

## **Absolute assignment in *takāful* industry: *Sharī'ah* contracts, issues and solutions**

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**Abstract:** This article deliberates on the Islamic contracts used in absolute assignment in *takāful* industry and identifies *Sharī'ah* issues that might accrue from it. The article studies the market practice of absolute assignment in *takāful* industry in Malaysia and proposes the adequate Islamic contracts that can be used in absolute assignment and at the same time resolve any *Sharī'ah* issues that might occur from it. This research consists of both library-based research and fieldwork research. The researchers interviewed some practitioners and studied the related documents and acts used in executing absolute assignment in *takāful* industry in Malaysia. The study infers that there are two types of absolute assignments. The first one is between an individual to an individual on the basis of *hibah* and the second one is between an individual and a financier/bank on the basis of *kafālah*.

**Keywords:** Absolute assignment, *hibah*; *kafālah*; *Sharī'ah*; *takāful*.

**Abstrak:** Kertas kerja ini membincangkan tentang kontrak-kontrak Islam yang digunakan di dalam penyerahan hakmilik sijil secara mutlak di dalam industri *takāful* dan mengenal pasti isu-isu Shariah yang mungkin timbul daripadanya. Kertas kerja ini juga mengkaji amalan-amalan semasa penyerahan hakmilik sijil secara mutlak di dalam industri *Takāful* di Malaysia dan mencadangkan kontrak-kontrak Islam yang sesuai untuk menangani isu ini dan pada masa

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yang sama menyelesaikan isu-isu Syariah yang mungkin timbul daripadanya. Kajian ini melibatkan kajian perpustakaan dan kajian lapangan. Untuk kajian perpustakaan, pengkaji bergantung kepada buku-buku yang telah diterbitkan, artikel-artikel, surat-surat edaran dan bahan-bahan internet. Sementara untuk kajian lapangan, pengkaji menemu-bual beberapa orang pengamal *Takāful* dan mengkaji dokumen-dokumen dan akta-akta yang berkaitan. Kertas kerja ini menyimpulkan bahawa ada dua bentuk penyerahan hakmilik sivil secara mutlak. Bentuk pertama di antara seorang individu dengan individu yang lain berdasarkan kontrak *hibah* dan bentuk yang kedua di antara seorang individu dengan pembiayaan/bank berdasarkan kontrak *kafalah*.

**Kata Kunci:** Penyerahan hakmilik sivil secara mutlak; *hibah*; *kafalah*; *Shariah*; *takāful*.

*Takāful* is a contract whereby the participants commit to regularly contribute certain amounts in a specified fund to mutually guarantee each other and appoint a body to act as the fund manager. In this contract, the participants have the opportunity to mitigate the possible financial risk that their family might encounter in case of any misfortune. This could be done by nominating his or her family members to receive the *takāful* benefit, or just absolutely assigning the *takāful* benefit to anyone. Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) defines *takāful*, or Islamic insurance, as a process of agreement among a group of persons to handle the injuries resulting from specific risks to which all of them are vulnerable. It is based on the commitment of the participants to make donations for the sake of their own interest. The participants, therefore, protect their group by payment of contributions that constitute the resources of the insurance fund, and assign the management of that fund to a committee of policyholders, or to a joint stock company that possesses the license of practicing insurance business (AAOIFI, 2010).

In Islamic Financial Services Act 2013 (IFSA 2013), *takāful* is defined as an arrangement based on mutual assistance under which *takāful* participants agree to contribute to a common fund that provides mutual financial benefits payable to the *takāful* participants or their beneficiaries on the occurrence of pre-agreed events (IFSA, 2013). As far as absolute assignment is concerned, all of the *takāful* benefit is transferred completely from a participant to an assignee. Although absolute assignment has been regulated in the Islamic Financial

Services Act 2013, it is not comprehensively touched; moreover, the repealed *Takāful* Act 1984 did not even mention this assignment. In any case, the issue of absolute assignment is crucial because originally it was widely practiced by insurance industries. As such, this paper is written to discuss how this practice can be adapted in *takāful* industry. The paper will also propose the adequate Islamic contracts that can be used in absolute assignment and at the same time resolve any *Sharī'ah* issues that might occur from it.

### ***Takāful* participants relationship**

*Takāful* is not restricted to a single contract only. Basically, it consists of two arrangements: the first one is among the *takāful* participants; while the second one is between the *takāful* participants and *takāful* operator. As for the first arrangement, the participants commit to donate to the participants' risk fund (PRF), which is also known as *tabarru'* fund. When any of the participants are inflicted with a specific risk, a specific amount will be disbursed from the *tabarru'* fund to them. Here comes the concept of partnership which is created by their undertaking to contribute to the fund to reduce or eliminate the impact of the risk. For the second arrangement, the participants appoint a *takāful* operator to manage the *tabarru'* fund and they agree to be charged on the service rendered by the *takāful* operator.

Based on the above arrangements, we can see the difference between a *takāful* operator and an insurance company in terms of their roles. An insurance company serves to be an insurer and the company owns any payments received from policyholders. Accordingly, it is their liability to pay in the event of misfortune, whereas a *takāful* operator acts only as a fund manager, thus, any contributions received from participants are still owned by them. As a result, the *tabarru'* fund itself is liable to pay in the event of misfortune on the basis of cooperation. Apart from that, contributions received by the *takāful* operator can be invested by using either *muḍārabah* contract (an investment contract between two parties, or more) or even *wakālah bi-al-istithmār* which is an agency contract between two parties; one party (principal) assigns another party (agent) to invest on the principal's behalf. However, 100% of investment profit or loss will be passed to the principal. It differs from one another based on models that are adapted by a *takāful* operator.

### ***Takāful* model: A hybrid of *wakālah* and *ju‘ālah***

Based on the model, the participant will give his commitment to contribute on a monthly basis to the fund according to the risk carried. An upfront charge will be deducted first from the contribution made before going into the Participant's Individual Account (PIA) or also known in the industry as Participant Individual Fund (PIF). The upfront charge is a *wakālah* fee which is payable because of service and expertise that will be provided by the *takāful* operator. This is where the contract of *wakālah bi-al-ujrah* takes place. The money in PIA will then be dropped into a *tabarru‘* fund. All of the money in PIA and *tabarru‘* fund will be invested in *Sharī‘ah*-compliant portfolios. In this model, the contract used is *wakālah bi-al-istithmār*. Hence, it is up to a *takāful* operator to charge or not. At the end of the financial year, 100% of investment profit will be given and credited into PIA. There is also a return to *takāful* operators called underwriting surplus. To understand underwriting surplus, we must first understand underwriting. Underwriting is a process in which a *takāful* operator evaluates and assesses the risks borne by a participant and the coverage that they want. From those data, underwriters in a *takāful* operation will then decide on the appropriate contribution that a participant should pay as his contribution. Underwriting involves a calculation of probability, so even though it is made to be as accurate as possible, the claim made for a certain year might be less or even higher than what has been projected.

If the claim made for the certain year is lower than the pool in the *tabarru‘* fund, this will result in an underwriting surplus. *Sharī‘ah* Advisory Council of Bank Negara Malaysia (SAC of BNM) has pronounced that the surplus from the *tabarru‘* fund belongs to the *takāful* participants collectively (Bank Negara Malaysia, 2010). Notwithstanding that, in March 2004 and May 2006, SAC of BNM has resolved that surplus from the *tabarru‘* fund may be distributed amongst the participants and the *takāful* company. Further in October 2006, SAC of BNM also resolved that for the *takāful* model based on *wakālah* concept, the underwriting surplus can be shared between the participants and the *takāful* operator based on an agreed percentage, whereby the right of the *takāful* operator to share the underwriting surplus is considered as a performance fee (Bank Negara Malaysia, 2010). This is where the contract of *ju‘ālah* which is a contract on which

a party commits to remunerate another party who achieve to realise the expectation of the former takes place.

Apart from *ju'ālah*, there is also another *fiqh* adaptation made by different *takāful* operators in this regard, which is *hibah mu'allaqah* (contingent *hibah*). *Hibah mu'allaqah* is a type of *hibah* (gift) in which a donor will only donate if something happened. In the underwriting surplus sharing, *takāful* participants (donor) will give part of their underwriting surplus to the *takāful* operator (donee) only if the donee can realise the underwriting surplus in that financial year. The reason why there is a difference of *fiqh* adaptations in this regard is because the SAC of BNM only provides general ruling on the matter which is based on the *fiqh* maxim, “*al-aşlu riđā al-muta'āqidayn*”, which is translated as “the original ruling for a contract is the consent of the contracting parties” (Bank Negara Malaysia, 2010) .

Notwithstanding the above, *Takāful* Operational Framework (TOF) currently has imposed three requirements on *takāful* operators for taking in the performance fee. Two of them are listed:

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 PRF payable to the *takāful* operators shall not exceed the amount of surplus paid or accrued to participants (Bank Negara Malaysia, 2013).

From these two requirements, market players understood that the maximum portion of underwriting surplus sharing between *takāful* operator and *takāful* participants would be 50:50 respectively, and the minimum, by logic would be 0:100. Nevertheless, as far as underwriting surplus is concerned, AAOIFI, as an independent international organisation that also stipulates *Sharī'ah* standards for Islamic financial institutions seems to differ from SAC of BNM. AAOIFI in its *Sharī'ah* Standard No. 26 on Islamic insurance, under statement no. 14 (Additional Guidance on the Insurance Surplus) has made clear the following items:

1. Subject to item (5.5) which stipulates that the company shall not be entitled to benefit from the surplus, the shareholder shall not have any inherent entitlement to the surplus which shall be the property of the insurance fund.

2. The surplus, after putting aside the reserves and provisions for the Insurance Fund, shall be distributed in a manner as may be determined by the *Sharī'ah* Supervisory Board of the company, such as the three ways mentioned in item (12.2), without prejudice to the provisions of item (14.1) above.
3. There is no objection to allocating a percentage of the surplus as an incentive for the management of the company, on top of the determined management commission, provided that such incentive - if any – shall be estimated on a year by year basis, as may be approved by the *Sharī'ah* Supervisory Board of the company.
4. The giving of incentive shall be subject to the surplus reaching a certain percentage of the policyholders' contributions so that the incentive shall be deemed as a reward for the good performance of the company.
5. The *Sharī'ah* Standards Board recommends the incentive to be around 30% of the surplus (AAOIFI, 2012).

It is very interesting to know that, for example, at the end of a year, a *takāful* operator realises the underwriting surplus is RM 5 million and 30% of it will go to the management as *ju'ālah*, or incentive. If the company has 500 staff, each staff will get RM 3,000 for that year. Unfortunately, based on the latest *Sharī'ah* Standards 2014, the statement no. 14 (Additional Guidance on the Insurance Surplus) has been removed. This means, AAOIFI is reverting back to its stance in 2010 that underwriting surplus is solely the participants' property (AAOIFI, 2014).

On the other hand, if the claim made for the certain year is higher than the pool in *tabarru'* fund, resulting the *tabarru'* fund to be deficit, the *takāful* operator will pump in money as a benevolent loan or *qard*. This arrangement is a requirement under Islamic Financial Services Acts 2013 (IFSA 2013), which stated:

Where the value of the assets of the *takāful* fund is less than the value specified under paragraph 92(1) (b), the licensed *takāful* operator shall provide *qard* or other forms of financial support to the *takāful* fund from the shareholders' fund for an amount and on such terms and conditions as may be specified by the Bank.

The *qard* then will be payable if the *tabarru'* fund realises the underwriting surplus for next year. Otherwise, after a certain time period, the debt will be written-off. Below is Diagram 1 of a family *takāful* model in an industry using a hybrid of *wakālah* and *ju'alah*:

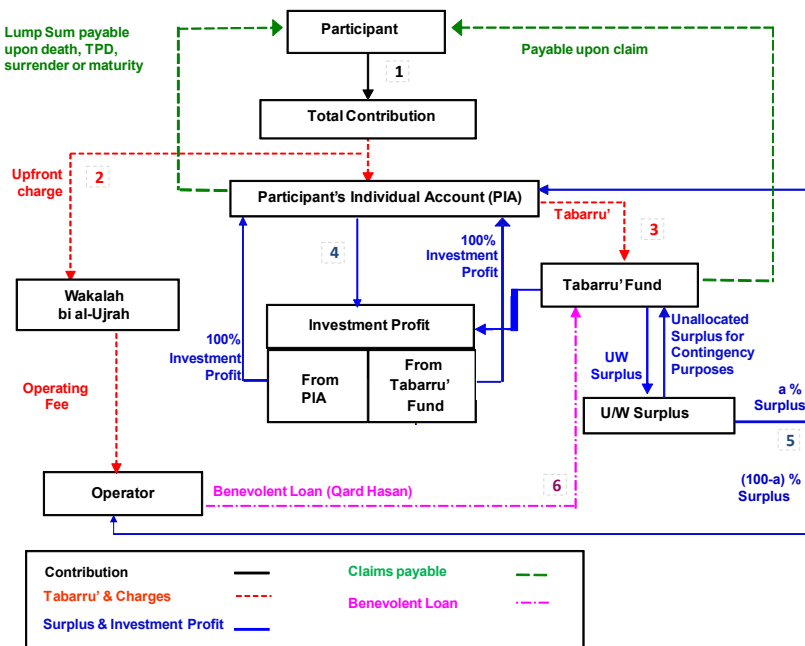


Diagram 1: Example of family *takāful* model

### Takāful benefits

A participant who enters into a family *takāful* contracts will be grouped together with other participants who share the same risks with him/her, such as death or total permanent disability. So, if the participant dies, a claim will be made payable to nominees. The claim will be paid from the *tabarru'* fund and the balance in his/her PIF will be given back accordingly. IFSA 2013 interprets *takāful* benefits as any benefit, whether pecuniary or not, which is payable under a *takāful* certificate (IFSA, 2013). Thus, *takāful* benefits will include sum covered as well as total account value in PIA. Some *takāful* operators do not regard the balance in PIA as part of *takāful* benefits because it is not payable to nominees. This is because PIA is regarded as part of the estate of the person covered, so it has to be distributed to the heirs of the person

covered according to *farā'id* law for Muslims and distribution law for non-Muslims.

There are certain ways allowed to distribute *takāful* benefits; among others, it is on default done by means of nomination. In Schedule 10 IFSA 13, it is clearly stated that a *takāful* participant who has reached the age of sixteen may nominate an individual to receive *takāful* benefits payable upon his/her death under the *takāful* certificate, either as an executor or as a beneficiary under a conditional *hibah* (IFSA, 2013). This provision is backed by a resolution from SAC of BNM in April 2003, as follows:

1. The *takāful* benefit may be made as *hibah* because the objective of *takāful* is to provide coverage for the *takāful* participant. Since the *takāful* benefit is the right of the *takāful* participant, the participant is at liberty to exercise his right in accordance with *Sharī'ah*;
2. Since the *hibah* by the participant is a conditional *hibah*, the status of the *hibah* will not be transformed into a bequest;
3. Normally, the *takāful* benefit is attached to the death of the participant and maturity of *takāful* certificate. If the participant is still alive when the *takāful* certificate matures, the participant will receive the *takāful* benefit. However, if the participant passed away before the maturity date, the *hibah* will be effective.

### **Pledging & assignment in legislation**

Assignment can be classified into two categories, which are absolute assignment and conditional assignment. Absolute assignment of a life insurance policy, as clarified by Lanctot (2014), involves transferring all rights and ownership decisions to another party. Meanwhile, conditional assignment is when the rights of the policy get transferred back to the assignor if he/she fulfills the conditions under which the rights of the policy were transferred. Based on the above definitions, the only difference between the two is that conditional assignment is contingent to any condition that has been prescribed beforehand, while absolute assignment is outright, effectively implemented and not contingent at all.

In this research, the topic will be on absolute assignment only, because conditional assignment - while still being practiced in Malaysia



- is not absolute enough and may not prevail in court if it were to be contested. Normally, assignment in insurance policy or *takāful* certificate only happens in life policy or family certificate. There is no instance of general policy or certificate being pledged as an assignment. In a family *takāful*, normally the assignor can assign the right to *takāful* benefits from his/her *takāful* certificate to a person whom he/she wants to give the benefits. IFSA 13 defines ‘person’ as an individual, any corporation, statutory body, local authority, society, trade union, co-operative society, partnership and any other body, organisation, association or group of persons, whether corporate or unincorporated (IFSA, 2013).

Assignment can be made for several causes, such as donation and giving gifts to a mosque committee or orphanage, or even for paying debt to a bank. It is noted that assignment is only a transfer of rights, not a transfer of both rights and liabilities, which means that the contributor still has to pay contributions accordingly for the certificate to be enforced. For transferring the property, which encompasses its right/benefits with liability/obligations, the term novation is more appropriate. Absolute assignment in family *takāful* certificate means a person covered as an assignor fully transfers his right on *takāful* benefits to another person, who is an assignee, on a voluntary basis as in Diagram 2.

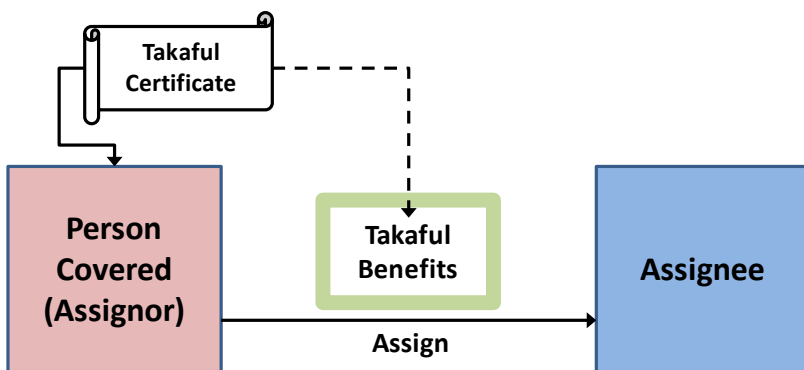


Diagram 2: Assignment of *takāful* benefits in family *takāful* product

Apart from nomination, as discussed above, there are also provisions on pledging and assignments, which are, treated superior to nomination in Schedule 10 (IFSA 2013). When the *takāful* benefits, wholly or partly, have been pledged as security or assigned to a person, the claim of the person entitled under the security or the assignee shall have priority over the claim of the nominee (IFSA, 2013). The *takāful* operator then

still has the liability to pay the balance of the *takāful* benefits (if any) to the nominee accordingly. The same provision is also stated in the Financial Services Act 2013 (FSA 2013). For a record, the provision on pledging and assignment came from the repealed Insurance Act 1996 (IA 1996) which has the exact wording with FSA 2013. As for the repealed *Takāful* Act 1984 (TA 1984), there is no such provision, but TA 1984 did recognise assignment in its definition of participant which stated “participant includes, where a certificate has been assigned, the assignee for the time being...” (*Takāful* Act 1984).

Assignment practice in the insurance industry came from conventional insurance. So this explains why in TA 1984, there is no such provision on assignment. It was only later that Islamic insurance, or *takāful*, embraced the practice but without a comprehensive *Sharī‘ah* contract and legislation. As for pledging, unfortunately as of now, it is not practiced in the insurance industry widely, although it does have its provision in IFSA 2013 and FSA 2013.

### Market practice

Not all *takāful* operators have the same arrangement for absolute assignment. As the researchers clarified before, in assignment, assignor only transfers the right to *takāful* benefits only, meaning to say the assignor still remains as the certificate owner. The researchers have conducted a survey and looked at the replies from respective representatives; there are *takāful* operators that have different types of assignment from the one above, in which the assignor transfers the right to *takāful* benefits, including *takāful* certificate, to the assignee. The legal effect of this practice, among others, is that the assignor will no longer be the certificate owner, thus losing the power to make nomination, but still has to pay contributions accordingly to honour the assignment.

One of the questions posed in the survey is, “Whom will PIF belong to, in the event that assignor surrenders the certificate?” Some respondents answered PIF will belong to the assignee. The justification given is that under the assignment contract, it has been agreed upon that all of the benefits will belong to the assignee. Based on the way the questions are answered, they seem to contradict each other. If the certificate is assigned, the assignor should lose his power

to surrender, and by right, the certificate owner's name should be changed to assignee's name also. But that is not the practice - even in Malaysia's conventional insurance industry - which confirms that the market practice of assignment is to assign *takāful* benefits only. The consequences of this are assignor still retains his ownership on the certificate; he has the power to nominate, the power to surrender, but the *takāful* benefits will be owned by the assignee. Nevertheless, the industry interpretation of *takāful* benefits differs from one *takāful* operator to another, resulting in different implementations of assignment.

### ***Sharī'ah* issues related to absolute assignment**

In complying with day-to-day *Sharī'ah* requirement, the researchers have identified three *Sharī'ah* issues regarding absolute assignment. Bear in mind that these issues are not exhaustive, because absolute assignment in the *takāful* industry is not being researched thoroughly by academics and practitioners. The identified issues are as follows:

1. Surrender and lapse in absolute assignment
2. Predeceased issue
3. Absolute assignment as medium of debt payment

#### *Surrender and lapse in absolute assignment*

As explained above, an assignee has a greater right on *takāful* benefits compared to a nominee. But still, the assignor can surrender the certificate if he wants to. Will the surrendered amount go to the assignee, or does the assignor himself have the right to the amount? What will be the *fiqh* adaptation on absolute assignment if the assignor surrendered? A lapse of certificate can still occur although the *takāful* benefits have been assigned. If the participant failed to pay his/her contribution on time, a sum of money will be deducted automatically from the PIF, gradually. If the PIF is exhausted, a lapse will occur. So, what is the view of *Sharī'ah* in this regard? Does an assignee still have the absolute right to claim the *takāful* benefits? What will be the *fiqh* adaptation on absolute assignment if a lapse happened? The issue is quite bizarre. The assignor assigned his certificate to the assignee and this was regarded before as *hibah*. But if a surrender or lapse happens, the assignee will not benefit from anything.

### *Predeceased issue*

Participant A, who has a *takāful* certificate, has a best friend. In consideration of natural love and affection, participant A absolutely and irrevocably assigns to his best friend, Assignee B, all of the benefits under the certificate. Unfortunately, Assignee B passes away first. Do the *takāful* benefits remain with Assignee B, or they are to be returned back to Participant A? If the *takāful* benefits return back to Participant A, the *fiqh* adaptation for the absolute assignment would be *hibah ruqbah*.<sup>1</sup> Meanwhile, if the *takāful* benefits cannot be returned back and have to remain with the deceased Assignee B, the heirs of Assignee B must wait for Participant A to pass away in order for the *takāful* benefits to come into the picture. The case would be simple if Participant A passed away two or three days after Assignee B deceased, but it would be a big problem if Participant A is still alive even after 20 or 30 years. The issue of how the *takāful* benefits can be distributed to heirs of Assignee B, according to *farā'id*, might also appear considering that in that long period, some of the heirs might also pass away.

### *Absolute assignment as medium of debt payment*

To identify this third issue better, let's understand the situation as illustrated by Diagram 3. Participant X wants to be financed by an Islamic bank. As collateral, she absolute assigns her *takāful* certificate and all of the underlying *takāful* benefits to the bank. So, if anything happened to her that made her unable to pay the debt, the interest of the bank is secured because the outstanding amount would be paid from the *takāful* benefits. As the researchers have stated before, the *fiqh* adaptation for absolute assignment is *hibah*. But in this case, the absolute assignment is used to pay debt, so it is not really a *hibah* contract. Hence, the obligation to pay debt can be observed here rather than *hibah*. The concern is if the *takāful* benefits assigned are higher than the outstanding amount of debt as this will surely result to *ribā*. In market practice however, the researchers noticed that even if all of the *takāful* benefits have been absolute assigned to the bank, the bank will only take an amount, which is outstanding and will return back the remaining balance to the nominees, if any.

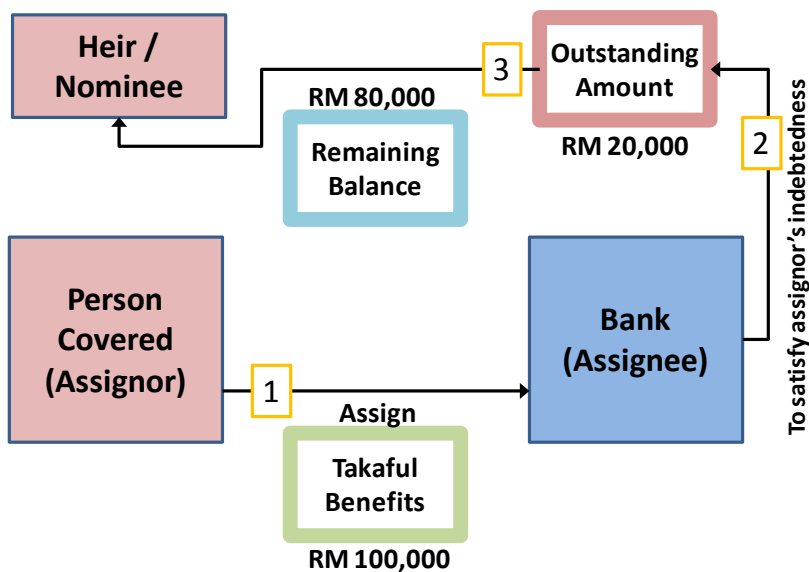


Diagram 3: Existing arrangement of absolute assignment for debt payment.

Even if the practice is as such, the researchers still consider it as a *ribāwī* transaction because of the fact that initially, the assignor pays an amount larger than his debt. If the assignor has the option to assign less, without a doubt he will assign less because who would want to pay the bank more than what one should pay? It is true that if one wants to pay a debt higher than what he should pay, he would do so out of his freewill, but it cannot be stated in a contract and forced by the creditor. All of the above issues are actually *Sharī'ah* issues and need adequate attention from *Sharī'ah* scholars. To the best of the researchers' knowledge thus far, these issues are not attended by *Sharī'ah* scholars adequately.

### Proposed solutions

#### *Surrender and lapse in absolute assignment*

Absolute assignment is a form of *hibah*. If a certificate has been surrendered, *takāful* benefits will not exist. But there is still a balance amount in PIF. The question now is who is entitled to the amount; assignor or assignee? We propose that the assignor would be entitled to this amount because *hibah* cannot be executed. From a legal point of view, in the case of a surrender, absolute assignment will be terminated automatically because an assignment is still bound to the

status of the certificate, notwithstanding the irrevocability of absolute assignment by the assignor. As for a lapse, both *takāful* benefits and PIF do not exist. It is as if the assignor does not *hibah* anything in the first place. This is because *mawhūb bihi* (subject matter) of the *hibah* is not in place.

#### *Predeceased issue*

In the event the assignee predeceases the assignor, like in the example before where Assignee B has long predeceased Participant A, the question is: do *takāful* benefits remain with Assignee B, or do they have to be returned back to Participant A? In normal circumstances, the assignee has absolute right to the *takāful* benefits. In addition, assignment shall not be void unless the assignee waives his right and returns it back to the assignor by using a mechanism of release or reassignment. Thus, *hibah ruqbah* in this regard is not applicable. As discussed earlier, absolute assignment is *hibah muṭlaqah* (unrestricted gift). We also noticed that usually, there are two different important funds in a *takāful* certificate, i.e. PRF and PIF. The proposed solution to the above issue is the assignment will be revoked automatically. The justification for the solution is that the subject matter of the *hibah* was not in place yet before the assignee deceased.

For a *hibah* to be executed, its subject matter should exist during *hibah* (Ministry of *Awqāf* and Islamic Affairs-State of Kuwait, 1427H). If the subject matter did not exist yet, the *hibah* is understood as only an assignor's declaration or commitment to give *hibah*; not to implement it yet. However, if the subject matter has been confirmed as unable to be delivered during the assignee's lifetime, the *hibah* or commitment to *hibah* should be considered as being revoked. Hence, in the long run, it is recommended for *takāful* operators to allow the assignment of basic sums covered only (payable from PRF), excluding PIF amount or maturity value and other benefits such as *badal ḥajj* (Pilgrimage by proxy) or bereavement benefit to sidestep other unnecessary *Sharī'ah* issues. In both cases, surrender and predeceased issues are no longer relevant.

If assignment is allowed to a basic sum covered including PIF, this would invite an operational issue. This is because when the assignee deceases, the only amount that already exists is the balance in PIF. If PIF is assigned, the available amount has to be taken out and distributed

to the assignee's heir as soon as possible to avoid *farā'id* distribution issue. To implement this, system limitation may occur and may hasten up a lapse of certificate.

#### *Absolute assignment as medium of debt payment*

Once again, the issue is about the fact that an assignor has paid an amount larger than what he/she should pay. In the researchers' view, this is tantamount to *ribā*, even though the bank actually pays the remaining balance to the nominee/heir. Even if one claims that this is not *ribā*, the researchers are of the opinion that the initial contract must be straight forward, untwisted and honouring Islamic commercial contracts. As mentioned earlier, the researchers have stated that absolute assignment is a form of *hibah*. It is true that an absolute assignment is a transfer of right from a person to another person on the basis of a gift. Nevertheless to act as an instrument or method for paying debt, it is not appropriate because logically, we do not use the term gift to imply payment of debt, such as "This RM 400 is a gift from me to you, so my RM 400 debt with you is settled then"; rather we just use the term repayment, such as "This RM 400 is to repay my RM 400 debt with you, so my debt is settled then."

In the researchers' initial discussion, pledging is a possible mechanism as an alternative for an absolute assignment. It will not vary too much with the current arrangement of absolute assignment, though. The idea is that the certificate owner (pledger) could put his/her *takāful* certificate to the bank (pledgee) as collateral for the financing made. The *takāful* operator takes note of the pledging made by the certificate owner. Whenever the pledger dies and he/she still owes the bank, the *takāful* operator will deduct a portion from *takāful* benefits to satisfy the outstanding amount. Only then the remaining balance from the *takāful* benefits will be distributed accordingly.

The only difference between a pledge and an assignment in debt payment is that pledge is a straightforward contract, while the assignment is not. Pledge honours the existing contract of *rahn* and *wa'd* in Islamic transaction law. The researchers have brought this proposed solution to two legal solicitors. The first solicitor is Megat Hizaini Hassan, a consultant partner at Lee Hishammuddin Allen & Gledhill, who said that pledging cannot be done because in Malaysia's common law, one cannot pledge an asset that does not exist at the time

of pledging. This might be true because *takāful* benefits would only come to existence after the person covered dies. Although IFSA 2013 clearly states in Schedule 10 that *takāful* benefits can be pledged, the legal solicitor believes that the spirit of the statement is to regard a pledge as an assignment.

However, the researchers discussed with another legal solicitor, Madzlan Mohamad Hussain, a partner at ZICO law who said otherwise. Pledging can be applied to *takāful* benefits. But it cannot be done now because one has to invest time and effort to research this possibility. Furthermore, there is no case regarding pledging of *takāful* benefits being discussed in court, so the first who does the pledging have incurred a high risk in terms of court-dealing if such a case arises. Taking into consideration these situations, the researchers decided to revert back to an absolute assignment but with a different *fiqh* adaptation. The first proposed *fiqh* adaptation for absolute assignment is *rahn*<sup>2</sup> and *wa'd*.<sup>3</sup> The assignment will function as what has been written on pledge as above. But actually, absolute assignment is a transfer of right only, while *rahn* will require full transfer of the asset, which will include transfer of right and liability.

Legally, this is what has been called as novation. If a novation is used instead of an assignment, *rahn* will be a suitable match for its *fiqh* adaptation. Likewise, in this scenario, that is not the case. The second proposed *fiqh* adaptation for absolute assignment is *kafālah*<sup>4</sup>. This is what has been opined by the second legal solicitor. To understand this better, we need to identify the four pillars of *kafālah*, which are *kafīl* (guarantor), *makfūl 'anhu* (who is being guaranteed), *makfūl lahu* (who receives the guarantee) and *makfūl bihi* (obligation being guaranteed). Below are the identified four pillars of *kafālah* in absolute assignment for debt payment:

1. *Kafīl* : *Tabarru'* fund
2. *Makfūl 'anhu* : Person covered/Debtor
3. *Makfūl lahu* : Bank/Creditor
4. *Makfūl bihi* : Outstanding amount

This can be illustrated as in Diagram 4:



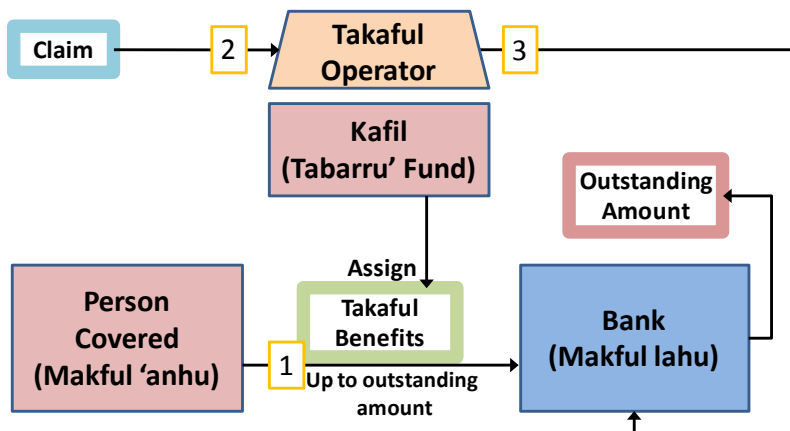


Diagram 4: Proposed arrangement of absolute assignment for debt payment

1. Person covered made a financing with an Islamic bank. As collateral, he assigns his *takāful* certificate to the bank. But in the absolute assignment form that he sent to the *takāful* operator, the amount he assigned is not fixed to an amount, rather there is a clause in the form that “he has assigned the *takāful* benefits to satisfy the outstanding amount” or “he has assigned up to the outstanding amount only” in case *takāful* benefits were to be paid.
2. After a person covered dies, a death claim will be sent to the *takāful* operator. Upon receiving the claim, the *takāful* operator identifies that the person covered has assigned part of his *takāful* benefits to pay the outstanding amount of his financing.
3. To proceed with payment of the outstanding amount, the *takāful* operator needs to seek the bank to request information for the outstanding amount. Only after getting a reply from the bank, only then the *takāful* operator (as the manager of the *tabarru’* fund) could pay part of the *takāful* benefits to satisfy the outstanding amount. Subsequently, the balance of the *takāful* benefits will be distributed accordingly to the nominee and/or to heir.

From this arrangement also, we have made clear that the *tabarru’* fund is not possessed by the *takāful* operator. *Tabarru’* fund is a different entity, which is only managed by *takāful* operator. The differences of the proposed arrangement with the existing arrangements are:

Table 1: Differences of both arrangements

No	Aspect	Proposed Arrangement	Existing Arrangement
1	<i>Sharī'ah</i> Contract	Honoring the existence of <i>kafālah</i> , untwisted, straight forward.	Not straight forward, and outwardly tantamount to <i>ribā</i> .
2	Type of Assignment	Absolute partial assignment – still an absolute assignment, but only part of the assigned will be given to the assignee.	Absolute Assignment – All of it will be given to the assignee.
3	Amount Assigned Given to Assignee	Unknown, only be known after the clarification of the outstanding amount.	Known and clearly stated in numbers.
4	Takāful Benefits	Some will be paid first to the bank to satisfy debt, the balance will be distributed accordingly to the nominee/ heir	All will be paid to the bank. After bank deducts debt, the remaining will be paid back to <i>takāful</i> operator to distribute accordingly to the nominee.

The usage of *kafālah* as a *fiqh* adaptation for absolute assignment is not contrary to *Sharī'ah*. *Kafālah* itself is a recognised contract in Islamic transaction. *Kafālah* literally is assurance; its original meaning is related to joining and commitment (ISRA, 2010). *Kafālah* can be divided into three types; namely *kafālah al-dayn* (debt guarantee), *kafālah al-'ain* (asset guarantee) and *kafālah al-badan* (guarantee of a person). In this study, *kafālah al-dayn* is our concern. According to the Ḥanafī School, *kafālah al-dayn* is the adding of the *kafīl*'s liability to the liability of the *asil* (*makfūl 'anhu*) when it comes to demanding repayment (2010). This is the definition that most suits the arrangement above. Whereas the definition given by the Mālikī, Shāfi'ī & Ḥanbalī Schools is quite different; where both of *kafīl* and *asil* have a joint liability in the assumption of the debt except that the Maliki School stipulated that the creditor has no right to demand from the guarantor unless he fails to get repayment from the original debtor (2010).

## Conclusion

Absolute assignment is a transfer of rights from an individual to another person. From this arrangement, the suitable *fiqh* adaptation for absolute assignment is *hibah*. It is because the person covered cancels his/her right on the *takāful* benefits in order to give it to the assignee. In

addition, based on the solution for issue of absolute assignment as a medium of debt payment, there is a second *fiqh* adaptation for absolute assignment, which is *kafālah*. Discussion on *hibah* (regardless whether pure or conditional) of *takāful* benefits will surely trigger questions on whether or not one could give *hibah* on something that is yet to exist (*hibah ma 'dūm*). To answer this question, scholastic opinions must be sought. Al-Suyūfī (1990) gave a simple rule on *hibah* in which he said in his Islamic jurisprudence book: *Mā jāza bay 'uhu, jāza hibatuh, wamā lā falā.*” (Anything that can be sold can be given as gift, and what cannot be sold, cannot be given as a gift).

Subsequently, he gave some exceptions to the rule. For the first part of the rule (anything that can be sold, can be given as gift) the exceptions are:

1. Usufructs that are sold by way of leasing cannot be given as *hibah* (because to *hibah* a usufruct will be regarded as *i'ārah* or borrowing the asset).
2. Anything that is owned but not possessed yet can be sold by way of *bai' salam* (a contract in which the advance payment is made for goods to be delivered at a future date), cannot be given as *hibah*.
3. The property of sick people can be sold, but cannot be given as *hibah*.

For the second part of the rule (anything that cannot be sold, cannot be given as gift), the exception is:

1. Anything that cannot be sold because of its tiny (and immaterial) amount such as a grain of wheat can be given as *hibah*.

Meanwhile, *al-Mawsū'ah al-Fiqhiyyah al-Kuwaytiyyah* (Kuwait's Islamic Jurisprudence Encyclopedia) gave the following conditions on something that can be given as *hibah*:

1. The thing must exist
2. The thing must be in the possession of the giver
3. The thing must be *mutaqawwim* i.e. recognised islamically in terms of its value
4. The thing must be divisible. (for a shared *hibah*)

5. The thing can be delivered and accepted (*qabd*) (Ministry of *Awqāf* and Islamic Affairs-State of Kuwait, 1427H, vol. 42).

The first condition clearly stated that the thing that can be given as a gift must exist at the time of *hibah*. If the gift did not exist at the time of *hibah*, the transaction (*hibah ma'dūm*) is deemed invalid. This is what has been opined by the majority of *madhhab*. Meanwhile, the Mālikites are of the opinion that *hibah ma'dūm* is permissible because the radix of their opinion is that it is permissible to *hibah* everything that can be transported compliantly with *Sharī'ah* even though the thing is unknown. In addition, the Mālikites are of the opinion that for example, if one wants to give as *hibah* the fruits of a tree to another for 20 years onward, it is permissible. Reverting back to *takāful* benefits discussion, the researchers are of the opinion that the Mālikites' opinion can also be applied here because *takāful* benefits can be transported to the beneficiary when the time comes even though at the time of nomination, it does not exist yet.

The same also happens in an absolute assignment. The example of the fruits of the tree can also be applied here in which a certificate that bears *takāful* benefits (or a maturity amount in the PIF), the *takāful* benefit can be given to others as *hibah*. It is noted that even though the assignee has the right on the *takāful* benefits, the risk is still based on covered person's condition. For example, if the person covered is still alive, the assignee has to wait to really benefit from the assignment. Thus, this paper suggests two types of absolute assignments. The first one is between individual and individual on the basis of *hibah* and second one is between individual and financier/bank on the basis of *kafālah*. For the absolute assignment on the basis of *hibah*, it is recommendable to allow assignment of basic sum covered only to avoid unnecessary *Sharī'ah* and operational issues. While for the assignment on the basis of *kafālah*, assignor can be allowed to assign all of the benefits as collateral to the financing made. For further research, this paper suggests that the usage of pledge in the *takāful* industry be explored and studied.

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### (Endnotes)

1. Bank Negara Malaysia in its *Hibah* Exposure Draft defines *hibah ruqbah* as a conditional *hibah* on which is contingent upon the demise of either of the parties (donor or donee) as a condition of ownership for the surviving party.
2. Bank Negara Malaysia in its *Rahn* Exposure Draft defines *rahn* as a contract between a pledgor (*rahin*) and a pledgee (*murtahin*) whereby an asset is pledged as collateral (*marhun*) to the pledgee to provide assurance that the liability or obligation against the pledgee will be fulfilled.
3. Bank Negara Malaysia in its *Rahn* Exposure Draft defines *wa'd* as promise or undertaking.
4. Bank Negara Malaysia in its *Kafālah* Concept Paper defines *kafālah* as a contract where the guarantor (*kafīl*) conjoins the guaranteed party (*makfūl 'anhu*) in assuming the latter's specified liability.

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