

- ***A Legal and Fiqhi Assessment of the Nomination Clause in Takaful and Pension Contracts***

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PRESENTATION OUTLINE

- The Life Takaful and Pension contracts
- Comparative Legal position regarding the nomination clause
- Fiqhi debate under Malaysian law

- *What is a Nomination clause?*
- *Why we should discuss it?*

- ***The Life Insurance and Pension contracts***

DEFINITION OF LIFE INSURANCE CONTRACT

- Life insurance is a contract between an insured (insurance policyholder) and an insurer or assurer, where the insurer “promises” to pay a designated beneficiary a sum of money (the “benefits”) in exchange for a premium, upon the death of the insured person.
- Policy holders are encouraged to nominate someone who will be the recipient of the funds.
- How is this different from a pension scheme? Pension is the reverse of life insurance.

- *Comparative Legal position regarding the nomination clause*

ENGLISH LAW

- First, the process is that the letter from the pension plan member to the trustees is advisory only. If it were executor (i.e. the trustees were forced to comply with it) then on a death any money arising would fall within a deceased's estate, and would rank for inheritance tax.
- So the trustees are given an absolute discretion, and there are occasionally cases where they decline to follow terms of the nomination letter.
- So it is certainly not an inheritable asset (under English law).
- In the case of insurance policy the beneficiaries will have a insurable interest in the life of the deceased. Thus has full right to claim the compensation. What about life takaful?

FRENCH LAW

- The beneficiary clause gives the beneficiary a direct right of access against the insurance company. Under French law the compensation to be paid after death does not form part of inheritance law per se.
- However, the nomination/beneficiary clause in life insurance is both an instrument of guarantee as well as an instrument for transmission of funds which are not subjected to tax law.
- The question is whether this money should form part of mirath (estate) or can it be the legal asset for a beneficiary?
- Tendency among many French Muslim scholars is that it should form part of inheritance via testamentary disposition.
- Other scholars argue that there is no need to insist on a will/testament because the insured can stipulate a beneficiary during his life with post-effect of taking possession as this can be construed as a donation because this is his savings account held with the insurance company.

MALAYSIAN LAW

- There is a fatawa of 1976 which considers a nominee as a trustee and not a beneficiary.
- But the takaful legislation is contradictory.

HIBAH/WASIYYAH/MIRATH

- Hibah (gift) is something given immediately. There are no restrictions in amount nor in who can be gifted. The giver has an absolute right.
- Wasiyyah (will), a gift attributed to after death. There are restrictions in the amount and in who a will can be made for. The testator has a partial right.
- Mirath (inheritance), laws ordained by Allah. Recipients and amounts are determined by Allah. The testator has no right.

- ***Fiqhi debate under Malaysian law***

LEGAL STATUS OF THE NOMINEE

- Under English Law the nominee is the actual beneficiary
- Malaysian Takaful Act 1984 used the term 'proper claimant' as the recipient of the takaful benefits
- Insurance Act 1996: a nominee is always a trustee
- Islamic Financial Services Act 2013: a takaful participant may nominate an individual to receive takaful benefits

OPERATION OF TAKAFUL COMPANIES – FIRST OPINION

- The scholars differ on the proceeds of Takaful as to whether it should be subject to inheritance or can it be gifted.
- Bank Negara Malaysia resolved that “Takaful benefit can be used for hibah since it is the right of the participants. Therefore, the participants should be allowed to exercise their rights according to their choice”
- Dallah al Barakah states: ‘it is also permissible to distribute the payment to a particular individual as specified by the participant on the basis that the benefit is the contribution of other participants to the beneficiary and not his estate’

FIQHI ISSUES

- This is based on conditional hibah, in which the hibah is an offer to the recipient for only a specified period.
- Fiqhi issues for hibah
 - (a) how to make hibah of something which is not yet realized.
 - (b) in a valid hibah, the ownership is transferred to the recipient. What if the recipient dies before the policy holder? Does it become his/her estate?
 - (c) Hibah attributed to after death is a will, can the hibah be made for an inheritor

OPERATION OF TAKAFUL COMPANIES –SECOND OPINION

- Another group opine that a nominee is just a trustee whose duty is to receive the benefits and distribute them according to mirath laws

ISSUES WITH THIS OPINION

- The Objective of Takaful may not be achieved. A non-dependant inheritor may become rightful of the money while the non-inheritor dependant will get nothing
- An element of riba exists. The participant enters into a contract which provides an amount exceeding the amount contributed
- On what basis does the money form part of the estate?

TAKAFUL COMPANIES IN UK

- Which opinion should be adopted for Takaful and Pension companies under English Law?
- It would seem that the hibah approach is more appropriate in my opinion for 2 reasons:
 - Law of the land based on consistent case laws;
 - the money accrued in the pot is for the person concerned as it is a personal right already (an actuarial value specially in case of pension), it can be construed as hibah bi al-shart.
 - However the SAC of Bank Negara under the Central Bank Act 2007 as Amended can issue a fatawas to finalise the issue which can be used as a model?

RECOMMENDED READING ARTICLES

- **Shariah Issues in Takaful: Nomination and Hibah** (by Fatima Zahra Habib Eddine)
- **Takaful (Islamic Insurance) Benefit: Ownership and Distribution Issues in Malaysia** (by Dr. Azman Bin Mohd Noor & Dr. Mohamad Asmadi bin Abdullah)

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