THE APPLICATION OF TAKAFUL
BASED ON THE WAQF MODEL
IN SOUTH AFRICA

PREPARED BY: BILAL AHMED JAKHURA
In the Name of Allah the the most compassionate and most merciful – May Peace and Blessings be upon His Noble Messenger:

1. The purpose of this paper is to provide an outline of the South African experience in the application of Takafol based on Waqf.

2. Although the application of Takafol has gained widespread acceptance, contemporary shariah experts have differed over the legal characterization of the entity of the Takafol Fund and its relationship with the participant.

3. Characterizations proposed have ranged from that of conditional gifting, to that of the donor creating an imposition upon him/her/itself to donate an
amount to the Takaful Fund on condition that the Fund too undertakes to compensate the donor for specified losses.

4. However, a closer study of these characterizations reveals that they are not free from objection and criticism.

5. Since the object of this paper is not to analyse the various characterizations proposed, suffice it to say that the primary objection in many of the suggested structures is that these arrangements inevitably result in bilateral obligations analogous to commercial contracts in which Gharar is not permitted.

6. In this respect (the legal characterization of the Takaful Fund and the nature of its legal

4. ومع ذلك، فإن كلاً من هذه الصيغ ليست خالية من الاعتراض والانتقاد.

5. ومن حيث أن غرض هذه الورقة ليست لتحليل انتقادي لهذه الصيغ تكفي الإشارة بأن الاعتراض الأساسي هو أنه كلاً من هبة التواب والإلتزام المتبادل لا يطло من شبهة عند المعاوضة. و هذه الحقيقة تسبب مشكلة واقعية من حيث أن الغر يفسد العقود المعاوضة.

6. في هذا الصدد (التكييف الفقهي لحفظة التأمين التعاوني الإسلامي والعلاقة فيما بين المحفظ و المشتركون). الظاهرة أن هناك فقط صيغتان خالبتان من الانتقادات المعترضة.
relationship with the participant), it appears that only two of the various characterizations identified could be regarded as being free from valid criticism.

**A. THE ILTIZAM-BI-TABARRU MODEL WITH SEPARATE LEGAL IDENTITY**

7. The first is based on an unconditional and absolute donation to a fund.

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 волн من أهم المتطلبات لهذه الصيغة أن تعطي المحافظ صفة الشخص القانوني (التسجيل القانوني) بحيث تصبح قادرة على تملك الإشترات وتمليك التعويضات. هذه الشخصية المستقلة غير واضحة في بعض التطبيقات اليوم حيث لا تميز من شخصية الشركة المديرة للمحافظ.

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9. The participants make contributions in terms of unilateral benevolent payments.

10. The Juristic person should be incorporated not for gain in order to clearly distinguish that the contributions to the fund and compensations paid from the fund are all on the basis of mutual assistance and that they are not commercial in nature.

11. The Juristic person or "Fund" will have a set of rules that regulates the payment of benefits upon the occurrence of defined events, and other

contributions and compensations. In practice, it has been found that in many instances, the legal personality of the fund itself is not distinctly identifiable from that of the management company.
reliable matters such as
surpluses. These rules could
even be recorded in the articles
of association of the company
formed.

11. The Fund would be managed
by a management company who
can charge an administration fee
for actual services rendered like
management and investment
and may also share in
investment profits in terms of
Mudharaba or Wakaala Bil
Istithmaar.

B. THE WAQF MODEL

12. The second characterization
is based in the classical concept
of Waqf, a benevolent /
charitable institution, sui generis,
recognised by Islamic Law.

ب) التأمين التعاوني على أساس الوقف

12. أما الصيغة الثانية فهي صيغة أصلية في
الفقه الإسلامي – الوقف -
معهد / مؤسسة خيرية، الفريدة من نوعها ،
التي تعترف بها الشريعة الإسلامية.
13. Such a Waqf is created by the founder making a nominal donation which is the capital held in perpetuity;

14. The Waqf would be managed by trustees who can charge an administration fee for services rendered and is governed by rules prescribed by the founder in the Deed;

15. The rules of the Waqf, regulate membership of the Waqf, payment of contributions, benefits, surpluses and all other relevant matters;

16. All contributions paid to the Waqf (as a separate legal
entity) pass into the ownership of the Waqf to be regulated by the terms of the Waqf Deed.

17. In summary, however, there appears to be little practical difference between both models and both appear to be workable provided that the Takaful Fund is given a separate legal identity distinct from that of the Management Company.

18. Certain scholars have argued that the characterization based on Waqf is preferable and superior for the following reasons:

a. The writings of the Fuqahaa indicate that they treated a Waqf as possessing separate legal status.
<table>
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<tr>
<th>PRACTICAL IMPLEMENTATION OF THE WAQF MODEL BY TAKAFOL S.A.</th>
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<td>11. During 2002, Takaful SA became the first company to practically implement the Waqf Model for providing Islamic Insurance.</td>
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<tr>
<td>12. A Waqf fund was established for the purposes of providing</td>
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Takaful by means of a nominal founding donation of R5000 in cash made to the Waqf Fund. See Figure 1. at the end

13. In South Africa, a Waqf deed can easily be registered under the Trust Property Control Act, 1988 since the Act defines a "trust" very broadly¹

14. This founding donation is the original Waqf Capital to be held in perpetuity and invested in terms of the rules of the Waqf Fund.

15. The Waqf Capital will not be distributed except in the

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¹ "trust" (in terms of the Trust Property Control Act, 1988) means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed—

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
<table>
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<th>15. Takafol SA (Pty) Ltd then appointed four members of its board as trustees of the Waqf fund with the object of handling administrative matters pertaining to the fund.</th>
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<td>16. In lieu of these administrative services, Takafol SA would be entitled to receive a management fee equivalent to 10% of the gross premiums received by the Waqf Fund.</td>
</tr>
<tr>
<td>17. The contributions of participants to the Waqf Fund, in the form of benevolent donations, are not waqf themselves but rather they are extraordinary circumstance of winding up or liquidation of the Waqf Fund in which case it could be distributed in terms of the provisions of the Waqf rules (charitable avenues).</td>
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<tr>
<td>15. ثم عين Takafoil أس أي (Pty) LTD (LLC) أربعة من أعضاء مجلس إدارتها أمناء ومتولين لصندوق الوقف لإدارة شؤون الوقف.</td>
</tr>
<tr>
<td>16. بدلًا من هذه الخدمات الإدارية، سيكون من حقها الحصول على رسوم إدارية بـ 10% من اجتياز التبرعات المدفعة إلى صندوق الوقف التي تلقاها صندوق الوقف.</td>
</tr>
<tr>
<td>17. الاشتراكات من قبل المشتركين، في شكل تبرعات خيرية ليست وقتنا بل هو من تراكم الوقف الذي تصير مملوكًا للوقف، فتصبح استعمالها لمصالح الوقف والموقع عليهم معارضة.</td>
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<td>treated as assets owned by the Waqf fund. These contributions may therefore validly be utilised for spending upon the beneficiaries of the Waqf in accordance with the rules and objectives of the Waqf.</td>
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<td>18. In the event of one the participants experiencing an event causing loss like an accident for example; the participant would claim compensation from the Fund on the basis that he is entitled to compensation, not in terms of a bilateral commercial contract, but in terms of the rules of the Waqf Fund. This is in terms of the well known principle that the condition stipulated by the founder of a Waqf is treated like the law explicitly stated by the</td>
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law maker.

19. Naturally, the aggregate contributions would be applied to offset any claims for compensation. After these have been provided for, two possible scenarios exist:

20. A deficit: in such case, Takafol SA will arrange for an interest free loan from itself or a which would be repaid from future surpluses.

21. A surplus; in such case, the rules of the Waqf fund stipulate that the surplus would be distributed as follows:

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<th>Percentage</th>
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<tr>
<td>10%</td>
<td>in charity</td>
</tr>
<tr>
<td>75%</td>
<td>to participants</td>
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<tr>
<td>15%</td>
<td>reserves</td>
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CHALLENGES FACED IN THE
IMPLEMENTATION OF TAKAFUL IN THE SOUTH AFRICAN LEGAL ENVIRONMENT

22. The providing of insurance services in South Africa is governed by:

a) the Short – Term Insurance Act, 1998; and

b) the Long Term Insurance Act, 1995;

23. Both these statutes separately provide in section 9 (3) of each Act that the Applicant (licence holder) must be a **public company** whose **main object** is to carry on short-term insurance business, or, long-

1. ينظم توفير خدمات التأمين في جنوب أفريقيا:

أ) قانون التأمين القصير المدة المنشور 1998 م

ب) قانون التأمين الطويل المدة المنشور 1995 م

2. يشترط كلاً من هذه القوانين في المادة 9 (3) من القانون على أن كل مقدم خدمات التأمين (صاحب الرخصة) يجب أن يكون شركة عامة هدفها الرئيسي هو التجارة في التأمين القصير المدة، أو التجارة في التأمين الطويل المدة.
24. It follows therefore, that the registration of a Takaful product would have to comply with this legislation as currently no separate Legislation catering specifically for Takaful exists in South Africa.

25. This presents numerous challenges to implementing a Takaful Product. The following paragraphs deal with some of these critical challenges.

26. Due to the heavy administrative and cost burden of registering a company under the insurance acts Takafol S.A. and certain other upcoming Takaful Providers in South Africa opted initially to use the licences...
of existing insurers.

27. This may raise the objection that despite the structure being given a Shariah paradigm, the insurer, in terms of the applicable law, is the license holder and effectively not the separate Takaful fund created (whether on the basis of Waqf or otherwise).

28. The response to this objection is that in the absence of legislation catering specifically for Takaful and having regard to legal constraints in the time being, the spirit of the relationship will be regarded as taking precedence over the apparent legal form.

29. In order to solve this problem, some operators even require the participants to sign a declaration clarifying the true

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29. لمعالجة هذه المشكلة أوجبت بعض شركات التأمين الإسلامي توقع المشتركين على إقرار يوضح حقيقة التكييف من الناحية الشرعية

28. الجواب على هذا الاعتراض هو أنه في غياب تشريع خاص لتقديم خدمات التكافل ومراعاة البيئة القانونية في الوقت الحاضر، يكون العبارة للمعاني لالألفاظ والمباني.

27. وهذا قد يثير الاعتراف من أن على الرغم من أن الهيكل تعطي تكييفًا شريعاً، فإن القانون الحقيقي، من حيث القانون الواجب التطبيق، هو صاحب المركبة وليس فعلاً صندوق التكافل المستقل (سواء كان ذلك على أساس الوقف أو غير ذلك).
Fiqhi characterization.

30. In the case of Takafol S.A., the actual insurer in terms of South African law is Compass Insurance and Takafol S.A. acts as a broker.

30. Besides the principle broker relationship, certain other legal structures, which are perhaps more transparent, are currently being considered by upcoming providers to give effect to the Takaful concept.

31. Most worthy of note, is the “cell-captive” insurance option.

32. Under the “cell-captive” insurance option, use is made of an existing umbrella licence of
a registered insurer through the acquisition of a parcel of shares in the existing registered insurer, constituting a separate portfolio. See diagram 2 below.

33. The vehicle acquiring the shares could be a company, or, a trust (waqf).

CONCLUSION

34. In conclusion, it is apparent from the discussion in this brief paper that the Waqf concept can successfully be applied to the concept of Islamic Insurance due to the flexibility of the Waqf structure. The experience of South Africa also emphasises the same fact.

And Allah Knows Best – May Peace and Blessings be on his Noble Messenger
Figure 1: Graphical Representation of Takafol S.A. Structure

Takafol S.A. fund flowchart

**Founder (Wakif)**

**Takafol SA (PTY) Ltd**

**Founding donation**

R 5000

**Four Trustees (appointed by founder)**

**Fee for administration – 10% of contributions**

**Wakf Fund**

Separate legal entity - owner of funds

**Contributions by policy holders in the form of donations**
Figure 2: Graphical Representation of a Cell Captive Structure

Cells represent other Cell owners in Centriq. Centriq is the Insurance Licence.

Interest free loan if required

Administration Agreement for sale of policies to participants, claims handling, policy admin etc.

Other Cell Owners

Centriq

Cell Captive

Preference Shareholder governed through a Shareholders Agreement

S21 Company or Trust

Albaraka Bank

Administrators (Glenrand MIB)

Participants

Interest free loan if required

Juristic Representation

Participation governed by Trust Deeds or Articles and Memorandum of Association
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