Hybrid Contract on Sharia Life Insurance in Indonesia

Zaitun Abdullah¹, Barkah², Rifkiyati Bachri³

¹²³Faculty of Law Universitas Pancasila Jakarta Indonesia
Email: zaitunabdullah@gmail.com

Abstract: (Abstract) Akad (contract) is a central point of a contract and is the determinant of a contract whether it is valid or not. If a contract is considered valid, then it will lead to the reciprocal relationship of rights and obligations between the parties. In Islamic law, akad is divided into two types, akad tijari (profit oriented) and akad tabarru’ (non-profit oriented). In line with the improvement of society’s needs and the Islamic economic institutions, a new concept of akad is introduced. A hybrid contract which involves the combination of contract in a transaction becomes one of the alternative options in sharia insurance. This is because there is a minimum requirement of two akad in every single transaction, whether it is bilateral or unilateral, and both are applied together. The aim of this paper is to examine the permissibility of hybrid contract in Shariah insurance in Indonesia. In analyzing the contract, the normative legal research method is applied by using secondary data. The studies showed that the shariah insurance is applying aqad tabarru’ and permissible according to Shariah.

Keyword: akad tijari, akad tabarru’, hybrid contract

1. Introduction

Shariah insurance, in the context of Islamic law, is grouped into the field of muamalah. In muamalah, concept of the contract has a very important position. The contract will become the first stepping-point to make sure that all business matters can be done properly under the guidelines of Islamic values, so it will distinguish clearly whether something is legitimate or not. In Islamic law, akad is divided into 2 (two) large groups, namely tijari (profit oriented) and tabarru’ (non-profit oriented). Along with the development of Islamic economic institutions and the needs of the society, then there is also a development of the akad concept or model. In relation to that condition, the mixing of multiple contracts (hybrid contracts) in a single transaction becomes widely used as an alternative in practice. The sharia insurance contracts are now more likely to become hybrid contract (al-uquud al-murokkab) or can be called as multi-akad. This is because there must be at least 2 (two) types of contracts applied at the same time in each transaction, both bilateral (akad tijari) and unilateral (akad tabarru’) applied jointly. The questions then arise: how does the concept of hybrid contracts used in the sharia insurance in Indonesia? Does the sharia life insurance use the hybrid contract?

In order to answer those questions, the normative legal research method is applied by using secondary data. The data analysis will be done descriptively and qualitatively. The secondary data which is used in this research can be found, among others, in the form of regulation or legislation documents, such as insurance legislation, KHES, and Fatawa DSN MUI. In the sharia insurance discourse, akad (contract) is the important element to distinguish between the sharia insurance and the conventional insurance. According to asy-Syaukani [1] [Khallaf, 1993], there is a rule in muamalah, which states al-aslu fi al-muamalah al-ibahahhattayadulludilil ‘alatahrimiha, means that in muamalah, everything is allowed (mubah), as long as there is no prohibition that forbids it. But the permissibility must be accompanied by legal acts that are not forbidden by religion, such as a contract that is free from elements of gharar, maysir, and riba.
Akad, in Arabic, means a bond or “a knot rope” [2] [Munawir, 1997]. It can also mean al-Rabtuwa al-syaddu, which is a physical bond such as tying something with a rope. In other words, akad is interpreted as an obligation or a tie (Abdurahman, 1999). Literally, the contract can be understood as connecting or binding (Syamsul Anwar, 2012). The Compilation of Islamic Economic Law (KHES) provides the definition of akad as an agreement between two or more parties to do or not to do certain legal acts. Especially for the sharia insurance, Fatwa DSN MUI clearly mentions the use of 2 (two) contracts in each transaction, both contracts are used together to avoid the elements that are prohibited by Islam, namely maysir, gharar, and riba. Those contracts mentioned by Fatwa DSN MUI are akad tabarru’ and akad tijari. Akad tabarru’ is represented by the use of grant contract, and akad tijari is represented by the use of mudharabah. Combining 2 (two) contracts in one transaction, hybrid contracts, as in the sharia insurance is legally allowed and may be done. Its legal reasoning comes from the principle which states that the law of origin of all things is permissible [Abdul Haq, Ahmad Mubarok, and Agus Rouf, 2006]. However, due to the lack of clarity of the akad regulation in the fatwa, as well as the development of the sharia insurance institutions in Indonesia, MUI then issued several fatwa regulating akad on the sharia insurance, such as Fatwa No. 21/DSN-MUI/X/2001 on Sharia Insurance Basic Guidance, Fatwa No. 51/DSN-MUI/III/2006 on Akad Mudharabah Musytarakah, Fatwa No. 52/DSN-MUI/III/2006 on Akad Wakalah Bil Ujrah, and Fatwa No. 53/DSN-MUI/III/2006 on Akad Tabarru.’

With the issuance of those fatwa, it is clearly seen that the range of focus (the scope) from such regulations are only related to (cover) the tijari agreement. That is because of, as it is known before, the implementation of the tijariin the sharia insurance are represented by the mudharabah contract. But, through the existence of new fatwa, nowadays, the tijari agreement is not only can be represented by the mudharabah contract, but also can be represented by the akad mudharabah musytarakah and akad wakalah bil ujrah. Akad tabarru’ is a contract that must be presented and attached to every Islamic insurance product, including the sharia life insurance. Akad tabarru’ itself is a form of contract made between the policyholders, therefore akad tabarru’ can be said as a form of commitment to mutual relationship in which every participants, as customers of the sharia insurance, helping each other. Through this tabarru’ contract, it can eliminate the element of gharar in insurance [Brian Kettell, 2011]. According to Adiwarman Karim [Karim, 2006], akad tijari is a kind of agreement concerning profit transaction. In the sharia life insurance, it is possible for participants follow only the insurance without investment, so for that purpose, in that system uses akad tabarru’ only.

The model of agreement used in the sharia life insurance is mudharabah (Fatwa No. 21/DSN-MUI/X/2001), and mudharabah musytarakah (Fatwa No. 51/DSN-MUI/III/2006). In the context of akad mudharabah, in the sharia life insurance, tabbaru’ fund (the premium collection) only comes from the policyholders as shahibul mal so that the insurance company only acts as a fund manager (mudharib). Meanwhile, in the mudharabah musytarakah, tabbaru’ contract (the premium collection) not only comes from the policyholders, but also comes from the company as the fund manager (mudharib), or in other words, in the mudharabah musytarakah agreement, the collection of premium (tabbaru’ fund) consists of the policyholders and the company as the holders of trust. Akad wakalah bil ujrah is done between the insurance companies with the participants, and can be applied to insurance products that contain elements of saving and non-saving. With the existence of wakalahbilujrah, then the participants give rights to the insurance company to manage the funds of participants and/or perform other activities in exchange for receiving ujrah (fee).

2. Findings
In the sharia life insurance, the hybrid akad used is akad tabarru’ which is represented by the grant agreement, and akad tijari is represented by the akad mudharabah and akad mudharabah musyarakah and also akad wakalah bil ujrah. The implementation of akad tabarru’ in takaful insurance system is realized in the form of division of premium deposit into 2 (two) purposes. For products containing saving elements, the paid premium will be divided into the participant’s funds account and the other is for tabarru’ account. While, for products that do not contain elements of saving (non-saving), every premium paid will be put entirely into tabarru’ account.

The existence of a tabarru’ account becomes very important to answer the question of the uncertainty’s presence (gharar) in the insurance from the side of claim payments. For example, a participant takes a life insurance package with 10 (ten) years of coverage with a benefit of 10 (ten) million rupiah. If he dies in the fourth year and only pays 4 (four) million, so heirs will receive a full amount of 10 (ten) million. The question is, where does the remaining payment of 6 million come from? From that situation then gharar problem can arise. For that reason, it is required a special mechanism to remove gharar, which is in the form of the establishment of particular account (tabarru’ account) only for paying the claims. Furthermore, the funds collected from the participants (shahibul maal) will be invested by the manager (mudharib) into investment instruments that are not contrary to the sharia (to avoid riba). If the return on investment is profitable, after deducting the insurance expenses, the profit will be shared to shahibul maal (participant) and mudharib (manager) based on the mudharabah agreement (profit sharing).

3. The use of mudharabah musyarakah contract in practice is quite difficult to apply. This is because, in akad mudharabah musyarakah, the company as holder of trust participates to collect tabbaru’ fund (collection of premium). If the company as the policyholder participates as a collector of tabarru’ funds (collection of premiums), so the form of the company will not be a limited company, but mutual entity (partnership). This is the reason why akad mudharabah musyarakah is difficult to be practiced because, formally, the company is in the form of a limited liability company. But inside it, its system is in the form of mutual relationship (partnership). In mutual relationship system (partnership), all allied partners in it must give their capital, while in limited liability company system, the party who will give the capital is the shareholder only.

Conclusion

In conclusion can be stated that: The concept of hybrid contracts used in takaful insurance in Indonesia is akad tabarru’ which is represented by the grant agreement. The implementation of akad tabarru’ in takaful insurance system is realized in the form of division of premium deposit into 2 (two) purposes. For products containing saving elements, the paid premium will be divided into the participant’s funds account and the other is for tabarru’ account. Meanwhile, for products that do not contain elements of saving (non-saving), every premium paid will be put entirely into tabarru’ account.

The sharia life insurance in Indonesia is using hybrid contract, especially akad tabbaru.’ This is because the tabbaru’ contract can eliminate the uncertainty (gharar) in the life insurance system. To eliminate gharar, it is required a special mechanism in which there is a particular account established, namely tabarru’ account.

4. References
[1] Agha. Oliver. “Islamic Finance in the Gulf: A Practitioner’s Perspective.” Berkeley Journal of Middle Eastern and Islamic Law.
[2] Al-Khallaf, ‘Abd, al-Wahab. 2002. ‘Ilmu Ushulu al-Fiqhi. Al-Azhar: Maktabah Dakwah al-Islamiyah.
[3] Al-Zarqo, Mustafa Ahmad.1965.Al-Madhol al-Fiqh al ‘Am al-Islami fi Tsaubihi al-Jadid. Beirut: Dar al-Fikr.
[4] Al-Zuhaili, Wahbah.1985. Al-Fiqhu al-Islamiyu wa Adillatuhi. Damascus: Dar Al-Fikr.
[5] Billah, Mohd Ma’sum. 2007. Kontekstualisasi Takaful dalam Asuransi Modern. Alih bahasa Suparto. Jakarta: Multazam Mitra Prima.
[6] Haji Hassan, Abdullah Alwi. 1986. Sales and Contracts in Early Islamic Commercial Law. Islamabad: Islamic Research Institute.
[7] Haq, Abdul, dkk. 2005. Formulasi Nalar Fiqh, Telaah Kaidah Fiqh Konseptual, Buku Kesatu. Surabaya : Khalista.
[8] Haqqi, Abdurrahman Raden Aji. 1999. The Philosophy of Islamic of Transaction. Kuala Lumpur: Univision Press.
[9] Kettell, Brian. 2011. Introduction to Islamic banking and finance. New Delhi: Willey Finance.
[10] Maslehuddin, Muhammad. 1995. Asuransi dalam Islam. Jakarta: Bumi Aksara.
[11] Shihab, M.Quraish. 2002. Tafsir al-Misbah, Jilid 4. Jakarta: Lentera Hati.
[12] Sula, Muhammad Syakir. 1996. Konsep Asuransi dalam Islam. Bandung: PPM Fi Zhilal.
[13] -------------. Asuransi Syariah (Life and General) Konsep dan Sistem Operasional.
[14] Yusof, Mohd Fadzli. 1976. Takaful Sistem Insuransi Islam. Malaysia: Tinggi Pres. Sdn. Bhd.
[15] Sukawarsini D 2010  Terorisme Tinjauan Psiko-Politis, Peran Media, Kemiskinan, dan Keamanan Nasional. (Jakarta: Yayasan Obor Indonesia) p 185
[16] Abdul W et al 2004  KejahatanTerorisme Perspektif Agama, HAM, dan Hukum (Bandung: Refika Aditama) p 2
[17] Moch. F S 2005 Motivasi TindakanTerorisme (Jakarta: Mandar Maju) p 1-2
[18] Wibowo A 2012 Hukum Pidana Terorisme Kebijakan Formulatif Hukum Pidana dalam Penanggulangan Tindak Pidana Terorisme di Indonesia. (Yogyakarta: Graha Ilmu) p 61
[19] Muladi 2004 Penanggulangan Terorisme Sebagai Tindak Pidana Khusus (Seminar About Terrorism Prevention as Special Criminal Act)
[20] Romli A 1997 Tindak Pidana Narkotika Transnasional dalam Sistem Hukum Pidana Indonesia (Bandung: Citra Aditya Bakti) p 77
[21] Irvan O M 2005 Sempitnya Dunia, Luasnya Kejahatan? A Short Paper About Transnational Crime. J Kriminologi Indonesia 4(1) 14–27
[22] Bassiononi MC 1986 International Criminal Law voi I Crimes (New York: Transnational Publishers) p 2-3
[23] Indonesia 2009 Act number 5 about the Ratification of United Nation Convention Against Transnational Organized Crime
[24] Edi S 2007 Kebijakan Sosial Sebagai Kebijakan Publik (Bandung: Alfabeta) p 3
[25] Barda N A 2005 Bunga Rampai Kebijakan Hukum Pidana (Bandung: Citra Aditya Bakti) p 41-42
[26] Sudarto 1981 Kapita Selektta Hukum Pidana (Bandung: Alumni) p 118
[27] Muladi and Barda N A 1998 Teori-teori dan Kebijakan Pidana (Bandung: Alumni) p 148