

# Legal and Shari'ah Analysis of Wa'ad in Takaful

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# Outline of Presentation

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- Introduction
- Why not conventional insurance?
- Islamic Jurisprudential differences between bilateral and unilateral contracts
- Shari'ah analysis of Wa'ad in Takaful
- English common law analysis of Wa'ad in Takaful
- Conclusion / Q&A



# Introduction

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- Evolution of Wa'ad (Promise) in product design
- Role of Wa'ad in product structuring
- Aims and Objectives of the Presentation



# Why not conventional insurance?

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- Definition of conventional insurance contract
  - A contract between an insurer and an insured whereby the insurer undertakes in return for the payment of a price (premium) to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest.
- As a contract of exchange it contains elements prohibited by Shari'ah
  - Riba, Gharar, Maysir
  - Resolution No. 9(2/9) – Islamic Fiqh Academy of OIC (Jeddah, 1985)



# Islamic Jurisprudential differences between bilateral and unilateral contracts

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- Bilateral contracts
  - Mejelle (Ottoman Civil Code)
  - 'Uqud al-mu'awadat
- Unilateral contracts
  - 'Uqud al-tabarru'at
  - Ibra' (rebate), hibah (gift), tanazul (waiver), wasiyyah (will), **tabarru'** (donation), **wa'ad** (promise)
- 'Aqd versus Wa'ad



# Shari'ah analysis of Wa'ad in Takaful

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- Classical Islamic Juristic views regarding fulfilling Wa'ad
  - Only Mustahab (desirable)
  - Unconditionally Wajib (compulsory)
  - Conditionally Wajib (compulsory)
- Contemporary Shari'ah position
  - Islamic Fiqh Academy Rulings
  - Dhallah Albarakah Rulings
  - AAOIFI Shari'ah Standards
  - Islamic Banking Conferences / Shari'ah Board of KFH



# English common law analysis of Wa'ad in Takaful

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- Wa'ad versus Promise
  - Nudum Pactum (bare promise) unenforceable (Four Oaks Estate Ltd v. Hadley, 1986) unless
    - Executed under a deed poll
      - Gilbert Steel Ltd v. University Construction Ltd (1976)
    - Doctrine of forbearance deemed as consideration
      - Thomas v. Thomas (1842), Curie v. Misa (1875), Wigan v. English and Scottish Law Life Assurance Association (1909)
  - Accompanied by a tort
    - Hedley Byrne & Co Ltd v. Heller & Partners Ltd (1964)



# English common law analysis of Wa'ad in Takaful (cont'd)

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- Wa'ad versus Promissory Estoppel
  - Similarities
    - Central London Property Trust Ltd v. High Trees House Ltd (1947)
    - Combe v. Combe (1951)
  - Differences
    - Birmingham and District Land Co v. London and North Western Rly Co (1888)
    - WJ Alan & Co Ltd v. El Nasr Export and Import Co (1972)
  - Future English legal stance
    - No consistent judicial stance – Hartley v. Hymans (1920) OR Combe v. Combe (1951)
    - Courts may allow the doctrine as basis for independent claim and not just as defence





# Conclusion

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- Wa'ad as a commercial promise in takaful
  - Shari'ah stance: valid and legally binding
  - English law position: enforceable if done under a deed poll, forbearance proven as sufficient consideration or accompanied by a tort



# Q&A

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Thank you

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