first canon of it was found in the book Laws of Hammurabi of Babylon, around 2,100 B.C. Later in history, the Romans developed an idea to create an agreement of marine insurance in the 12th century. Subsequently, it spread out in several regions of Europe in the 14th century. Fire insurance was established in London (in 1680) as a consequence of the great fire of London in 1666 which engulfed more than 13,000 homes and roughly 100 churches.

In the 18th century, fire insurance companies were later established in other countries, such as France and Belgium on the European continent. Then in the 19th century life insurance emerged in America. It was widely accepted and further developed in the 20th century (Bekkin, 2007). The first marine and fire insurance company in Indonesia was Batavianche Zee and Brand Assurantie Maatshappij, which was founded in 1843. In the life insurance company Bumi Putera was established in 1912 as an indigenous effort (Sudarsono, 2003).

The development of insurance in the 18th century was spurred by the advances in mathematics upon which the practical models of insurance were based. The leading insurance companies in the West began to offer their products on Ottoman soil, where Muslim utilized them in the trading relationship with Europe (Sadeghi, 2010).

The development of economic, industry and trade encouraged insurance companies to grow rapidly. This is evidenced by many new insurance companies that competed to promise protection against a risk. Institutionally, the development of the global Islamic insurance is characterized by the presence of Islamic insurance companies in various parts of the world, among other Sudanese Islamic Insurance (1979), Islamic Arab Insurance Co. (1979), *Dar Al-Maal Al-Islami*, Geneva (1981), Islamic *Takafol* Company (ITC), SA Luxembourg (1985) Islamic *Takafol* and *Re-Takafol* Company, Bahamas (1983), *Al-Takafol Syarikat Al-*

Islamiyah Bahrain, E.C. (1983), Takaful Malaysia (1985). Later, these developments prompt the scholars and practitioners of Islamic economics in Indonesia to develop insurance based on Islamic principles (*takaful*). In 1994, the Ministry of Finance of Indonesia legalized the first Islamic life insurance program, PT Asuransi Takaful Keluarga.

Takaful is an Arabic word which means guaranteeing each other (Swartz and Coetzer, 2010). It is often referred to as the company that runs the principle of the mutual bear of the possible future risks among the members (Said and Grassa, 2014). In this case, each member performs as guarantor on it. This mutual bear of risk was done on the basis of mutual help in goodness, particularly by issuing mutual funds, which dedicated as worship. That is why these activities are categorized as *tabarru'* (goodness).

The concept of helping (*ta'awun*) and protecting (*al-tadhamun*) each other in Islamic insurance encompasses all participants as a single collective entity. Thus, the mechanism is established to collectively withstand uncertain future risks (Said and Grassa, 2014). Muhammad Amin bin Umar (d. 1252H/1836), who known as Ibn Abidin al-Dimaski is considered as one of the first Islamic jurists who discussed Islamic insurance (Bekkin, 2007). His opinion about insurance departed from the case when a trader rents vessel for loading merchandise from non-Islamic countries. The merchants pay the cost of the ship and a certain amount of money to person outside the Islamic countries in order to ensure the safety of goods. If the vessel was sunk or burned, and then the surety (insurance agency) has to pay compensation as a consequence of the accident. According to him, such engagement is not allowed (*haram*) (Ahmad, 1420H).

There is a gap between theory and practice of *tabarru'* contract in Indonesia. The refund system contribution (funds of *tabarru'* and *ujrah*) cannot be accepted from the Islamic law's perspective. It will be granted when the agreement terminated unilaterally by the participant before the period of the agreement runs out. Any refund or profit should not be gained due to the gift (*tabarru'*) provided by the participants. It is forbidden to look back for grants which have been awarded since it is mutual help with the hope of obtaining the pleasure of Allah (s.w.t.).

Takaful is a mutual effort to protect and help each other participant (Hussain and Pasha, 2011). It is done through the asset of gratuitous funds (*tabarru'*). It has the return pattern to face certain risks through contract (engagement), which is in accordance with Islamic principles. In this case, the *tabarru'* contract involves all forms of contract which are carried out with the aim of kindness and mutual help with the hope of obtaining a reward from Allah (s.w.t.). *Tabarru'* funds that have been submitted should not be taken back. Practically, the participants are entitled to receive the *tabarru'* funds.

Shari'ah insurance in Indonesia has been growing rapidly, especially since 1994. It is characterized by the establishment of *takaful* insurance. At that time the basic operation of *takaful* was the judgment of the Ministry of Finance. There were no formal laws that regulate the operations of Islamic insurance. All references to Law No. 2 of 1992 on Insurance Business are supposed intended for the implementation of the rules of conventional insurance. Unfortunately, there are a number of things that are not covered in the rules.

Table 1: *Shari'ah* Insurance Overview on January 2016

Items	Number of <i>Shari'ah</i> Industries (Units)	Number of <i>Shari'ah</i> Business Units	Assets (Billion Rp)	Liabilities (Billion Rp)	Equities (Billion Rp)	Productive Assets (Billion Rp)
<i>Shari'ah</i> Life Insurance	5	19	22.019	3.395	18.624	19.609
<i>Shari'ah</i> Non-Life Insurance	3	23	3.974	1.952	2.021	2.557
<i>Shari'ah</i> h Reinsurance	-	3	1.196	359	837	968
	8	45	27.189	5.706	21.482	23.134

Source: Indonesia *Shari'ah* Non-Bank Financial Institutions Statistics (issued by OJK, April 2016)

Takaful market share exceeds the market percentage of Islamic banking industry is no more than 5 percent. Chairman of the Indonesian Association of Islamic Insurance (AASI), Taufik Marjuniadi, presumed it will reach 5.79 percent this year. Based on this bright prospect, it is no wonder that there are many conventional insurance companies opened Islamic insurance products in conjunction with the development

of Islamic banking and other Islamic financial institutions in Indonesia. The Islamic insurance market share of assets reached 5.43 percent. The market share of premiums reached 6.55 percent and on investment reached 6.19 percentage of 5.44 percent. These developments are in tandem with the increasing consciousness of the Muslim community to endeavour to establish that their economic actions are based on Islamic law.

The Islamic scholars who permit insurance base their contention on various considerations. The first one is the basic principle of permissibility to perform a new contract. Second, insurance is an agreement that aims to commiserate victims of accidents, death, or loss of property. It is required on the basis of emergency. To distinguish the conventional insurance, the scholars argued that the Islamic insurance should be based on the following points: 1) The principle of *takaful* (mutual help); 2) premiums collected will be treated as customers' funds and invested in the system for the results (*mudharabah*).

Fatwa on Islamic insurance in Indonesia was stipulated by The National *Shari'ah* Council - The Indonesian Ulama Council (DSN-MUI). The fatwa of DSN-MUI No. 21 (2001) allows insurance, which is based on the principal of *tabarru'*. It is established on the mutual help of fellow members. At the same time, it is based on the *mudharabah* contract. According to the fatwa DSN-MUI No. 53/DSN-MUI/III/2006 on *tabarru'* contract, there should be a separation between *tabarru'* and *tijarah* funds. Therefore, this article is intended to examine the application of double contracts: *tabarru'* and *tijarah* in Islamic insurance products. Basically, all applicable insurance products in Indonesia use the same rationale. The condition occurs due to the statutory provisions in Indonesia, which requires the insurance industry to refer to the fatwa of DSN-MUI.

This study is an attempt to examine the legal problem of *takaful* in Indonesia. Its focus is on the gap between the theory of Islamic law (*mu'amalah*) and its practice. It does not solely rest on the contradiction between *tabarru'* and *tijarah*, but on the arrangements of investment contract as well. It is based on the fact that most of the insurance models offered to the participants are encompassing of investment (endowment insurance and multi-contracts). Based on the description above, there were many problems concerning the law. It mainly concerns the implementation of dual contracts of *tabarru'* (gratuitous) and *tijarah* (business) within insurance services in Indonesia. Based on the discussion, the chart of *takaful* flow of funds, is as follows:

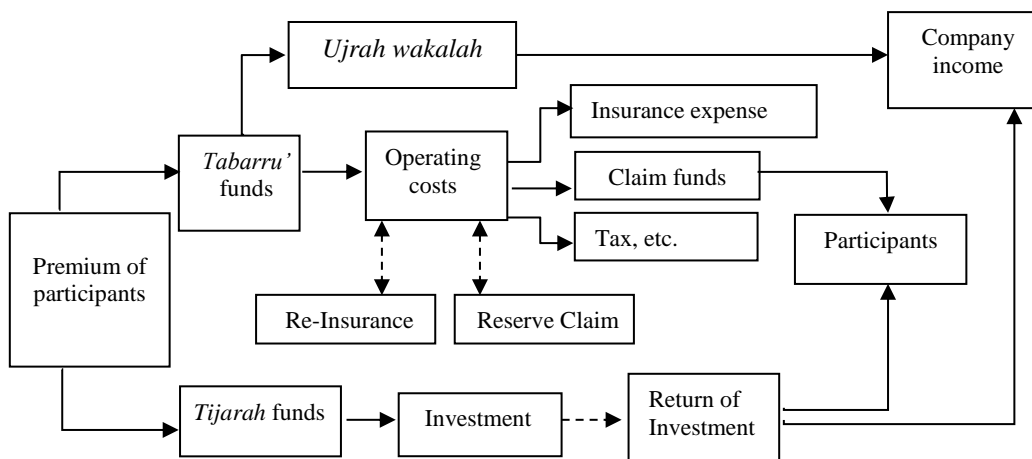


Figure 1: The Premium Flow of the *Tabarru* and *Tijarah* Funds

Position and conditions of the parties in the contracts illustrated in the Figure 1 are:

1. Basically, the premium will be separated for the two different accounts: *tabarru'* and *tijarah* funds. The main contract of *takaful* is the first one. It means that it must be present on Islamic insurance, while the latter is merely an option.
2. At the same time, the insurance company acts as a representative who manage the *tabarru'* funds based on *wakalah*; and as an entrepreneur on *mudharabah* contract;
3. Participant as an entity act as *muwakkil* to the company to manage the funds; and as the *aāhib al-mal* on the *mudharabah* account.
4. Each participant act as a *muwakkil* in the *takaful*.

5. The representatives (*wakil*) shall not delegate to others the mandate received, except by permission of *muwakkil* (policyholders);
6. *Wakalah* is trustworthy (*yadd al-amanah*) and not dependent (*yadd al-dhamanah*). The deputy does not bear any risk of investment losses, for example by reducing the fee that has been approved, except for negligence to the contract;
7. The insurance company as an agent (*wakil*) is not entitled to a share of the return of investment, since the contract is *wakalah*.
8. The insurance company (as a *mudharib*) and the participants (as *shahib al-mal*) are entitled to a certain share of the investment return, since the contract is based on profit and loss sharing.
9. In the case of loss return investment, the insurance company will not bear it materially. The rest properties of business, if any, belong to the participants.

2. Literature Review

Studies on Islamic insurance in Indonesia have been conducted by several researchers. Most of these works focus on the performance and its comparison performance and its comparison (Anggraeni, 2009; Khan et.al., 2011; Hussain and Pasha, 2011; Patriani, 2012; Yaacob et.al., 2012; Janjua and Akmal, 2014), operational (Bekkin, 2007; Sholihah, 2010; Muhammad, 2012; (Htay and Zaharin, 2012), management risk (Soedibjo and Fitriati, 2009; Stanovich, 2002; Said and Grassa, 2014; Saniatusilma and Suprayogi, 2015) and principle and legal aspects (Wahab, et.al., 2007; Sadeghi, 2010; Swartz and Coetzer, 2010; Muhammad, 2012; Abubakar, et.al., 2014; Azeez and Saliu, 2016). A study of Islamic insurance which is focus on the *tabarru* and *tijari* aspects has been conducted separately. For example, the study of Puspitasari (2012), which aims to determine the variables that affect the composition of the division *tabarru* and *ujrah* and its effect on financial performance. Thus, the author did not discuss on the legal aspects. There is a paucity in the study of Islamic legal (*fiqh al-mu'amalah*) problem of *takaful* in Indonesia, especially on the application of dual contracts.

3. Methodology

This study used qualitative methods. It includes the philosophical assumption that using the method of positivism (Meyer, 2009). The qualitative research is intended to analyze legal aspects of Islamic insurance, both from the primary and secondary sources (Bakker and Zubair, 1994). In this case, explorative analysis refers to the meanings, concepts, definitions, characteristics, metaphors, symbols, and descriptions (Berg, 1998). Based on the nature, this research can be classified as a library research.

The data source of this research is the models of Islamic insurance contracts in Indonesia, which has been published in the large numbers. It was collected systematically from the application of *Shari'ah* insurance. It involves the documentations of *takaful* treaties in Indonesia. The approach of the problem is the normative juridical approach. It is applied to resolve the legal problems through secondary data.

This study uses taxonomic analysis techniques. It provides more detailed analysis results and more focused on the sub domain of *Shari'ah* unit link insurance company. The technical analysis data of the study is an interactive model. It is moving on from the formulation of research problems and then proceed to the stage of the data collection, reduction and analysis, data presentation, and conclusion.

This research did not choose a particular insurance agency as an object research for the two reasons. First, its subject matter is the legal reasoning which is used by institutions of Islamic insurance in Indonesia. Therefore, the majority of Islamic insurance institutions in Indonesia has the similar legal considerations. They use the same classification of the contract, namely *tabarru'*. Second, the differences that have been found in every *takaful* institution depart from the same philosophy of *mu'amalah*.

4. The Nature of the *Tabarru'* Contract

Insurance based on *tabarru'* was proposed to answer some questions as mentioned above. The basic concept of doing *mu'amalah* of *tabarru'* is to "worship". It means that someone who engaged in *tabarru'* contracts have an intention to seek God's blessing. So it can be categorized as a non-profit oriented business. It based on the fatwa of DSN-MUI No.21/DSN-MUI/X/2001. Thus, if we inspect *takaful* merely from this aspect,

there is nothing to dispute about its validity. *Tabarru'* principle is a kind of virtue oriented *mu'amalah*. So it can be guaranteed that there will be no dispute about its validity among the Islamic scholars. Generally, scholars who allow *takaful* have been held on this aspect.

Islamic scholars define *tabarru'* as a voluntary contract which is resulted from the ownership of the property, without compensation. In a broader sense, it is doing a kindness without any requirements. So, it can be categorized legally as a grant agreement. The general definition of *tabarru'*, according to the fuqaha is donated certain property for the benefit of others when alive (Alam, et.al., 2011).

In this regard, *takaful* industries organized Islamic insurance based on the Fatwa on the General Guidelines for *takaful*. It determined that Islamic insurance (*ta'min, takaful, or tadamun*) is a mutual effort to protect and help each other of the member. They help to overcome the risks which are experienced by other members through *tabarru'* fund. It patterns returns was based on the certain risks encountered through a specific contract (engagement) which is in accordance with *Shari'ah*.

Definition of *tabarru'* contract of the Islamic insurance, according to DSN MUI as determined on the fatwa No. 53/DSN-MUI/III/2006 is all forms of contract which done in the form of grants with the aim to benevolence and mutual help among the participants. It is not for commercial purposes. The *tabarru'* contract must be attached to all Islamic insurance products. It is a basic form of agreement among the participants who performed the policyholder. The *takaful* based on *tabarru'* contract must have mention following things:

1. Individual rights and obligations of each participant;
2. The procedure and schedule of premium and claim payment;
3. The specific terms in accordance with the type of insurance.

The intention of every participant of *takaful* since the beginning is to help and protect each other. Their "social" activity is coordinated by the manager of insurance, by setting aside funds in the form of *tabarru'* premiums. Thus, this system does not use a risk transfer scheme in which the insured must pay a premium as found in the conventional insurance system.

The prevailing system in the Islamic insurance can be described simply as a risk sharing arrangement between the participants (*takaful*) (Alam, 2011). Considering its goal, Islamic insurance will alleviate the suffering of a member. It is a kind of guarantee of safety, health insurance, old age pensions, accident insurance, health insurance, and so on.

As described previously, *tabarru'* is a grant agreement. The Fatwa of DSN MUI No. 53/DSN-MUI/III/2006 regulates the application of *tabarru'* contracts in the Islamic insurance business. The management of a *tabarru'* fund must follow the requirements: (1) the accounting of *tabarru'* funds must be separate from *tijarah* funds; (2) The return on *tabarru'* investment become the collective rights of participants and must be recorded in the *tabarru'* account; (3) the insurance company gets a share of the profits of investment based on *mudharabah musytarakah*, or obtain *ujrah* (fee) based on *wakalah bi al-ujrah*.

At this point, contemporary scholars are exploring and developing a performance of Islamic insurance management. It should bring an element of mutual help, such as what happened in the early history of insurance that makes the principle of mutual assistance as the main element in it (Swartz and Coetzer, 2010). From here, *takaful* institutions have an obligation to carry out the cleaning elements which are not in accordance with *Shari'ah* of practices by conventional insurance. There should be no materialistic, individualistic, and capitalist values, but rather the spirit of fairness, cooperation, and mutual help.

The fatwa of DSN-MUI No. 53/DSN-MUI/III/2006 explained that the *tabarru'* fund in Islamic insurance was intended for mutual help (charity) among the members. It cannot be changed to the business oriented contracts. This provision is in line with the basic principles of *tabarru'* contract, which prohibit to change the charity (goodness; *tabarru'*) into business oriented (*tijarah*). In other words, a contract which has been agreed as *tabarru'* should not be transformed or changed into a *tijarah* contract. In another word, the insurance participants who had been intended at the beginning to help fellow members should not seek any benefit from their gift.

Based on the principle of non-profit oriented above, it can be concluded that uncertainty (*gharar*), speculation (*muqamarah*), and its derivatives became irrelevant to the discussion on *tabarru'* contracts. This can be understood when considering *tabarru'* as a "one-direction" contract. It does not require the consent or willingness of the recipient. The elements of uncertainty, speculation, and its derivatives, only become a problem in the "two-direction" contract, namely benefit-based contract (*tijarah*). For example, insurance participants should not ask rights associated from an insurance claim if there was no specified risk. In other

hand, there remains the right to profit share from the investment (*tijarah*) even though they have an underwriting claim.

The prohibition against uncertainty applies only to *tijarah* contracts. It has no relation to the *tabarru'*. It has been articulated on the fatwa of DSN MUI on the *tabarru'* contract. It describes that there is no requirement for "certainty" with respect to the time and the amount of payment, and also the object of the transaction. The presence of uncertainty does not make a *tabarru'* contract fail (imperfect) as in the *tabadduly* contract. Likewise, the amount of the object of *tabarru'* contract does not need to be clarified as it in the *tabadduly* contracts. This term of condition means that a person is not required to face risk first, in order to obtain the benefit (or insurance claim).

The principle of the *tabarru'* contract above cannot be applied for any types of the *tijarah*. It is mean that a contract, which was intended for the purpose of seeking profit (*tijarah*) can be converted into a *tabarru'* contract. The *Qur'an (Al-Baqarah, 2:280)* teaches that the businessmen should give concessions to their associates who face difficulties. Regarding to the case, *Shari'ah* does not acquaint to the principle borrowed from Milton Friedman, "the business of business is business," but "the business of business is mercy" (Irkhami, 2015). There will be no problem of law regarding to *takaful* insurance if the points of the contract only refer to the *tabarru'* principles. If the *tabarru'* is applied solely in the Islamic insurance, then there is no longer need to discuss about the elements of *gharar*, *maysir*, *riba*, *zulm*, *rishwah*, and so forth, as ordered by the fatwa No. 21/DSN-MUI/X/2001. This is because those things are not relevant to the non-profit oriented based contracts. They did not need for mutual benefit (*tabadduly*). So, the "mixing" between *tabarru'* with *tijarah* contracts in Islamic insurance become the main topic.

5. Review on the *Tijarah* Contract in *Takaful*

Islamic insurance products in Indonesia use both *tabarru'* and *tijarah* contract models. The *tijarah* agreement scheme is actually a commercial character, which seek to obtain profit. It has been introduced by the Islamic insurance industries in Indonesia in order to fit *Shari'ah* stipulations. Based on it, the use of the *tijarah* contract (profit oriented business), which is categorized as a *tabaddul al-manafi'* (mutual) contract, must have following consequences:

1. The payment shall be determined; how to pay.
2. The object of the contract must be determined and clarified (e.g., the type goods should be clear).

Desecration to the one of both elements will make the transaction vanity. Therefore, the contract will be void legally; since *tabaddul* contract requires the existence of "certainty" in all respects. Thus, there is no aggrieved party, and vice versa, there is no other party who takes an advantage by vanity or injustice.

The practice of transactions that take place between the institutions of Islamic insurance in Indonesia with its customers have posed *takaful* as a subject of law to act as parties who have the skills to act in a position, which generally uses status Limited Liability Company. The contract of *takaful* puts the customers as deposing party (*sahib al-mal*). It also poses the Islamic insurance as the *mudharib*. Both of them will share profit or loss at the end of the engagement. Then *takaful* would set itself as the party that receives funds from the clients. As the depository of public funds, they must maintain public confidence in the funds deposited it.

On the other hand, the insurance also serves as channeling capitals to other parties who need it for business (for example, for venture capital or other purposes). Generally, in this case their position is *sahib al-mal*. Then, this second position was considered as the owner of capital. Investigating the existence of *takaful* as a store of public funds, it can be understood that the stockholder in the real terms is the customers (who are the real owner of capital). In this case, the Islamic insurance agency is the provider party, which serves as a store of funds. Most of the Islamic insurance companies in Indonesia follow the flow of funds, as in Figure 2:

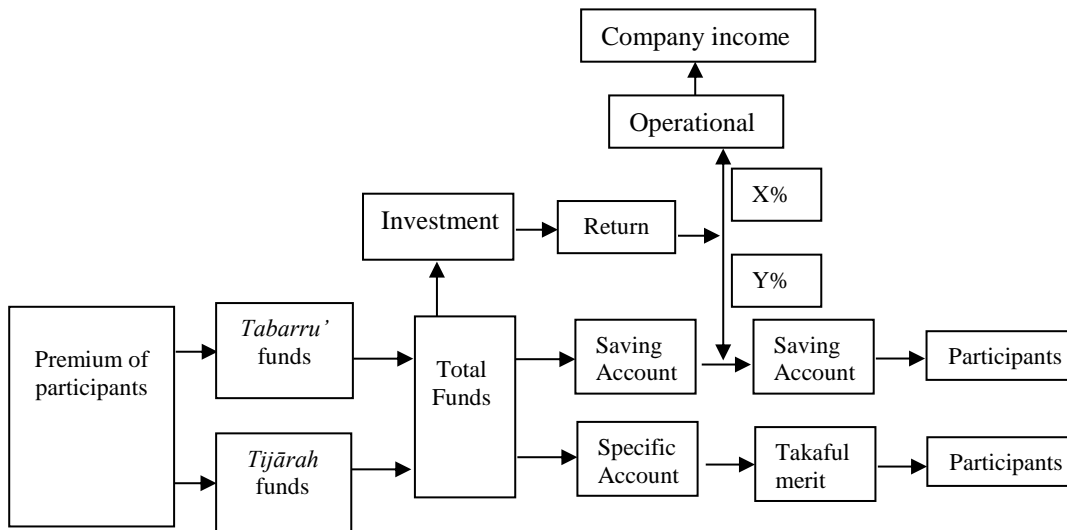


Figure 2: The Premium Flow of *Shari'ah* Insurance

Figure 2 is the flow adopted by PT Asuransi *Takaful* Keluarga (Sholihah, 2010), PT. AJ BRIngin Jiwa Sejahtera, and *Shari'ah* Devison (Soedibjo and Fitriati, 2009). The scheme shows that there is a mixture of the *tabarru'* and *tijarah* funds, as reflected in the "Total Funds" box. It will be utilized for three channels: investment, saving account and *tabarru. Shirkah* or corporation is an engagement between two or more persons who have the same consent to do a business. Its goal is to share on providing products or services, and to share the results (Nyazee, 2008). Thus, it should be started from the proposal business cooperation based on profit and loss sharing.

Furthermore, criticism against *mudharabah* transactions in Islamic insurance in Indonesia is its double status. On the one hand, they established itself as an entrepreneur (*mudharib*) and on the other as the owner of capital (*sahib al-mal*). The first position is their serves as an insurance company, while the second position is its engagement with the third party. It shows that basically, Islamic insurance has no role as a stockholder, since the capital belongs to the customers.

Takaful have a double status as an agency that collecting funds from the first party (participants) and as an agency that turn to account the funds. In this case the insurance poses itself as an entrepreneur and considers participants as the owners of capital. This means that once the money in their possession, they don't run the mandate of what should be done. They instead bind themselves with a new covenant to the other party to do other businesses. In the last context they claim to be the owners of capital (*sahib al-mal*) and the current clients are the *mudharib* who really require outpouring of capital to the real sector of business.

Based on the scheme, it can be seen that there are two kinds of the *mudharabah* contract conducted by an Islamic insurance. In the former contract, the insurance set itself as a *mudharib* who doing the business. The second one is their position as a *sahib al-mal*. They act as the provider of capital to the third party. Therefore, the real status of the insurance is merely as the intermediary, or the broker of capital. It is the investors and entrepreneurs who share the profit of *mudharabah*. Meanwhile, anybody who does not have the capital and did not take part in the implementation of the business is not entitled to share the result.

Some scholars banned the practice of *mudharabah* on the current Islamic insurance. They do not allow the *mudharib* to channel the capital, which has been received from the third party by using *mudharabah* agreement. If he did so with the permission of the financiers, he came out form the first *mudharabah* and changed its status as a representor for investors in this second *mudharabah*, and then it is justified. However, it is not justified to require for himself the slightest of gains. If he remains requires it, then the second *mudharabah* is not allowed.

At the first status, insurance was set as a *mudharib* and received capital from the customer, who is assumed as a creditor. Subsequently, they do not apply the mandate to carry out their role as entrepreneurs according to the *mudharabah* contract intended. Even then they distribute the funds to the other customers

(assumed as debtor), who want to apply as an entrepreneur. At this time, the insurance position itself as a financier, while the capital in hand belongs to the other customers. So the substance of the dual status “scenario” of it is allocating collected funds to other parties who promised to share the return.

It is thus operating involving a pseudo effort that essentially is not being conducted by the insurance agencies. All they do is to merely receive and distribute funds and take advantage of it. This is similar to the economic substance of conventional insurance, which seek profits from interest and "speculation". The flow of money from later participants was allocated by the insurance institution in the form of "sponsorship" of funds to other parties. In this case, Islamic insurance per se is not the real owner of the capital.

It is also required that the capital must be handed over to the *mudharib* at the time when the *mudharabah* contract was agreed. Thus, there should be no portion of the capital to be bestowed later. Once a contract has been agreed (*mudharabah* scheme), the capital should be submitted to the *mudharib*. This cannot be held in the insurance contract, since the "capital" submitted to the insurance as the manager. It is not delivered in cash at the beginning of the contract.

Based on the *mu'amalah* rules, the right to manage the *syirkah mudharabah* activity is fully under *mudharib*'s responsibility. He is entitled to carry out the appropriate *syirkah* on his own views and opinions. Financiers do not have the right on it. Therefore, *mudharabah* is dealing with the governing body and property financiers, rather than on the body financiers themselves. Thereby, the financiers became "strangers" from the business activity, since they cannot intervene in the business settlement. However, investors may specify the terms of the management at the beginning of the contract were made. In this case, *mudharib* was bound to the terms which have been set. He should not commit errors because his management duties of the *syirkah* are on their permit. Therefore, he is bound by the license, which was given.

A *shahib al-mal* should not intervene in the business activities, which he invested. This is because *mudharabah* happened on his own body. The activities of business settlement of *mudharabah* are a consequence of the contract for the *mudharib*. However, if the work is beyond the scope of management performance, the *mudharib* may do it and have the right of the payment. Therefore, the investor entity does not become the object of the contract, and he was like a stranger from it.

Shirkah al-mudharabah is categorized as the *'aqd al-jaiz*. It is mean that each party may cancel the contract anytime, unless there are some points of the contract which determined otherwise. If one of the party (*sharik*) dies, the *shirkah* was terminated. However, regarding to the *mu'amalah* law, the contract is categorized as *'aqd mustamirr*. So it will be updated automatically over time. If the *shirkah* period is end, or any party withdraws, automatically the contract will be renewed for the rest of the parties.

5. Analysis on the Mechanism of Insurance Premium

The premium is a fee charged to an insurance company for a certain amount of sum assured. Many factors must be considered by actuaries of conventional insurance companies to calculate the necessary thing to set premium rates adequately and reasonable. Premium rates must be sufficient for the company to have sufficient funds to pay benefits of insurance. Premiums must be reasonable so that it will reflect the level of risk borne by the insurance company in providing coverage.

As in the conventional insurance, *takaful* participants are required to pay a premium. Based on the designation, the *takaful* premium can be classified into *tabarru'* and *tijary* funds. The *tabarru'* funds devoted as a mutual assistance fund for customers in facing a risk. Meanwhile, *tijary* fund is used for operational expenses Islamic insurance companies. Since *tabarru'* and *tijary* funds are based on the different scheme contract, it should be managed separately. The lack of clarity in the management of funds will make it become invalid.

The concept of premium payment will also lead to some problems if the insured person cannot continue to pay premiums. In conventional insurance, with the cessation of payment, the premium is considered as forfeited funds. Absolutely, this cannot be advantage the insurer. Furthermore, there will be other possible cases when it appeared many unexpected risks. The insurer should pay much compensation, which can make cause a shortfall. Contemporary practices of conventional insurance in Indonesia show the participants of insurance will not experience any losses even when they have real risks. They always obtain benefits. This is due to fixed calculation on the premium amount, probability of risks, management fees, and including the expected profits.

Based on the empirical data, the other important issues related to the Islamic insurance premium are about

smaller percentage of *tabarru* funds than *tijarah* (Anggraeni, 2009). Accumulated funds of *tabarru* of the participants when calculated with the total payment of insurance claims are not fair. If the payment of insurance claims is only paid back from the *tabarru* funds, it will not be a problem. However, the lack of it cannot be taken from the *tijarah* fund. In this case, it requires the consent of all owners of capital. The willingness of the participants to have their actual claims payments stated in the agreement at the beginning of the contract regarding on *tabarru* and *tijarah* ratio. So it is not possible to be changed.

The possibility of the other issue, which is in the opposite of the above case, is when the accumulation of funds for the payment of insurance claims turned out to be smaller than the final balance of *tabarru'* funds. When it happens, the slightest possibility, then the "excess" should not be owned by the manager (insurance agency), because they have obtained fund management. The payment of Islamic insurance claims is simply deducted from the *tabarru'* fund. Any deficit is not the responsibility of insurance companies, given their position as representatives of participants. In addition, the basic concept of *takaful* is risk sharing, not a transfer of risk.

The excess of *tabarru'* funds also may not be returned to both participants or to the company. This is in sequence with the basic principles of the contract, which states that all types of businesses intended as *tabarru'* should not be twisted into *tijarah*. In other words, when the insurance participants have agreed to provide funding of "social" (for fellow participants), then the administration should not and do not deserve to ask for it to be returned.

6. Analysis on the Mechanism of Risk Insurance

From an economics perspective, insurance is the equitable transfer of the risk of a loss, from one entity to another in exchange for money. It also can be defined as an attempt to reduce risk by moving and/or combine the uncertainty of the existence of financial losses. Based on the conventional concept, insurance is a way to transfer the risks that may occur in the future. From a point of view, it is an effort to merge individual risks within a group. Furthermore, they will use the funds that have been collected by the members of the group to pay for certain losses. There is an effort to reduce uncertainty of certain parties (the insured). It is done through the transfer of certain risks to another party (the so-called insurer), who promises to provide a certain amount of insurance coverage (Stanovich, 2002).

In the concept of *takaful*, underwriting certain risks jointly by all participants of the insurance is an activity which is based on kindness (Billah, 2001). In this case the goodness of the participants to assume the risk does not require "reciprocity" of participants. Viewed from the aspect of risk that will occur in the future can indeed be considered as *gharar*. However, since the insurance contract does not include a reciprocal agreement. Therefore, the discussion about *gharar* in the *takaful* becomes irrelevant. In other words, scholar's opinions that linking the prohibition of insurance activities with uncertainty, speculation and gambling is not contextual.

Theoretically, since the beginning *tabarru* and *tijarah* are used at once on *takaful* contract. In reality, the risk is always associated with insurance claims, as well as the initial goal for the participants. In other words, the risk must be associated with the *tabarru'* contract. Whereas in the *tijarah* contract, returns of the investment depend on the acquisition of profit or loss. However, it is not associated with the risk (claims) that occurred.

This principle of separation between *tabarru* and *tijarah* becomes a major problem in the insurance industry in Indonesia. Mixed management of both different types of contract becomes the academic and practice anxieties that must be solved. Theoretically, the association between risk and profit sharing is in contrary with the Islamic principle. It clearly indicates the existence of *gharar* and speculation in the business. The benefits or profits which are allowed in Islam are derived from the real sector. Thus, the insurance industry as the *mudharib* must have real business units based on *Shari'ah*. Meanwhile, as *ṣahib al-mal*, they should have their own capital. It may not obtain it from business partners (i.e. customers).

The issue relating to the risk management also needs to be highlight is that the Islamic insurance company perform re-insurance. This is showed by the data issued by OJS in Table 2.

Table 2: Financial Highlights *Shari'ah* Non-Life Insurance (Billion Rp)

	Aug. 2015	Sept. 2015	Oct. 2015	Nov. 2015	Dec. 2015	Jan. 2016	Feb. 2016	March 2016	April 2016
Assets	1.062	1.061	1.091	1.097	1.119	1.196	1.189	1.179	1.191
Gross	179	198	225	242	286	51	71	97	126
Contribution									
Gross Claims	143	155	175	184	216	26	50	56	89
Investments	898	910	933	941	955	968	977	980	989

Source: Indonesia *Shari'ah* Non-Bank Financial Institutions Statistics (issued by OJK, April 2016)

The cooperation of the insurance companies with re-insurance is a mutual relationship. In this case, the insurance company adopts *wakalah bi al-ujrah*. However, as indicated, the purpose of re-insurance involves risk management that is not based solely on the pool of *tabarru* funds. *Shari'ah* insurance industries will not be capable to handle the associated risk entirely by themselves. Therefore, they undertake re-insurance, which is based on *tabarru'*, so that the participants share the risk between themselves and not left entirely with the insurance company.

7. Wakala Problems on *Shari'ah* Insurance

Wakala literally means standing for the authorization (Al-Ansary, 2013). The definition of *wakala* according to *Shafi'iyah* jurists is a phrase that implies granting delegation of power or something from one person to another, so that other people do the activities that have been authorized on behalf of another. Meanwhile, according to the *Malikiyah* scholars, it is the act of a person represents himself to others to carry out the activities. The activity is not associated with the authorization after giving power away. According to Shiddieqy (1985), it reflects a handover, where someone appoints another person as his successor to act on something (*tasharruf*). Meanwhile, according to Sabiq (1992), *wakala* is the delegation of power from one person to another in matters which can be represented. It means to preserve, uphold, submit, guarantee, and substitute.

Based on Fatwa of DSN MUI No.10/DSN-MUI/IV/2000 on *Wakalah*, the provisions on it is as follows:

1. A statement of consent and *qabul* must be declared by the parties to demonstrate their will to hold the *aqad* (contract);
2. *Wakalah* in exchange for binding and may not be cancelled unilaterally.

Ujrah (on *wakala*) is an administrative fee for the Islamic insurance agency. It is a payment for *tabarru'* fund management service (Muhammad, 2012). The engagement between participants and managers is *wakalah bi al-ujrah*. According to the fatwa of DSN MUI No. 52/DSN-MUI/III/2006 on *Wakalah bi al-Ujrah* on Islamic Insurance; *wakalah bi al-ujrah* is the authorizing by participants to the insurance company to manage their funds by giving *ujrah* (fee, commission).

The objects of *wakalah bi al-ujrah* contract can be an administration work, fund management, payment of claims, underwriting, portfolio risk management, marketing, and investment. In the contract, it should be mentioned at least: (1) the rights and obligations of participants and insurance companies; (2) the amount, manner and the presentation of *ujrah* on premiums; (3) other conditions were agreed in according to the type of insurance.

In the matter of the commission, Islamic insurances in Indonesia are based on the *wakalah bi al-ujrah*. The company has the right to obtain a commission. It is not the operating costs. It automatically becomes the assets of the company. So, it became the company income. The operational costs for underwriting risks are funded from *tabarru'*. Therefore, the separation of funds is realized by separating the asset-liability fund of *tabarru'* participants with the asset-liability of shareholders' funds. This is directed on the Fatwa No. 53/DSN-MUI/III/2006 on the *Tabarru'* Agreement.

The application of *wakalah* on Islamic insurance has been done by PT Asuransi *Takaful* Keluarga (Sholihah, 2010), PT. AJ BRIngin Jiwa Sejahtera (Soedibjo and Fitriati, 2009), and PT. AJS XYZ (Patriani, 2012) as showed by following chart:

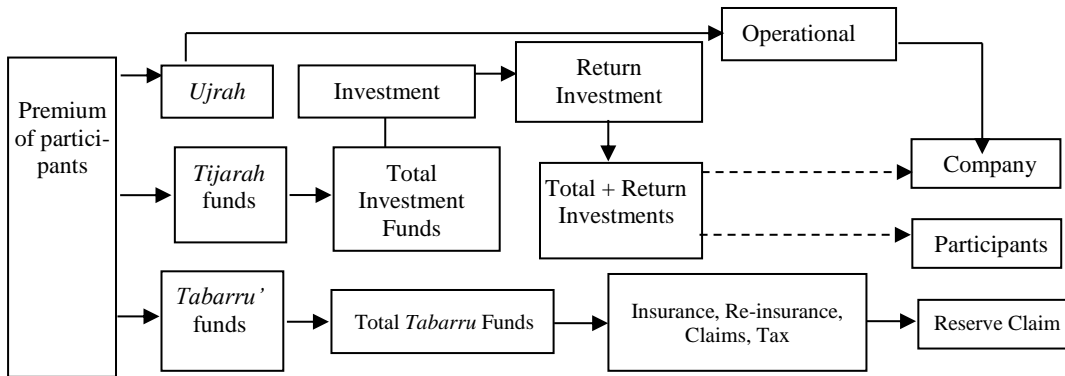


Figure 3: The Premium Flow of Islamic Insurance in Indonesia

Based on the scheme of figure 3, the separation between the *tabarru'* and *tijarah* raises two issues:

1. The *tabarru'* relationships merely exist between policyholders. There is no certain contract with the company.
2. The relationship of participants with the insurance is a *tijarah*, namely *wakalah bi al-ujrah*. Actually, *wakalah* is more appropriate for the *tabarru'* scheme, in which the company is obtaining *ujrah* (a fee) as payment for its management.

Legal issues concerning to the implementation of *wakalah bi al-ujrah* are only relevant to the *tabarru'* contract. This is a kind of management fee for the insurance. By *wakalah*, Islamic insurance acts as the agent, i.e. the party which is trusted by all participants to manage risk underwriting activities. They earn *ujrah* as the manager.

9. Conclusion

The *tabarru'* system became an important icon for Islamic insurance. There will be no Islamic insurance without it. It will "relieve" all the problems alleged to insurance transactions, namely *gharar*, *maysir* and *muqamarah*. A non-profit oriented contract has a "one way" direction. It does not need reward, any return, or agreement from the other party of the contract.

Generally, the legal problems concerning to the implementation of Islamic insurance were triggered by the mixing two different accounts of contract (*tabarru'* and *tijarah*). The implementation of *tijarah* principle is based on profit and loss sharing. *Shari'ah* insurance companies, as well as other practices of Islamic banking and other Islamic financial institutions in Indonesia, still act as the "mediator". In this case, their position was further extended to accommodate capital to entrepreneurs. This means that as *mudharib*, they serve as *sahib al-mal* too. This dual position would violate economic harmony.

Another problem of the *tijarah* implementation on *takaful* system in Indonesia is the application of *wakalah bi al-ujrah*. Legal issues concerning to the *wakalah* contract are only relevant to the *tabarru'*. In this case, Islamic insurance acts as the party that is trusted by all participants to manage risk sharing activities. As a manager, they entitled to *ujrah*. Another problem found in this study is their double positions on *wakalah bi al-ujrah* of *tijarah* and *tabarru'* engagements.

Based on the research of the Islamic legal aspects, it can be concluded that Islamic insurances in Indonesia are not separating returns obtained from the *tabarru'* and *tijarah*. This indicates that the *tabarru'* and *tijarah* dualism in Islamic insurance in Indonesia is not in line with the basic principles of *mu'amalah* law.

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