

Legal and *Shari'ah* Issues in *Takaful* Agents in Malaysia: An Overview

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Abstract

This article aims at inter alia highlighting some important legal issues pertaining to *Takaful* agents in Malaysia. With the *Takaful* industry transcending the conventional insurance market locally and globally, *Takaful* agents have become an important tool in the recent development in the *Takaful* industry. Hence, the discussion will touch on the legal and *Shari'ah* position and the rights and liabilities of the *Takaful* agents parallel to promote and protect and maintain *Takaful* agents. This article fills that gap by providing specific recommendations regarding to *Takaful* agents in the *Takaful* industry. This article is intended to outline a more realistic and nuanced view, based on law and *Shari'ah* analytical techniques. It is intended to suggest the reasons why legal framework could be an appropriate platform to determine these issues on *Takaful* agents. Insofar as the current law's definition of *Takaful* agent was ambiguity. Yet, there is no legal framework solely supervises the *Takaful* agents' institutions as a representative or good spokesman. This problem leads to the possibility such as unethical or illegal conduct of the agents. With the regulatory framework for *Takaful* agents, it is hoped that *Takaful* agents should possess Islamic values and practices in order to aware that the main objective of *Takaful* is an Islamic alternative to conventional insurance. This article is setting out to provide a sound regulatory framework for *Takaful* agents in Malaysia. Thus, the regulation is needed to enhance confidence amongst participants and investors as well as to ensure stability in the *Takaful* industry worldwide is thus necessary. Conversely, it is intended to suggest a way to predict when these issues might best be determined through more specific legislative mechanism. This article gives some important implications for various groups like *Takaful* agents, *Takaful* operator as well as the regulators in reflecting just that determines the demand for *Takaful* agents in *Takaful* services and products in Malaysia.

Keywords Liabilities, rights, *Takaful* agents, *Takaful*

INTRODUCTION

Takaful industry is starting to flourish in Malaysia, especially in the country's aim towards achieving a positive economic growth. It is seemingly that *Takaful* agents have mushroomed in the *Takaful* industry. As far as *Takaful* industry is concerned, there are several of the players in the field like the insurers, *Takaful* agents (*wakeel*), brokers, *Takaful* operators (*dhamin*), participant (*mua'mman 'alaih*) [in *Takaful* policy, the participant is a person who subsequently becomes the insured against a defined risk pays regular contributions to the *Takaful* operator for the purpose of future security of the subject matter at risk], and investors as well as the regulators. In this context, emphasis added to the discussion only upon the *Takaful* agents. In Malaysia, the rights and liabilities of the *Takaful* agents has become a crucial issue in the *Takaful* system. Like other professions, *Takaful* agents play the dominating role over the participant on *Takaful* industry as a whole. Hence, this article is dedicated to *Takaful* agents and participant, notably; to have insightful matters related such rights and obligations in *Takaful* industry. This article aims to provide a legal and *Shari'ah* analysis of the *Takaful* agents from the perspective of the Malaysian law system. For this purpose, we will first examine the factual circumstances for the agents as elucidated by the Common Law/Malaysian Law and its legal context. Then we will sketch the concept of *Takaful* agents. Finally we will provide some recommendations and suggestions on the *Takaful* agents in the Malaysian context. In particular, in this article we will address four controversial questions, as follows:

1. Who is the *Takaful* agent in the eye of Malaysian Law and *Shari'ah* Laws' point of view?
2. What are the rights and liabilities of the *Takaful* agents in the light of *Takaful* industry?
3. Are the current provisions of law applicable and governing the roles and conducts of the *Takaful* agents?
4. Does the law protect the interest of the *Takaful* agents?

WHO IS AGENT?

This part briefly sets out general understandings of the agent as regulated by contract law. It first considers the legal source of the definition of the agent through reference to the Malaysian Contracts Act and other sources like common law. The terms of agent and agency have in popular use a number of different meanings, but in law, the word agency is used to connote the relationship which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. This meaning is narrower than the colloquial usage in which the word agent refers to one who has no principal but offers for sale particular articles on his own account. (Malaysian Law Journal, 2004) Similarly, in the case of *Syed Abdul Khader v. Rami Reddy* 1979 AIR 553, Desai J. stipulated that the term agency is used to connote the relation which exists where one person has

an authority or capacity to create legal relations between a person occupying the position of principal and third parties. It seems like he is a connecting link between the principal and third person. For reasons of space and brevity, this article will not set out detail the origin and history of the agent other than to have a better insightful on what it is all about.

A brief discussion is made on the concept or the philosophy in the agent from the legal's point of view. As is well known, the legal maxim applicable to the agency is *qui facit per alium facit per se* which means he who acts through another is himself performing the act. In Malaysia, an agent is defined as a person who is employed to do any act for another or to represent another in dealings with third persons. The term agent should be differentiated to the principal whereby the person for whom such act is done or who is so represented.

Looking at the Part X Contracts Act 1950 which containing the provisions in dealing with the law of agency. Section 135 Contracts Act 1950, agent has been defined as an "agent" is a person employed to do any act for another or to represent another in dealings with third persons. Interestingly, it was clearly stated in the case of *Loon Karan v. John & Co.*, AIR 1967 All 308. Dhavan, J. elaborated that an agent has never acted on his own behalf but always on behalf of another. He/she either represents his/her principal in any transaction or dealing with a third person or performs an act for the principal and his act binds the principal.

Likewise, the agency is a representative relation. The agent represents, acts for, and derives his authority from another, his principal; he is an attorney, standing in the place of his employer. The most characteristic feature of the agent's employment is that he is employed primarily to bring about business relations between his principal and third persons, and this power is perhaps the most distinctive mark of the agent as contrasted with others, not agents, who act in representative capacities." However, in the case of *Sternaman v. Metropolitan Life Insurance Co.*, 170 N.Y. 13, 62 N.E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318, the word of agency has been illustrated and discussed thoroughly by the court as follows:

"A legal relation, founded upon the express or implied contract of the parties, or created by law by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority."

Interestingly, our Malaysian Penal Code, section 402A is provided so. "Agent" has been defined as any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any company or other person whether as agent, partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to

trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not.

It is worth noting that the agents have dominant roles and duties in that sense of his/her practice as required by the laws. Section 164, 165 and 167 of the Contracts Act 1950 are provided so.

Section 164 agent's duty in conducting principal's business	An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts the business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.
Section 165 skill and diligence required from the agent	An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.
Section 167 agent's duty to communicate with the principal	It is the duty of an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

WHO MAY BE AN AGENT?

At this juncture, it is noteworthy to mention that eligibility to be an agent. This is also governed by section 137 of the Contracts Act 1950. Section 137 provided that: -

As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

It is worthwhile to indicate the status of agent in the light of the legislation. As Lord Cranworth explained in the case of *Pale v. Leask* [1863] 33 LJ Ch. 155 "no one can become the agent of another except by the will of that person."

This article is intended to address the issues of "who may be an agent" and "who may employ agent" and in the context of discussion on the *Takaful* agent in Malaysia. Section 136 of the Contracts Act 1950 provided so.

Who may employ an agent

136. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Section 136 of the Contracts Act 1950 provided that any person who is the age of majority according to the law to which he is subject, and who is of sound mind may employ an agent. As indicated, section 137 of the Contracts Act 1950 provided that any person may become an agent as between the principal and third persons. However, no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal according to the provisions in that behalf herein contained. It should be noted that first of all section 136 require that the principal must be competent to contract. Whereas section 137 reveals that it is not necessary that the agent to be competent to contract. It was decided and supported in the case of *William Jacks & Co. (Malaya) Ltd. v. Chan Yong Trading Co.* [1964] 30 MLJ 105. Gill J. stated that any person, as between the principal and third person.

THE GOVERNING LAW AND PRACTICE ON THE TAKAFUL AGENTS

An overview over the current governing law and practice on the issue of *Takaful* agents has been made. Basically, the relevant statutes might be applicable in the future and compatible with the concept of *Takaful* agent are as follows: -

1. Malaysian Contracts Act 1950 (Act 136)
2. Malaysian Penal Code (Act 574)
3. Malaysian *Takaful* Act 1984 (Act 312)
4. Islamic Financial Services Act 2013 (Act 759)

Under the Section 35 Malaysian *Takaful* Act 1984 (Act 312) provided *Takaful* agents:

1. No person shall carry on *Takaful* business in Malaysia as *Takaful* agent for an operator not entitled under this Act to carry on the business in question in Malaysia; and a person contravening this subsection shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit increased by four thousand ringgit for each day on which he is proved to have done so, or to imprisonment for a term not exceeding twelve months or to both.
2. Subject to subsection (3), no *Takaful* broker shall in the course of his business as such negotiate any contract of *Takaful* with an operator other than an operator entitled under this Act to carry on the business in question in Malaysia, and no person in Malaysia shall solicit *Takaful* business for an operator not entitled to carry on that business in Malaysia; and a person contravening this subsection shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding

eight thousand ringgit or to imprisonment for a term not exceeding six months or to both.

3. The references in subsection (2) to a contract of *Takaful* and to *Takaful* business shall not apply to *re-Takaful*.
4. Section 33 shall apply to *Takaful* agents and to *Takaful* brokers.

Section 409 Malaysian Penal Code provided that criminal breach of trust by public servant or agent. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits a criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

As noted, the Islamic Financial Services Act 2013 is, however, silent on the rights and responsibility owed by *Takaful* agents. Undoubtedly, there are several written laws to indirectly deal with these matters. Most of the laws do not perceive the rights of the *Takaful* agent.

TAKAFUL AGENTS IN MALAYSIA

With the *Takaful* industry transcending the conventional insurance market globally, there are enormous prospects for moving the *Takaful* industry to the next level of excellence in order to fully realize its market potential. Therefore, *Takaful* agents have become one of the professional jobs in the industry. The provision of Section 2 of the Islamic Financial Services Act 2013 has continued to raise definitional problems. Many, if not all, of its key terms are susceptible to varying interpretations. However, one thing is clear, namely, that Section 2 was intended to explain the duties or roles of *Takaful* agents as enumerated in paragraphs (a)-(c). Under section 2 of the Islamic Financial Services Act 2013, *Takaful* agent has been defined as a person who solicits or obtains a proposal for a *Takaful certificate* on behalf of a *Takaful* operator, offers or assumes to act on behalf of a *Takaful* operator in negotiating a *Takaful* certificate or does any other act on behalf of a *Takaful* operator in relation to the issuance, renewal or continuance of a *Takaful* certificate.

Section 2, *Takaful* agent has been defined as a person who does all or any of the following: (a) solicits or obtains a proposal for a *Takaful certificate* on behalf of a *Takaful* operator; (b) offers or assumes to act on behalf of a *Takaful* operator in negotiating a *Takaful* certificate; or (c) does any other act on behalf of a *Takaful* operator in relation to the issuance, renewal, or continuance, of a *Takaful* certificate;

The question is, who can be a *Takaful* agent? None has provided sufficient guidelines to be a *Takaful* agent. In Malaysia context, in order to be a qualified *Takaful* agent, a person has to pass the *Takaful* Basic Examination (TBE) organized by Islamic Banking and Financial Institute Malaysia (IBFIM) and the registration can be made through any *Takaful* operator. (Malaysian *Takaful* Association)

As previously stated, the maxim illustrates that a person who is duly appointed as an agent shall act within the scope of his/her authority binds his/her principal by his/her actions personally. In Malaysia, the powers of an agent are provided under the Contracts Act 1950 which among other things provides under section 181. The general principle is that the principal will not held for liable for any dealings or transactions carried out by an agent beyond his/her authorized powers. These powers could be categorized as follows: - (Stone, R., 2000)

(a)	Express authorities	These must be mandated verbally or in writing, and in the event of ambiguity which raises questions of interpreting the authorizations, the agent can be protected as long as he/she interprets them reasonably, even if not according to the intention of the principal in the first place.
(b)	Implied authorities	These authorities may not be expressed verbally or in writing, generally they refer to the powers whereby the agent should be able to act according to general guidance given, and which are reasonably relevant to or connected with his/her express authorities. Section 140 of the Malaysian Contracts Act 1950 defines implied authorities as something that can be derived from the circumstances of the case, which is what reasonably could be understood from an expression verbal or in writing or in the ordinary course of business.
(c)	Common authorities	These authorities that naturally would come with the function or role of the job, something that is commonly practiced within the industry or the profession.

However, this said Act also provided the extent of agent's authority. Section 141 of the Contracts Act 1950 stated that (1) an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do the act; (2) an agent having an authority to carry on a business has the authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business. These are due to their significance role and impact on the society in the light of the *Takaful* industry.

MALAYSIAN TAFAKUL ASSOCIATION (MTA)

Malaysian *Takaful* Association (MTA) was established on November 2002 under the Societies Act 1966. It is a statutory organization, as provisioned in the *Takaful* Act 1984, which states that all *Takaful* operators of the country are required to be the member of MTA before commencing their operations. The objectives and power of MTA are clearly defined in the provisions of *Takaful* Act 1984, which in brief, is basically to guard the interest of its members and counsel the *Takaful* industry in Malaysia. The establishment of the Malaysian *Takaful* Association to confederate that promotes and counsels the *Takaful* industry in

Malaysia as well as foster cooperation and mutual understanding amongst its registered members. MTA is distinguished with worldwide recognition as the body of reference pertaining to the fundamentals of *Takaful*. MTA is dedicated in promoting the interest of its members and to supervise the exercise of self-regulation within the *Takaful* industry. For this reason, the MTA issues a code of ethics for its members which is also covering the *Takaful* agents.

LEGAL AND SHAR'IAH FRAMEWORK ON TAKAFUL AGENTS IN MALAYSIA

As has already been noted that the primary source of the agent is the law of contract and agency. In Malaysia, the law governing the agent is stipulated under Contracts Act 1950 i.e. from section 135 to 191. In the *Shari'ah* context, principles of *al-wakala* (agency) the appointment of an agent by the insurer and the broker is of utmost important. In fact, such an appointment was a common practice as it made the transactions and dealings between the insurer and the insured more effective. The governing principles between agents and brokers, however, are laid down in the Article 1449 of the *Mejelle al-Ahkam al-Adliya*, as a *wakalah* is for someone to put the business of his one another, and to make him stand in his own place in respect of their business. (Tyser, C.R. et al., 2002)

As far as *wakalah* is concerned, *wakalah* is a contract of agency. In this contract, one person appoints someone else to perform a certain task on his behalf, usually against a fixed fee. (AAOIFI). Taking *Wakalah* Operational Model as an example, in a *wakalah* model, the participants contribute to the *Takaful* fund as a donation or *tabarru'*. The participants as a group will appoint and authorize the *Takaful* operator to be their agent to manage the *Takaful* fund. The *wakalah* normally authorizes the *Takaful* operator to the participants' agent (*Takaful* agent) to manage the *Takaful* fund for both insurances as well as investment job. (Engku Rabiah Adawiah Engku Ali and Hassan Scott P. Odierno, 2008)

Essentially, the role of the *Takaful* agents from the conventional perspective is similar to the conventional insurance agents. As far as *Takaful* industry is concerned, the *Takaful* agents have owed a certain standard of professional conduct in liaising with customers. (Ahmad Mazlan Zulkifli, et al., 2012) There are some basic conducts are as follows:

1. A *Takaful* agent has to present his/her Agent's Authorization Card at all the time/reasonable period/upon request from customers.
2. A General *Takaful* agent can represent a maximum of two General *Takaful* Operators while a Family *Takaful* agent can only represent one *Takaful* Operator.
3. A *Takaful* broker must be a member of Malaysian Insurance and *Takaful* Brokers Association (MITBA) and be licensed by Bank Negara Malaysia.
4. A *Takaful* agent shall understand customer's needs and assist them in the right choice of *Takaful* products and services.

5. A *Takaful* agent shall explain the nature of information required in the proposal form and also the importance of understanding material facts.
6. A *Takaful* agent shall explain the terms and conditions of the proposed *Takaful* contract to ensure that the customer fully understand the *Takaful* products being considered.

As mentioned earlier, the laws do, in general, are consistent and compliant with the *Shari'ah* rules and principles of agency, disputes and ambiguity may still arise *per se* particularly with regard to (1) the almost absolute discretion of the *Takaful* operator themselves as agents for the *Takaful* participants in the management of the *Takaful* fund investments and the utilization or distribution of underwriting surplus and (2) any misconduct or negligence on the part of the *Takaful* operators. (Simon Archer. et al., 2009)

Needless to say, the *Takaful* operator may be appointed agents or brokers as distribution channels for their products and services. This is common practice for *Takaful* operator in the industry. Interestingly, the ultimate aim of the *Takaful* agents is to seek the pleasure of Allah s.w.t., submit entirely to His Will and strive for the final abode in the Hereafter. [Emphasis added] It is concluded that all *Takaful* agents act as a businessman/woman. Quoting the words of *Al-Qadarawi*, which stated that any merchant who remains within the bounds of honesty and fairness in such an atmosphere is a fighter against his desires, meriting the status of a warrior in the cause of Allah? (Y.A. Quadri, 1988) It is in the line with *Shari'ah* point of view that every Muslim has to do what Islam has asked and to avoid what Islam has prohibited.

However, in terms of contribution collections, once the payment of contribution is made by a participant to an authorized *Takaful* agent, the said payment is deemed to be paid to the *Takaful* operator *per se*. If the *Takaful* agent does not remit the said payment to the *Takaful* operator the participant would be on the cover. For this reason, the *Takaful* operator will not be liable upon the misconduct done by the said agent.

Section 261 of the Islamic Financial Services Act 2013 elucidated that “where a person is liable under this Act to a penalty for any act, omission, neglect or default, such person shall be liable to the same penalty for the act, omission, neglect or default of his employee, director, controller or agent if the act, omission, neglect or default was committed by (a) his employee in the course of the employee’s employment; (b) his director in carrying out the function of a director; (c) his controller in carrying out the function of a controller; or (d) his agent when acting on his behalf.

RECOMMENDATIONS AND SUGGESTIONS

Technicality, *Takaful* is a transaction which is based on trust and honesty and requires a strong sense of responsibility and high professionalism. In order to bring to fruition, an efficient, progressive and comprehensive *Takaful* industry, the Malaysian Takaful Association, Malaysian Insurance and *Takaful* Brokers

Association in collaboration with Bank Negara Malaysia setting out the sound regulatory framework and guideline on *Takaful* agents in order to monitor and refine further the code of ethics and standard market practices for *Takaful* agents.

With the aims to achieve the *Maqasid Al-Shari'ah*, a reasserted Islamic consciousness and increasing alienation is leading towards a revival and reformulation if the *Shari'ah*. One part of the definition as elucidated in Islamic Financial Services Act 2013, however, has led to some confusion in understanding what constitutes *Takaful* agent. The text of the definition of *Takaful* agent is identical to the definition as construed under Takaful Act 1984. Section 2 of the Act has a reference to the *Takaful* agent as something apparently distinct from the definition of *Takaful* agent. The Act seems to list down the duty of *Takaful* agent itself other than give the concept of *Takaful* agent. Apparently, we submit that adding a new definition of what counts as *Takaful* agent is needed.

Islamic Financial Services Act seems to elucidate on the punishment and penalty that would be imposed on the *Takaful* agents rather than protect them that might be happening in the future in terms of conflict of interest amongst *Takaful* agent with his/her principal or in terms of abuse of power in that sense of *wakalah* fee or commission rate.

In addition to that, it would be proper if there is a guideline to the *Takaful* agent as to what conduct is permitted and what is proscribed. Hence, the issue of ethics is applicable at this juncture. As Bobby Reagan mentioned, the ultimate future of the agent itself is identified by the consumer and could meet the consumer expectations as well as their needs, it would make the future of agent become more brighten. (Reagan, B., 2001)

CONCLUSION

In a nutshell, *Takaful* is about risk management, *sui generis* in sharing or distributing risk revelation across a numerous people and organizations. Hence, *Takaful* have been deemed as a root of a community activity. This article establishes that there is no universal definition of *Takaful* agent. There is a need to have a standard regulatory to govern the *Takaful* agents which would cater to the unique principles of *Takaful* products and services. The development of a sound legal framework to protect the interest of the *Takaful* agent is important because they play a role in the market. For this purpose, it is worthwhile to have a sound guideline to meet the current expectations and needs. However, further improvements are still needed. Future research is encouraged to explore the following research questions:

1. What are the offenses that might be committed by the *Takaful* agent if he/she misconduct or omitted to carry out his/her duty?
2. Are the existing laws sufficient in dealing with the misconduct of the *Takaful* agent?

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