Received : 23-04-2023
Revised : 05-07-2023
Accepted : 16-09-2023
Published regularly : December 2023

Al-'Adalah
Volume 20, No. 2, December 2023
ISSN: 0854-1272; E-ISSN: 2614-171X
DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

High Risk in Loss Insurance in the Perspective of Conventional Insurance and Sharia Insurance

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Abstract: This study examines the risk management of *tabarru* funds of sharia insurance at PT Asuransi Bumiputera Muda 1967 Serang. The aim is to determine the differences in principle between the conventional insurance system and the Sharia insurance system in regulating high-risk issues. This study is classified as doctrinal legal research (normative juridical) which is descriptive and analytic based on data obtained through a literature review. This study found differences in tendencies between Conventional Insurance and Sharia Insurance in responding to high risks in a guaranteed contract. According to the Conventional Insurance system, high risks occurring at the implementation stage of the agreement can result in the termination of the insurance agreement. However, if the high risk has been calculated from the beginning of the contract and agreed upon by both parties, then the contract will continue following the agreement stated in the policy. In contrast to this principle, the Sharia insurance system applies the principle of *ta'āwun* (mutual assistance) where each insurance participant donates their funds to other participants who are affected by disasters, regardless of the risk being low or high. Thus it can be concluded that in conventional insurance the relationship that occurs is between individuals and the company while in Sharia insurance all insurance participants are collectively bound to the company and share the risk (transfer risk).

Keywords: conventional insurance, Sharia insurance, high-risk loss insurance

Abstrak: Penelitian ini mengkaji manajemen risiko dana *tabarru* asuransi syariah di PT Asuransi Bumiputera Muda 1967 Serang. Tujuannya untuk mengetahui perbedaan prinsip antara sistem asuransi konvensional dengan sistem asuransi syariah dalam mengatur masalah risiko tinggi. Penelitian ini tergolong penelitian hukum doktrinal (yuridis normatif) yang bersifat diskriptif analitis yang didasarkan kepada data yang diperoleh melalui kajian pustaka. Penelitian ini menemukan adanya perbedaan kecenderungan antara Asuransi Konvensional dengan Asuransi Syariah dalam menyikapi risiko tinggi dalam kontrak penjaminan. Menurut sistem Asuransi Konvensional risiko tinggi yang terjadi pada tahap pelaksanaan perjanjian dapat mengakibatkan perjanjian asuransi berhenti. Namun, jika risiko tinggi itu telah diperhitungkan sejak awal kontrak dan disepakati oleh kedua pihak, maka kontraknya akan tetap berjalan sesuai dengan kesepakatan yang dituangkan dalam polis. Sedangkan, sistem asuransi syariah menerapkan prinsip *ta'āwun* (tolong menolong) dimana setiap peserta asuransi menghibahkan dananya untuk peserta lainnya yang terkena musibah tidak peduli

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risiko itu berskala rendah ataupun tinggi. Jadi, dalam asuransi konvensional hubungan yang terjadi adalah antara individu dengan perusahaan, sementara dalam asuransi syariah semua peserta asuransi secara kolektif terikat dan saling menanggung risiko *(transfer risk)*.

Kata kunci: asuransi konvensional, asuransi syariah, asuransi kerugian berisiko tinggi

Introduction

Everyone is always haunted by bad events that may occur in the future. If a bad event occurs, then at that moment a person will experience suffering, hardship, loss, or loss, either related to property or life. The bad event that may occur can result in the loss or loss of certain economic values which is termed risk.[1] Conceptually, risk can be defined as any danger threatening safety, aimed at material objects in the form of property and immaterial objects, namely the human body and soul. If the threat of danger becomes a reality, it will cause property loss, physical disability, or even death.[2] To anticipate losses arising from the event, humans do various ways so that the potential for unwanted risks (risk averse) can be prevented or at least minimized.[3]

Efforts to anticipate the possibility of risk can be made by avoiding, preventing, or holding back the potential losses that arise from it. This method is a common effort that is done by each person. Apart from that effort, another way that can be done is to share or transfer the risk to another party. The transfer of risk to another party then gives rise to an underwriting agreement that is economically important for both the insured and the insurer.[4] The party that receives the risk transfer, either in part or in full, is known in the business world as insurance. One of the benefits of insurance is helping the community overcome

[1] A. Junaedy Ganie, *Hukum Asuransi Indonesia* (Jakarta: Sinar Grafika, 2011), p. 5.

[2] Abdulkadir Muhammad, *Hukum Asuransi Indonesia* (Bandung: Citra Aditya Bakti, 2006), p. 63.

[3] Risma Dani, 'Implementasi Manajemen Risiko Pada Sistem Asuransi Jiwa Syariah di PT. Prudential Life Asurance Binjai', *Masharif Al-Syariah*, 8.30 (2023): 1374–83. See also Nita Triana, 'Alternative Dispute Resolution Model in the AJB Bumiputera Life Insurance Company of Purwokerto in Shari'ah Perspectives', *Al-'Adalah*, 15.2 (2019): 367 <https://doi.org/10.24042/adalah.v15i2.3004>.

[4] Sentosa Sembiring, *Hukum Asuransi* (Bandung: Nuansa Aulia, 2014), p. 36.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

the risks they face and providing peace of mind and confidence to the community, especially the party that takes out the insurance.[5]

Some insurance businesses are based on agreements, namely the occurrence of insurance agreed voluntarily by both parties (commercial insurance agreements), there is also insurance based on statutory regulations, namely in the form of social insurance to protect the community. The object of insurance can be an object that can be counted, including loss insurance (general insurance), and can also be an object that cannot be counted (life insurance).

The amount of risk that will be transferred/covered will affect the rights and obligations of each party. The insurer (insurance company) has the right to receive premium payments, namely an amount of money that must be paid by the insured to the insurer within a certain period. The amount of the premium is adjusted to the provisions of the insurance company approved by the insured when the insurance contract is held.[6] Generally, insurance companies have certain standards in determining the size of the premium, standard risk and the period of insurance to be held, or the parties' agreement. The obligation of the insurer after receiving a certain risk transfer from the insurance object, if the risk occurs, the insurer will pay the insurance money, this is the right of the insured who has an interest in the insurance object. Therefore, to know the rights and obligations for premium payments, and the amount of insurance money in insurance, the level of risk of the specified insurance object must first be known.

The risk level is certainly not always standard, sometimes it contains low risk, and sometimes high risk. The risk event itself occurs at the pre-contract stage, at the contract stage, or the post-contract stage. Article 293 of the Commercial Code (here-in-after abbreviated as KUHD) has regulated that if there is a change in the insurance

[5] Munawir, Mahbub, and Jaka Anggara, 'Implementasi Akad *Wakalah Bi Al-Ujroh* Pada Asuransi Jiwa PT AXA Mandiri dalam Perspektif', *Jurnal Hukum Islam, Ekonomi dan Bisnis*, 7.2 (2021): 220–35 <https://doi.org/ 10.30739/istiqro.v7i2.941>.

[6] Dudi Badruzaman, 'Perlindungan Hukum Tertanggung dalam Pembayaran Klaim Asuransi Jiwa', *YUSTISIA MERDEKA: Jurnal Ilmiah Hukum*, 5.2 (2019): 91–114 <https://doi.org/10.33319/yume.v5i2.16>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

object it faces a higher danger which results in the insurance agreement being terminated. The provisions of Article 293 of the KUHD are the legal basis for determining the rights and obligations of the insurer if there is a change in risk. In this provision, it is stated that for the danger of fire on the insured house, where the house during the insurance period experiences a change in function, namely being used for another purpose, so that the possibility of fire is higher, then the insurer can reject the risk and the previous agreement automatically stops. On the other hand, if the risk has been known in advance, agreed by the parties, and included in the premium, then the contract continues and the company is obliged to pay the loss claim filed by the insured party.

Research on the risks of insurance, both conventional insurance and sharia insurance, has been widely conducted. Among them is the research by Humaemah and Ulpatiyani entitled "Risk Management Analysis of *Tabarru* Funds for Sharia Insurance (Study at PT Asuransi Umum Bumiputera Muda 1967 Serang)". This study discusses the risk management of *tabarru* funds of Sharia insurance at PT Asuransi Bumiputera Muda 1967 Serang. The results of the study indicate that in principle, Sharia insurance applies the principle of *ta'āwun* (mutual assistance) where each insurance participant donates their funds to other participants who are affected by a disaster. Thus it is clear that the relationship between insurance participants and insurance companies is to bear each other's risks (transfer risk).[7]

The next study was conducted by Salsabila and Dian under the title "Analysis of Loss Risk Management Case Study of PT Asuransi Jiwa Manulife Indonesia during the Pandemic". This study analyzes loss risk management at PT Asuransi Jiwa Manulife Indonesia which found that the financial health indicators used by PT Asuransi Jiwa Manulife Indonesia include the fulfillment of solvency levels including minimum risk-based capital and achievement ratios. During the pandemic, it was

[7] Ratu. Ulpatiyani Humaemah, 'Analisis Manajemen Risiko Dana *Tabarru* Asuransi Syariah (Studi Pada PT Asuransi Umum Bumiputera Muda 1967 Serang)', *Http://Jurnal.Uinbanten.Ac.Id/Index.Php/Si/Issue/Archive JURNAL*, 7.2 (2021).

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

found that PT Asuransi Jiwa Manulife Indonesia decreased by -71% from 1041 to 943. [8]

Furthermore, the research of Nandasari, et al., entitled "Analysis of the Implementation of Risk Management in the Offshore Energy Insurance Underwriting Process at PT Asuransi XYZ". This study concludes that the source of risk in the insurance process is emphasized when the underwriter classifies the risk of the insurance object according to the assumptions or factors that determine its risk class. Furthermore, PT Asuransi XYZ has implemented risk management although not optimal enough. This is based on 2 (two) things, namely: a. There is no complete guideline or separate regulation, and b. no updates have been made since 2016.[9]

The problem in this study is how to manage high risk in loss insurance based on conventional insurance and sharia insurance and what the legal consequences of high risk in loss insurance based on conventional insurance and sharia insurance. That is where this study differs from previous studies.

Research Method

This research is a doctrinal (normative) legal research[10], which uses a statute approach including legal principles.[11] The method used in discussing the problem is a literature review related to how to find out the high risk of insurance objects and their legal consequences in loss insurance. The data used is secondary data derived from primary legal materials in the form of laws and regulations governing insurance, namely Civil Code (here-in-after abbreviated as KUHPerdata), KUHD, and Insurance Law. In addition, sources of information from secondary legal materials are also

[8] Nabila Putri Salsabila and Dian Hakip Nurdiansyah, 'Analisis Manajamen Risiko Kerugian Studi Kasus PT Asuransi Jiwa Manulife Indonesia Pada Masa Pandemi', *Jurnal Ilmiah Wahana Pendidikan*, 8.23 (2022): 306–15 <https:// doi.org/10.5281/zenodo.7397511.>.

[9] Desi Nandasari, 'Analisis Penerapan Manajemen Risiko dalam Proses Underwriting Asuransi Energi Offshore di PT Asuransi XYZ', *Jurnal Asuransi Indonesia*, 2.1 (2021): 12 <https://oldejournal.stma-trisakti.ac.id/ index.php/premium/article/view/95>.

[10] Dyah Ochtorina Susanti and Efendi Efendi, *Penelitian Hukum (Legal Research)* (Jakarta: Sinar Grafika, 2015), p. 28.

[11] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2015), p. 64.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

used, both in the form of literature, scientific journals in the field of law, and the opinions of legal experts. After all the data has been collected, a qualitative analysis[12] is carried out to obtain conclusions.

Result and Discussion

Determination of High Risk in Loss Insurance

The term insurance according to Article 246 of KUHD is: "*an agreement, by which an insurer binds himself to an insured, by accepting a premium, to provide compensation to him for a loss, damage or loss of expected profit, which he may suffer, due to something, an uncertain event*".[13] This provision only mentions loss insurance, not life insurance, which is regulated in Article 302 of KUHD. Meanwhile, in the KUHPerdata, the term insurance or coverage is defined as an agreement in which the insurance company commits to the insured party by paying a premium to compensate him for losses, damages, or loss of expected benefits.[14] This formulation was then revised through Law Number 40 of 2014 concerning Insurance Article 1 Number (1) which reads: "Insurance is an agreement. between two parties, namely the insurance company. with the policyholder, which is the basis for the receipt of premiums by the insurance company, in return for:

a. providing compensation to the insured or policyholder, due to losses, damages, costs incurred, loss of profits, or legal liability to third parties that may be suffered by the insured or policyholder due to the occurrence of an uncertain event, or
b. providing payments based on the death of the insured or payments based on the life of the insured with benefits that have been determined and or based on the results of fund management."

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[12] Mukti Fajar ND and Achmad Yulianto, *Dualisme Penelitian Hukum Normatif dan Empiris* (Yogyakarta: Pustaka Pelajar, 2010), p. 79.

[13] Meriza Elpha Darnia and others, 'Asuransi dalam Perdagangan Internasional', *INNOVATIVE: Journal of Social Science Research*, 3.5 (2023): 7498–7505 <https://j innovative. org/index.php/Innovative/article/ view/ 5732>.

[14] Bonanda Japatani Siregar and others, 'Aspek Hukum Terkait dengan Perjanjian Asuransi Menurut Kitab Undang-Undang Hukum Perdata', *JURNAL RECTUM: Tinjauan Yuridis Penanganan Tindak Pidana*, 5.3 (2023): 299 <https://doi.org/10.46930/jurnalrectum.v5i3.3641>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

The provisions in the Insurance Law further divide insurance, based on the object of the agreement, namely loss insurance and life insurance. Through these two types, various interests of the insured can be protected by transferring the risk to another party. However, if examined further, there is another type of insurance not mentioned in the Law, namely insurance that occurs based on laws and regulations that are mandatory for all people to follow to protect the community. Therefore, the Insurance Law as a general provision that applies in Indonesia, should formulate the definition of insurance not only based on an agreement but must include social insurance. Thus, the formulation of insurance in the provisions of laws and regulations should change to: Insurance or coverage is a contract that can occur between the insured and the insurer based on an agreement and can also occur based on laws and regulations, for a risk that exists on property or life where the transfer is with a certain premium so that the insurer will pay compensation or a certain amount of money if the risk insured occurs. O. J. Jejelola formulates the definition of insurance as *"A contract of insurance can be defined as a contract whereby a person called the insurer agrees in consideration of money paid to him, called the premium, by another person, called the assured, to indemnify the latter against loss resulting to him on the happening of a certain event"*.[15]

The explanation of the term insurance as written above is intended to find out the existence of loss insurance as insurance for the transfer of risk on an object whose value can be calculated so that it can be agreed upon by the parties regarding the amount of premium that must be paid by the insured to the insurer and the insurance money that can be given to the insurer if a risk occurs, while a claim is filed by the insured.

The existence of an agreement to cover losses to a certain object creates a legal relationship that must be implemented by the parties as reciprocal rights and obligations, where the risk transfer to the insurer is

[15] Mr. O. J. Jejelola, 'The Doctrine of Non-Disclosure Under The Law of Insurance: A Critical Appraisal', *European Science Journal*, 2.2 (2014): 50-59 <http://eujournal.org/index.php/esj/article/viewFile/4133/3969>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

followed by the payment of a premium by the insured. The amount of this premium is determined from the results of the risk selection carried out at the request of the prospective insured.[16]

The legal relationship between the parties gives rise to reciprocal rights and obligations, where the risk transfer to the insurer followed by the payment of a premium, must occur in the form of a contract (official agreement). Agus Yudha Hernoko explained that legal thinkers, including John Locke, J.J. Rosseu, Imanuel Khan, and John Rawls, realized that without contracts and the rights and obligations that arise from them, agreements will not occur and people will not be willing to be bound and depend on the statements of other parties. Contracts are one way to ensure that each individual will fulfill their promises.[17] This means that both parties must agree where neither party feels any coercion or follows the wishes of the other party, and both need an agreement.

In insurance, there are at least 3 principles, namely: the principle of insurable interest, the principle of compensation guarantee (*amānah*), and the principle of good faith (complete good faith).[18] This is as regulated in Article 250 and Article 251 of KUHD. Article 250 of KUHD stipulates that an insurance agreement must include a condition of interest for the insured so that the risk of loss lies with the insured. The party entitled to act as the insured is the party who has an interest in the insured object.[19] If no interest in the risk of the insurance object is found, the insurer is not required to pay the insurance claim. This is because interest is an absolute requirement in loss insurance, in addition to that the insured object must also be able to be calculated as regulated in Article 268 of KUHD.

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[16] Andreas Krisvian and others, 'Manajemen Risiko Permodalan Perusahaan-Perusahaan Asuransi Jiwa di Indonesia', *Jurnal Dinamika Manajemen*, 10.3 (2022): 107–18 <https://mail. online-journal.unja.ac.id/jmbp/ article/view/11535>.

[17] Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial* (Yogyakarta, 2008), p. 73.

[18] Yurika fitria Astuti, 'Perbedaan Efisiensi Perusahaan Asuransi Jiwa Syariah dan Konvensional di Indonesia dengan Metode DEA', *Jurnal Ekonomi Syariah Teori dan Terapan*, 4.8 (2017): 668–83.

[19] Wulandari, Andi Sri Rezky. "Tanggung Jawab Perusahaan Asuransi terhadap Tertanggung yang Ikut dalam Asuransi Risiko Penerbangan." *PETITUM,* 4.2 (2016): 75-88.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

Insurance agreements must meet certain requirements as applied in general agreements. This is regulated in Article 1320 of KUHPerdata which includes:

1. There is an agreement between the parties who promise.
2. The competence of both parties.
3. The existence of a certain object (the insured object)
4. The agreement made by both parties is a lawful act, meaning it does not conflict with laws and regulations, does not conflict with public order, and does not conflict with the prevailing social norms.

In insurance, there are at least 3 principles, namely: the principle of insurable interest, the principle of compensation guarantee (*amānah*), and the principle of good faith (complete good faith). This is as regulated in Article 250 and Article 251 of KUHD. Article 250 of KUHD stipulates that an insurance agreement must include an interest requirement for the insured so that the risk of loss lies with the insured party. The party who has the right to act as the insured is the party who has an interest in the insured object. If there is no interest in the risk of the insurance object, the insurer is not required to pay the insurance claim. This is because interest is an absolute requirement in loss insurance, in addition to that the insured object must also be able to be calculated as stipulated in Article 268 of KUHD.

In addition to the above requirements, both parties must also know the level of risk faced in the insurance event (an uncertain event that can cause a loss), in other words, this level of risk requires openness from the owner of the insurance object about matters relating to the object and other things that are considered important to be conveyed and agreed upon by both parties. This means that in an insurance agreement, notification is a requirement that must be met by the insured (prospective insured), as stipulated in Article 251 of KUHD. The notification is not only at the beginning of the contract but also during the insurance agreement because when the insurance is running, certain events or circumstances may occur that affect the level of risk, from the event that has been determined.

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Notification from the insured (prospective insured) is important information for the insurance company, to then consider whether it can accept the risk from the insured. For this reason, the company will then study further by conducting a risk assessment analysis by the underwriting team, so that it can be known whether it is a standard risk or a high risk/ risk weighting so that it will be the basis for determining the premium value that must be paid by the insured and the amount of insurance money that is the obligation of the insurer if the risk occurs. This is called risk management, which is an approach to identifying, evaluating, managing, and reducing potential losses that can occur in various situations or activities. The standard risk level is the risk level that commonly occurs from the insurance object, so that the premium becomes a standard premium, and there is a list of standards used as a reference during the bidding process. The high-risk level means the threatening potential danger is higher so that it can cause higher losses. For high risks, calculations made by a special team are required. If approved by the prospective insured, the agreement process can be continued to the contract stage.[20]

The standard risk level is the level of risk that commonly occurs from insurance objects, so that the premium becomes a standard premium, and there is a list of standards that are used as a reference during the bidding process. The high-risk level means the potential danger that threatens is higher which can cause higher losses. In this case, calculations made by a verification team from the insurance company are required. If approved by the prospective insured party, the agreement process can be continued to the contract stage.

Concerning the agreement on high risk in insurance, the author analyzes using the theory of the momentum of the occurrence of contract, which consists of:

a. Statement Theory (*uitingstheorie*): an agreement occurs when the party receiving the offer states that he accepts the offer, as seen from the side of the recipient

[20] Sonia Ritonga, Laylan Syafina, and Fakultas Ekonomi dan Binis Islam, 'Analisis Efektivitas Manajemen Resiko Terhadap Produk Asuransi Kecelakaan Diri Pada Asuransi Bumida', *Jurnal Ekonomi dan Pendidikan*, 6.2 (2023): 24–31 <https://doi.org/10.26858/jekpend.v6i2.51256>.

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b. Delivery Theory (*verzendtheoire*): an agreement occurs when the party receiving the offer sends a telegram.
c. Knowledge Theory (*vernemingstheoire*): An agreement occurs when the party offers an acceptance, but the acceptance is not yet known directly.
d. Acceptance Theory (*ontvangstheorie*): toesteming occurs when the offering party receives a direct answer from the opposing party.[21]

Of the four theories of the momentum of the contract above, the acceptance theory (*ontvangstheorie*-acceptance theory) from Opzoomer (Pitlo. 1971), according to the author, is more complete and understandable. According to this theory, before there is acceptance or agreement to an offer/statement, there must be a statement from the offering party. The offer can use certain means or communication tools through which the parties will know about what is being offered so that acceptance (agreement) can occur. The issuance of an agreement regarding the existence of certain risks in insurance, which includes the size or high or low risk faced, occurs after going through a process, namely risk assessment (underwriting). From here, the insurance company will then determine the amount of premium to be paid and the value of the insurance money which is the insurer's responsibility. Certainly, the company will also consider the profit that can be achieved.[22]

The first burden in the form of an obligation to pay premiums is on the insured party; while the insurer will carry out its obligations if the risk occurs during the agreement period. If the premium is not paid, then there is no risk transfer. Therefore, if a risk occurs, on a condition where the premium is not paid, the insurer can be released from its responsibility to pay the insurance money, and the insurance agreement will be terminated. If at the time the contract occurs, the risk of the insurance object falls into the light-low category or falls into the standard risk, while the insurance is running, there is a change in

[21] Vollmar H.F.A, *Pengantar Studi Hukum Perdata Jilid II,* (Jakarta: Rajawali Press, 1984), p. 90.

[22] Fadjar Harimurti, 'Manajemen Risiko, Fungsi dan Mekanismenya', *Junal Ekonomi dan Kewirausahaan*, 1.1 (2006): 105-112.

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the function of the object that is the insurance object, for example, a house insured against fire insurance, originally as a regular residence for the occupants of the house, changes its function to a house for business (home industry), then that means that there has been a change in the function of the house with high risk due to the use of certain tools connected to electricity or others that are susceptible to fire hazards.

Legal Consequences of High Risk in Loss Insurance

Every insurance will always contain a level of risk previously known by the parties in the insurance agreement. However, certain events may occur beyond the expectations/capabilities of the parties concerned so that the risk level changes to a high-risk level from what was previously agreed upon regarding the presence or absence of high risk in an event. This situation may occur in an insurance agreement, resulting in certain legal consequences that require legal intervention to find a solution. However, before examining the legal consequences of high risk in loss insurance, it is necessary to first know about the principles in the insurance agreement.[23]

The insurance law contains at least 6 principles that must exist and be the basis for an insurance agreement. These principles are:

a. The necessity of insurable interest: Without the interest of the insured party, the insured cannot collect any compensation from the insurer. In other words, without this principle, the insurance agreement is void (Article 250 of KUHD).
b. The principle of *Uberrima fides*: There is an obligation for the insured to notify the condition of the insured object which must be carried out honestly. (Article 251 of KUHD).
c. The principle of good faith (Utmost Goodfaith): In an insurance agreement, the element of trust is important between the insured and the insurer, as regulated in Article 1338 of KUHPerdata.
d. The principle of indemnity/balance: The principle of indemnity or the principle of balance has an important meaning in loss insurance.

[23] Sembiring.

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If during the period of insurance, an event occurs that causes a loss, then the compensation given must be balanced with the risk borne by the insurer. The insured may not receive more than the actual loss.[24]

e. Subrogation Principle: Replacement of the insured position to the insurer who has made compensation payments to the insured because of actions caused by a third party. (Article 284 of the KUHD).

f. Principle of contribution: According to David Ransom, *the principle of contribution is the right of the insurer to call or involve other insurers similarly, but not necessarily equally, liable to the same insured to share the cost of an indemnity payment*".[25]

Legal relations arising from agreements, which are of the same level as statutory regulations, must be carried out in good faith and cannot be unilaterally canceled. The existence of good faith in an agreement, according to Mariam Darus Badrulzaman, is a balance and protection for the weak party.[26] Good faith must be the basis of the relationship between the parties from the pre-contract stage, the contract stage, to the implementation of the contract. The function of good faith as regulated in Article 1338 paragraph (3) of KUHPerdata is dynamic and covers all contract stages.[27]

Good faith for the insured party having an interest in the insured goods is to honestly inform the insurer of things that need to be known, from the pre-contract stage before an agreement is made. This is a notification obligation stipulated in Article 251 of the KUHD. If the prospective insured party hides something that should be conveyed to the insurance company, it means that he has neglected his obligations,

[24] Ferri Asril, 'Analisis Terhadap Perbandingan Hukum Asuransi Konvensional dan Hukum Asuransi Syariah dalam Perspektif Filsafat Hukum Islam', *Ensiklopedia Social Review*, 1.1 (2019): 118-125.

[25] Luthfiana Arumsari, 'Penerapan Prinsip Kontribusi dan Prinsip Subrogasi dalam Asuransi Pengangkutan Laut (Studi Kasus PT. Asuransi AXA Indonesia dengan PT. Asuransi Buana Independent)', *Dharmasisya*, 1.1 (2020): 290-302.

[26] Mariam Darus Badrulzaman, *Kompilasi Hukum Perikatan* (Bandung: Citra Aditya Bakti, 2001), p. 35.

[27] Hernoko.

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so if the insurance has been running, the agreement can be canceled by law. This is so because the insured should understand that a legal agreement must be implemented in good faith.

The performance of an insurance agreement does not necessarily mean that the insured party is free from all events that may be faced, including changes in the function of the insured object or certain shifts from what has been agreed upon. Certain changes are an obligation to be conveyed to the insurer, otherwise it can be interpreted that the insured party will speculate to continue paying premiums, in the hope that if a risk occurs, the insurer will pay the insurance money. This applies not only at the beginning of the contract but throughout the insurance as regulated in Article 251 of KUHD.

A change in the function of the insurance object, based on Article 293 of KUHD, results in the insurance stopping. The termination of the insurance is due to the high risk in the ongoing insurance, which if continued will result in a higher responsibility of the insurer, whereas at the beginning it had not been agreed upon by both parties. This is contrary to the commercial purpose of the insurance company, namely to seek profit, not loss. Therefore, there needs to be a fair agreement between the two, which refers to estimates and assessments. Lawrence M. Friedman in one of his writings emphasized: "Society expects the law to meet ethical standards and they will judge it based on how the law "works". What it means is how the law treats people and how the law distributes benefits and losses".[28]

The existence of high risks that are not known to the insurance company before implementing the agreement certainly contradicts the principle of balance (indemnity). This principle is also known as the principle of nemo plus which means receiving no more than what is right, giving no more than what is obligatory.[29] In other words, the rights and obligations of both parties must follow what has been agreed upon, and if there is a change, of course, it is no longer following what is expected

[28] Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial,* (Bandung: Nusa Media, 2013), p. 64.

[29] Suryono. Arief, *Pengetahuan Dasar Hukum Asuransi* (Surakarta: UNS Press, 2020), p. 23.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

to obtain benefits for the insurer. The implementation of the principle of balance in high-risk insurance can be seen in the provisions of laws and theories related to agreements, functions, and balance where justice rests on the awareness of the thinking subject.[30]

Furthermore, the provisions governing insurance, especially regarding high risks, can be found in Article 293 of KUHD (related to high risk due to changes in the function of the insurance object) and Article 638 of KUHD (related to high risk due to changes in the course of a ship that is sailing). Based on the provisions of Article 293 and 638 of KUHD, the existence of a high risk in insurance that is already running means that an agreement has been made but when the insurance is implemented there is a high risk that burdens the insurance object in the form of a change in the function of the insurance object that makes the premium and the transferred risk are not balanced, or against a change in the destination of a trip that faces greater danger than the travel plan at the beginning of the agreement- results in the insurance being stopped. This is because a change in higher risk will cause an imbalance between the insured and the insurer. In other words, the risk occurs and is known, while the premium as a balance of rights and obligations between the parties remains/does not change. This causes injustice that the ongoing insurance should be stopped. It is different if the specific object to be insured is known and agreed upon from the beginning of the contract, then the company can immediately inform the prospective insured party about the high risk so that the insurance standards that exist in the insurance company can be determined in insurance with high risk.

Sharia-Based Loss Insurance

Islam allows humans to feel worried about uncertainty in the future. Islam acknowledges that accidents, misfortunes (losses), and even death are the destiny of Allah. However, humans are also encouraged to make plans to deal with this uncertainty. The presence of insurance companies

[30] Bahder Johan Nasution, 'Kajian Filosofis Tentang Konsep Keadilan dari Pemikiran Klasik Sampai Pemikiran Modern', *Jurnal Yustisia*, 3.2 (2014): 118-130 <file:///C:/Users/user/Downloads/11106-20138-1-PB.pdf>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

in general is to manage various uncertainties/risks. Sharia insurance is the same. This institution is present to manage risk as a means to mitigate threats that may occur in the future. In managing risks, however, Islam has its views characteristically expressed through the Sharia insurance.

Sharia insurance is one way for someone to help others if they are exposed to life risks. In Sharia insurance, no party benefits, and no one is harmed. What happens is mutual assistance through the collection of *Tabarru*' funds (charity funds).[31]

Sharia insurance is made from the spirit of Islamic values to maintain Sharia principles, namely responsibility, cooperation to help each other, protect each other in all circumstances, and avoid things prohibited in Islam, namely *gharar, usury, and maisīr*.[32] The presence of Sharia-based insurance is motivated by various opinions of Islamic scholars who state that conventional insurance as a protection system still contains elements prohibited in Islamic teachings, namely *gharar*[33]*, usury*, and *maisīr*. Meanwhile, sharia-based financial institutions also require insurance protection having a performance mechanism following Islamic teachings.[34]

Sharia insurance is one of the non-bank financial instruments that is used as a medium for the community to anticipate various risks that may occur in the future.[35] Insurance in Islam is known as *Takāful*. *Takāful* comes from the Arabic root word "*kafala*" which means helping each other, helping, guaranteeing, and bearing each other. In other words, sharia insurance is also translated as *ta'mīn* and *tadhamun* which means efforts to protect each other and help each other among several people/parties through investment in the form of assets and or *tabarru*' which provides

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[31] Mapuna.

[32] Agus Waluyo, 'Spin-Off Policy on Islamic Insurance Industry Development in Indonesia: Maslahah Perspective', *Muqtasid: Jurnal Ekonomi dan Perbankan Syariah,* 11.2 (2020): 133–48 <https://doi.org/ 10.18326/muqtasid.v11i2.133-148>.

[33] About *gharar* see Efa Rodiah Nur. "Riba dan *Gharar*: Suatu Tinjauan Hukum dan Etika dalam Transaksi Bisnis Modern." *Al-'Adalah,* 12.1 (2017): 647-662.

[34] Nurul Ichsan Hasan, *Pengantar Asuransi Syari'ah* (Jakarta: Gaung Persada Press, 2014), p. 28.

[35] Hadi Daeng Mapuna, 'Asuransi Jiwa Syariah; Konsep dan Sistem Operasionalnya', *Al-Risalah Jurnal Ilmu Syariah dan Hukum*, 19.1 (2019): 159 <https://doi.org/10.24252/al-risalah.v19i1.9976>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

a return pattern to face certain risks through contracts (engagements) that are following sharia.[36] Sharia insurance is mutually protective and mutually helpful, known as *ta'āwun,* namely the principle of mutual protection and helping each other based on *ukhuwah Islāmiyah* (Muslim brotherhood) between fellow members of Sharia insurance participants in the face of disaster.[37] The contracts between participants and the company comprised a *tijārah* contract and a *tabarru'* contract. *Tijārah* contracts are all types of contracts for commercial purposes, while *tabarru*' contracts are contracts made to provide property or benefits to other people either directly or in the future, without expecting compensation with the aim of benevolence and mutual help.[38]

The *tijārah* contract in question is a *mudhārabah* contract, where the company acts as *mudharib* (manager) and the participant acts as *shāhibul māl* (capital owners), namely the owner of the property by submitting premium money or *ro'sūl māl* to be used in the *takāful* protection scheme which will then be used as business capital, used as investment or others. In the agreement, it is agreed how the profit will be divided between the takaful company as the entrepreneur (*mudharib*) and the participants as capital owners (*shāhibul māl*). The agreement also explains how the takaful company will use the participants' premium money to be managed and invested and some of it is used to help other participants affected by disasters.[39]

Regarding this assistance, the mechanism is following the *tabarru'* principle. The *tabarru'* principle in question is using a grant contract, where participants provide grants that will be used to help other participants who are affected by disasters and the company acts as the manager of the grant funds. This *tabarru'* principle is also known as a non-profit

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[36] *Fatwa Dewan Syari'ah Nasional No. 21/DSN-MUI/X/2001 Tentang Pedoman Umum Asuransi Syari'ah*, p. 2001.

[37] Nurhadi, 'Analisis Perbandingan Asuransi Syariah Dan Konvensional (Studi Polis PT. Prudential Life Assurance)"', *Jurnal Keuangan Ekonomi dan Islam*, 10.1 (2019), 1–19 <https:// doi.org/10.20414/ iqtishaduna .v10i1.1593>.

[38] Rian Hasanah, Ikhwan Hamdani, and Hilman Hakiem, 'Tinjauan Terhadap Proses Klaim Asuransi Jiwa Kumpulan Pada PT. Asuransi Syariah Keluarga Indonesis', *Jurnal Ekonomi Islam*, 9.2 (2018), 211–25 <https:// journal.uhamka.ac.id/index.php/jei/article/view/1672>.

[39] Ichsan Hasan.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

transaction that is carried out to help each other insurance participant in doing good deeds. [40]

In the laws and regulations in Indonesia that regulate insurance, namely Law Number 40 of 2014, it is stated that sharia insurance is a collection of agreements, consisting of agreements between sharia insurance companies and policyholders and agreements between policyholders, in the context of managing contributions based on sharia principles to help and protect each other by:[41]

a. providing compensation to participants or policyholders for losses, damages, costs incurred, loss of profits, or legal liability to third parties that may be suffered by participants or policyholders due to an uncertain event; or
b. providing payments based on the death of participants or payments based on the life of participants with benefits that have been determined and, or based on the results of fund management.

The theoretical basis of Sharia insurance refers to three things[42]:

a. *Aqila*, namely mutually shouldering or being responsible for their families.
b. *Muwala*, namely a guarantee agreement, where a guarantor guarantees someone who has no heirs and whose heirs are unknown. If the person guaranteed dies, the guarantor may inherit his/her property providing that there are no heirs.
c. *Tanāhud*: two or more people in association to finance a "need" with equal shares.

Moreover, there are three types of sharia insurance businesses whose forms follow and are the same as the types of business in conventional insurance, namely: family *takāful* (life insurance), general *takāful* (loss

[40] Dwi Oktayani, 'Konsep Tolong Menolong Dalam Asuransi Syariah', *Jurnal Iqtishaduna*, 7.1 (2018).

[41] Nur Indah Hidayati and Ahmad Baehaqi, 'Faktor Penentu Kinerja Investasi Asuransi Jiwa Syariah Di Indonesia', *Muqtasid: Jurnal Ekonomi Dan Perbankan Syariah*, 9.2 (2018), 93 <https://doi.org/10.18326/ muqtasid.v9i2.93-108>.

[42] Herry Ramadhani, 'Prospek dan Tantangan Asuransi Syariah di Indonesia', *Al-Tijary*, 1.1 (2015): 57-66.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

insurance), and *retakāful* (reinsurance).[43] Sharia life and general insurance have the same form as Sharia banks, namely in the form of units of conventional businesses. Both can understand market potential so that they develop well in their institutions.[44]

Differences in Character and Principle between Conventional Insurance and Sharia Insurance

In the previous section, the author has explained at length the ins and outs of conventional and Sharia insurance. Furthermore, in this section, the author will identify the difference between ordinary and Sharia insurance, as presented in the following.

1. Sharia insurance uses the principle of risk sharing where participants bear each other, while conventional insurance uses risk transfer where the insured must pay a premium.[45]
2. The basic principle in the contract on Sharia insurance is *takāfuli* (mutual assistance), where one customer helps another customer who is experiencing difficulties. While in the conventional insurance contract, the principle that is implemented is *tadābuli*, namely buying and selling between the customer and the company.[46]
3. With premiums, in Sharia insurance the premiums collected are treated as funds belonging to the customer; the company is only a trustee to manage it.[47] While in conventional insurance the premiums collected from participants belong to the company, so the company is free to determine its management.[48]

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[43] Nurul Ichsan, 'Peluang dan Tantangan Inovasi Produk Asuransi Umum Syariah', *Jurnal Ekonomi Islam*, 7.2 (2016), 64–70.

[44] Astuti.

[45] Badan Pembinaan Hukum Nasional. "*Laporan Akhir Tim Analisis dan Evaluasi Hukum Tentang Perasuransian (Asuransi Syariah) UU No. 2 Tahun 1992*." Jakarta: Departemen Hukum dan Hak Asasi Manusia RI (2008).

[46] Jairin, 'Kajian Sistem Kinerja Keuangan (*Operating Financial System*) Pada Asuransi Syariah dan Asuransi Konvensional Ditinjau dari Perspektif Hukum Islam', *Indonesian Interdisciplinary Journal of Sharia Economics (IIJSE)*, 2.2 (2020): 171-189.

[47] Jairin.

[48] Moh. Asra and Rizqiyah, 'Studi Komparatif Asuransi Shari'ah dan Konvensional', *Istidlal: Jurnal Ekonomi dan Hukum Islam*, 3.2 (2019): 103–17 <https://doi.org/10.35316/istidlal.v3i2.155>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

4. In Sharia insurance, if an insurance participant is affected by a disaster, the funds for claim payments are taken from the *tabarru* account (social fund) which all participants have given up for mutual assistance. Whereas in conventional insurance, claim payment funds are taken from the company's account.
5. Sharia insurance does not recognize any funds forfeited even though the insurance participant states will resign. Funds that have been deposited can still be withdrawn except for funds that have been given up from the start to be entered into the *tabarru'* account. Whereas in conventional insurance, if the participant cannot continue paying the premium and wants to resign before the due date, then the funds are forfeited.
6. Regarding the investment of funds by the company to obtain profits, Sharia insurance invests its funds only in Sharia banks, BPRS, Sharia bonds, and other activities that follow Sharia principles; while in conventional insurance, the investment chosen is an investment model that is profitable and has liquidity by the obligations that must be fulfilled by the company.[49]
7. Regarding the high-risk issue, Sharia insurance does not have standard rules governing high risk as conventional insurance. This is because Sharia insurance applies the principle of *takāful* (mutual coverage) so that any risk experienced by a participant will be borne together by all other participants.
8. Sharia insurance can also carry out sharia reinsurance as part of risk management efforts based on sharia principles. This is as regulated in Article 1 number 7 of Law Number 40 of 2014 concerning Insurance which states that Sharia reinsurance is a risk management effort based on Sharia principles for risks faced by Sharia insurance companies, Sharia guarantee companies, or other Sharia reinsurance companies.

[49] Evelyn Dellarosa, 'Kajian Komparatif Produk Asuransi Syariah dan Asuransi Konvensional Serta Kesesuaian Antara Ketentuan Asuransi Syariah dengan Penerapannya" (Studi Kasus Pada PT. AIA Financial Cabang Kota Malang') *Jurnal Ekonomi Universitas Brawijaya Malang*, 20.2 (2014): 17-18<file://C:/Users/HP/Downloads/1064-2086-1-SM (1).pdf>.

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

Conclusion

Based on the previous description, it can be concluded that there are very fundamental differences between conventional insurance and Sharia insurance. These differences cover many things, from matters of principle to matters of technical nature. Regarding the issue of high risk, conventional insurance determines if the high risk is known at the beginning (pre-contract) based on information from the prospective insured and or from the results of the underwriter's examination report (risk calculator) and then agreed upon and written in the policy, the insurance runs according to the agreement. However, if the risk occurs at the implementation stage, the contract automatically stops and cannot be continued. This differs from what is regulated in Sharia insurance. Sharia insurance does not recognize or have standard rules regarding high risk. This is because Sharia insurance applies the principles of takaful (mutual coverage) and *tabarru* so that any risk experienced by a participant will be borne jointly by all other participants. Sharia insurance can also carry out Sharia reinsurance as part of risk management efforts based on Sharia principles.

Author Contribution

Sri Zanariyah contributed to developing research ideas so that the legal issues to be studied can be identified. Furthermore, formulating the problem and compiling a theoretical framework, organizing the overall structure of the article including the abstract section. introduction, research results and conclusions, and determining the research method.

Rendy Renaldy is responsible for collecting data with literature studies and conducting an initial analysis of data obtained from research results, including contributing to the emergence of the momentum theory of contract occurrence. Rendy Renaldy also assists in analyzing insurance regulations in the Commercial Code and Civil Code and conducting a final analysis to determine conclusions on the research.

Ledy Famulia is responsible for collecting data related to the discussion of Sharia-based insurance, including developing abstracts and introductions, conducting analysis of Sharia-based loss insurance,

DOI: http://dx.doi.org/10.24042/adalah.v20i2.13849

and providing conclusions, especially concerning high risk and risk management in Sharia insurance. In addition, Ledy also contributes to the journal input process through OJS, adjusting articles to journal templates, and making revisions according to the review results.

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