


AGENT'S MISCONDUCT: BRIEF DISCUSSION FROM SHARIAH PERSPECTIVE

Company: Prudential BSN Takaful

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The demand for Takaful coverage is increasingly important and high recently due to the variety of offers by the industry for a person's life, medical, business, property, and belongings as well as its contribution to the growth and development of the economy. Despite increased demand for Takaful via digital platforms, individual agents remain to play a very important role as the intermediary in promoting takaful products and servicing the takaful participants throughout the tenure of the takaful plan. In a nutshell, the roles of a Takaful agent have been described by Malaysian Takaful Association (MTA) as below:

<p>1 Before you participate in a Takaful Plan</p> <p>Deal only with registered agents</p> <ul style="list-style-type: none"><input type="checkbox"/> You can check the status of the agent via the Malaysian Takaful Association (MTA) website on Public Enquiry on Agent Status. Visit http://www.malaysiantakaful.com.my/Consumer-Zone/Public-Enquiry-on-Agent-Status.aspx for more details. <p>Assist you in Choosing the Right Takaful Plan</p> <ul style="list-style-type: none"><input type="checkbox"/> Go through the Customer Fact Find form with you to understand your financial needs and risk appetite.<input type="checkbox"/> Recommend suitable Takaful plan(s) based on the facts furnished in the form. <p>Explain Product Features</p> <ul style="list-style-type: none"><input type="checkbox"/> Explain the product features, benefits payable, exclusions, contributions and charges.<input type="checkbox"/> Provide Product Disclosure Sheet, to assist you in making informed decision and to facilitate product comparison.	<p>2 When you Decide to participate in a Takaful Plan</p> <p>Assist you in completing the Takaful Application</p> <ul style="list-style-type: none"><input type="checkbox"/> Explain the importance of answering the questions in the proposal form fully and accurately.<input type="checkbox"/> Provide information on making a nomination and/or hibah to ensure benefits payable are received by your nominee or beneficiaries in the event of death.<input type="checkbox"/> Submit your application for underwriting after you have signed the proposal form.<input type="checkbox"/> Arrange for medical examination with one of our panel clinics, if required <p>Explain the Certificate Terms and Conditions</p> <ul style="list-style-type: none"><input type="checkbox"/> Your Takaful certificate will be delivered to you (by hand or via post) within xx days.<input type="checkbox"/> Go through the certificate terms and conditions with you to ensure that this is the right Takaful plan that you have participated in.	<p>3 During the Term of the Takaful Plan</p> <p>Continuous Certificate Servicing</p> <ul style="list-style-type: none"><input type="checkbox"/> Assist in the renewal process of the certificate.<input type="checkbox"/> Provide continuous service e.g. certificate modifications, change of address and frequency of contributions. If the agent has left the Company, we shall appoint a new agent to service you. <p>Assist you in making a Takaful Claim</p> <ul style="list-style-type: none"><input type="checkbox"/> Guide you through the standard procedures on how to file a Takaful claim. <p>Customer Portal Please visit our Customer portal at XXXX for on-line access to your Takaful certificate information.</p>
<p>If you are not satisfied with the services of our agent, or require additional support from our Company, you may contact us at 03-xxxxxxx.</p> 		

Source: MTA website (<https://takaful4all.org/en/cards/family-takaful/service-guide/>)

Takaful agents play significant roles throughout the tenure of the takaful plan. As such, Takaful Operators are obliged to ensure not only the selection and training processes are appropriate but also to continuously monitor and assess the conduct of those Takaful agents. This article intends to start with briefly discussing the technical Shariah contract perspective governing the takaful agents' role and continue to discuss the relevant Shariah values and principles to be held and demonstrated by each takaful agents.

From Shariah perspective, the contract applied for the appointment of individual agents is *wakalah muqayyadah* (restricted agency) where the agents are appointed to perform certain defined tasks. Thus, *wakalah* is a contract of agency where a person delegates his right or business to a second party to act as his representative in a financial transaction. The appointee is the agent or *wakil* while the one who appoints is called the *muwakkil* (principal i.e. Takaful Operator). Individual agents are the *wakil* of the Takaful Operator by virtue of the execution of the Agency Agreement between the agent and the Takaful Operator.

The *Wakalah* Policy Document of Bank Negara Malaysia (BNM) shall be applicable and would need to be complied with in the overall implementation of the agency distribution set-up. The commission-based fee as applied for agency is, to a certain extent, similar to the practice in a contemporary brokerage set-up where the brokerage fee is depending on the volume of sales generated by the agent. A commission-based structure perhaps can be categorised as a contract that has no exact and specific principles outlined by the Shariah as it was not practised during the era of the Prophet Muhammad S.A.W. Such contract is classified as *al-uqud ghair al-musammah*. This type of contract could be a single contract or a combination of other contracts. Having construed the Takaful agency commission-based structure, the scholars agreed that it shall be governed within the principles of *wakalah* which includes the provisions relating to the *wakalah* fee. The agency fee structure as implemented, despite of its uniqueness as to its application, is consistent with the BNM *Wakalah* Policy Document. Among the provisions to be observed are;

- a) Clause 15.3: “*The wakalah fee must be determined and agreed at the time of entering into the wakalah contract*”;
- b) Clause 15.4: “*The wakalah fee must be determined and agreed at the time of entering into the wakalah contract*”;
- c) Clause 15.5: “*The wakalah fee may be paid in a manner that is mutually agreed by the contracting parties such as in one lump sum or in several payment.*”

A very important aspect of the Takaful agency profession is the values and principles that must be demonstrated by each of the Takaful agents. Islam is a religion that promotes fairness and justice in all aspects of our human life which includes our daily transactions. Islamic teachings strongly stress on the observance of ethical and moral code in human behaviour. In general, some of the prohibited elements to be avoided are:

- i. **Gharar (excessive uncertainties)** – excessive uncertainty in relation to the substance and terms of the contract. In the context of Takaful, a Takaful agent plays an important role to assist the potential participants to make informed decision;
- ii. **Maisir (betting)** – any activity which involves betting whereby the winner will take the entire bet and the other party loses his bet. It is also known as *qimar*;
- iii. **Ikrah (duress or coercion to force someone)** – The use of coercion to force someone to do something without his/her consent (*redha*);

- iv. **Ghalat (assumption)** – a negative element that can affect the validity of an *`aqd*. It takes place when the assumption made by a contracting party about what he wants that turns out to be otherwise;
- v. **Ghubn (cheating)** – fraud, inequality, deceit, cheating, etc. In the context of *muamalat*, *ghubn* may arise from the difference, in either way between the price at which a transaction is executed and the fair price; and
- vi. **Taghrir (deception)** – derived from Arabic word of *gharar*, which means disaster, hazard, risk, uncertainties and many more. From the *fiqh muamalat* perspective, this means someone who commit something without sufficient understanding or takes the risk for the action that he or she commits without having the full knowledge of the consequences, results or probability that occur from that action.

There are two types of *taghrir* which are as follows:

- a. **Taghrir qawli** – *related to statements*, occurs because of the deception of one or two contracting parties or his representative in order to induce the other party to conclude a contract even if it happens with inequality.
- b. **Taghrir fi'li** – *related to deeds*, a deception that occurs through doing something on the subject matter to show how it is in a condition that contradicts its reality.

The factors to be taken into account in establishing a case of deception are as follows:

- a. Misrepresentation of the materials fact must occur;
- b. There must be intent to deceive;
- c. The innocent party must rely on misrepresentation; and
- d. The innocent party must suffer loss or injury.

The prohibited elements as stated above must be avoided in all dealings. For example, *taghrir* (Deception and Fraud) is one of the possible misconducts in the dealing of a takaful agent on behalf of the takaful operator. According to *Majalla*, *taghrir* or *tadlis* means to cheat. We may consider that the act of inducing the potential participants to think that it is in their interest to enter the contract by where in fact it is not, comes under the definition of *taghrir* or *tadlis*. The foregoing wrong relates to the act of misselling. Misselling means the ethically questionable practice of a salesperson misrepresenting or misleading a customer about the characteristics of a product or service. When dealing with complex or unfamiliar products, consumers often rely on information and advice provided by representatives or promoters. The agent must be made aware that he/she must always represent and explain the product features and benefits clearly and correctly to avoid the risk of misselling. In short, agents must observe the values of truthfulness and trustworthiness in business transactions.

According to the Cambridge online dictionary, misconduct is defined as “*An unacceptable or bad behaviour by someone in a position of authority or responsibility.*” While fraud means “The intentional use of deceit, a trick or some dishonest means to deprive another of his/her/its money, property or a legal right.” Bank Negara Malaysia (BNM) further

defines Financial fraud as, “*intentional act of deception involving financial transactions for purpose of personal gain*”. Fraud is a crime and is also a civil law violation.

Fundamentally, mutual consent between the parties is a critical condition for the validity of a business transaction. Any transaction is deemed legal only if it is made through the mutual consent of the parties concerned. Taking advantage of someone’s hardship and charging a high price, for example, is a form of pecuniary exploitation and as such forbidden in Islam. The Holy Qur’an says:

“O you who believe! eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual goodwill: nor kill [or destroy] yourselves: for verily Allah has been to you Most Merciful”. (4:29)

Takaful is an arrangement based on mutual assistance where the participants agree to assist one another. A participant practices the *iltizam bil al-tabarru`* when he or she decides to contribute to the common fund i.e. the *Tabarru`* Fund. When making the decision whether or not to participate, the agents must have provided all the relevant and correct information. Agents’ fraud and misconduct will give impact not only the validity of the contract but in some circumstances the Shariah Compliance status of the Takaful operator if it is proven that the Takaful operator’s policies and procedures are insufficient in mitigating the said misconduct.

In accordance with the principles of *wakalah*, upon the discovery of fraud or misconduct on the part of an agent, an agent would have breached the relevant specified terms (*mukhalafah al-shurut*) in the agency contract. The takaful operator has the right to terminate the *wakalah* contract and/or the agent may be held liable for any losses and/or damages. Termination of contract is a common action taken against an agent in the case of fraud or misconduct by the agent.

Legally, an agency agreement is an agreement by which the agent is authorised to establish the privity of contract between the agent’s employer known as the principal, and the third party i.e. the potential Takaful participant/consumer. In a decided case, it has been explained that - “*The essential characteristic of an agent is that he is invested with a legal power to alter his principal’s legal relations with third parties; the principal is under a correlative liability to have his legal relation altered*” (Dowrick 17 MLR 36, Reynolds 94 LQR 225). An agent hired by an insurance company or a takaful operator to solicit business is, without a shadow of doubt, an agent of the company and no one else.

Section 12 of the Islamic Financial Services Act 2013 states that:

“Section 12 of IFSA - Knowledge of, and statement by takaful agent

12. (1) A person who is authorized by a licensed takaful operator to be its takaful agent and who solicits or negotiates a contract of takaful in that capacity shall be deemed, for the purpose of the formation or variation of the contract of takaful, to be the agent of the licensed takaful operator and the knowledge of that takaful agent shall be deemed to be the knowledge of the licensed takaful operator.

(2) A statement made, or an act done, by the takaful agent shall be deemed, for the purpose of the formation or variation of the contract of takaful, to be a statement made, or act done, by the licensed takaful operator notwithstanding the takaful agent's contravention of subparagraph 11(1) or any other provision of this Act.

(3) Subparagraph (1) shall not apply—

(a) where there is collusion or connivance between the takaful agent and the proposer in the formation or variation of the contract of takaful; or

(b) where a person has ceased to be a takaful agent of a licensed takaful operator and the licensed takaful operator has taken all reasonable steps to inform, or bring to the knowledge of takaful participants of the fact of such cessation.”

In conclusion, the matter can be dissected into two parts which are as follows:

- a) Whether the act of misconduct/fraud is a Shariah non-compliance.
An act of agent misconduct or fraud would not only trigger the prohibited elements under Shariah but would also be inconsistent with the expectation in terms of Islamic ethics. This aspect has been discussed in the first part of this article.
- b) Having established the above, would the takaful operator be said to have been non-compliant to Shariah when its agent commits misconduct or fraud?
It is clear that the agents are bound to conduct its role as an agent within the stipulated and agreed ways failing which, he would have been said as breaching the terms of the agency contract. Needless to mention, misconduct and fraud are wrongs which are not authorised by the takaful operator. Although the takaful operator may be said to be vicariously responsible under the law, the Shariah non-compliant status would apply to the individual agent himself and shall not automatically affect the Shariah compliant status of the takaful company and its stakeholders provided the Takaful operator is able to evidence that it has carried out all necessary measures in ensuring the agents are trained and informed. When an agent misconduct happens, the accountability of the takaful operator would also be on how the cases are being handled in accordance with the policies and procedures of the company the Shariah accountability principles and the regulatory standards.

Based on the key observations discussed above, it can be concluded that compliance to Shariah does not only concern the Shariah contractual aspects but also the Shariah values and ethical perspective. In brief, having understood the fraud and misconduct description under the regulatory and legal regime, it is suitable to conclude that the same shall also come under the definition of a Shariah non-compliant act. However, despite the unethical behaviour of the agents being in contravention to Shariah, such misconduct by the agent would not necessarily result in the invalidity of the contract between the Takaful operator and participants. Takaful operators remain liable to ensure that the services to

be performed under the takaful contract to the participants are in force by virtue of Section 12 of the Islamic Financial Services Act 2013 as quoted above.

Reference:

1. Islamic Financial Services Act 2013 (Act 759). (2013). retrieved from <https://www.bnm.gov.my/documents/20124/8102422b-e6dd-d149-8db0-e3637e89ed5c>.
2. Bank Negara Malaysia. (2016). Policy Document of *Wakalah*. Retrieved from [fe87974d-190f-0e11-b0e3-9cb7ab96eb02 \(bnm.gov.my\)](https://www.bnm.gov.my/fe87974d-190f-0e11-b0e3-9cb7ab96eb02).
3. Legal Dictionary - Law.com. (n.d.). *Fraud*. <https://dictionary.law.com/Default.aspx?selected=785>