

COZEN O'CONNOR MIDDLE EAST INSURANCE & SUBROGATION OVERVIEW

INTRODUCTION

The prevailing laws in the Middle East are generally based on and utilize elements of Shari'ah, The Koran and the Hadith together with what is termed as Latin law, influenced by Egyptian Napoleonic Code style law. The concept of insurance is not contradictory to Islam, for example, the payment of blood money by an individual to a deceased's family has been common through the ages. Further, the concept of risk mitigation, by using what can be termed as the law of large numbers, is and has been common practice in Islam. One of the explanations often cited for the low uptake for conventional insurance or what is termed as Islamic insurance, Takaful, in the Middle East is that insurance is viewed by many to be considered impermissible. It inherently contains elements of gharar (uncertainty) or, to put it into context, trading in risk, which is addressed in Shari'ah law.

Takaful is a Shari'ah compliant insurance scheme operated on the basis of shared responsibility and mutual obligations to safeguard its participants against a defined risk. As such, a Takaful policy differs from a conventional insurance policy—any surplus of funds at the end of the underwriting year is (in principle) divided between policyholders and the Takaful company in pre-determined proportions, similar in many ways to a mutual. The real issues facing a Takaful provider are how to construct a policy, a claims procedure, or an investment strategy that is Shari'ah compliant.

THE UNITED ARAB EMIRATES (INCLUDING DUBAI, ABU DHABI)

The law relating to insurance in the UAE was codified following the enactment of Federal Law No. #6 of 2007 (the "2007 Law") which created the UAE Insurance Authority ("IA"). The precise application of the 2007 Law is ongoing and is adopted from Jordanian insurance law. Currently the 2007 Law is very grey in its application and far from an all-encompassing regulatory system for conducting insurance or insurance mediation activities in the UAE.

As to laws governing insurance contracts, the UAE Civil Code has 29 articles in its insurance section relating to, inter alia, misrepresentation and non-disclosure, together with a specific subrogation clause at Article 1030 which sets out that:

"It shall be permissible for the insurer to take the place of the assured in respect of any indemnity paid to him for loss, in bringing the claims of the assured against the person who caused the loss out of which the liability of the insurer arose ..." There is no current law which

sets out how the day-to-day business of insurance should be conducted, nor is there any concept of binding precedent in the courts, which would give insurers and insureds some certainty as to how any court would resolve any conflicts that came before them. Finally, it is not permitted to purchase insurance from a non-UAE registered entity for liability arising out of a UAE onshore risk, although reinsurance written externally is permitted which results in the majority of large risks being fronted out 100 percent. Thirty-two foreign and domestic reinsurers sit in the Dubai International Finance Centre ("DIFC") which is an off shore financial district sitting onshore in the heart of Dubai City, together with many international financial organisations who base their Middle Eastern operations there. Overall there is a significant lack of local capacity and a lack of appetite for litigation although this is slowly changing after the severe economic downturn.

THE KINGDOM OF SAUDI ARABIA

Many Middle Eastern jurisdictions, such as Saudi Arabia, have historically not had any real concept of subrogation so there is quite a lot of structuring that needs to be done to protect the insurer/reinsurer's rights. That said Saudi Arabia is undergoing a wholesale review of its judicial system; but at present, litigation takes place in a series of short hearings with no pleadings or pre-trial procedures. Insurance disputes and claims to which insurers and reinsurers would want to bring subrogated actions are adjudicated by the Committee for the Settlement of Insurance Disputes. Insurance disputes are largely dealt with on paper submitted to the committee, there is relatively little in the way of oral advocacy. In Saudi Arabia there is no concept of judicial precedent and further, judgments are not reported. Any dispute, commercial or otherwise will be subject to Shari'ah law.

The business of insurance in Saudi Arabia is codified by the 2005 Law on Supervision of Cooperative Insurance Companies regulating for example, licencing of insurance companies, minimum capital requirements, and auditing. The insurance law is supplemented by a number of implementing regulations. Where there is a gap, general principles of Shari'ah apply.

An established insurance industry exists in Saudi Arabia. All insurance companies and brokers are regulated by the Saudi Arabian Monetary Agency ("SAMA") and all have to be licenced by SAMA, without which issued policies are technically void. Currently there are 32 approved insurers and reinsurers and all are co-operatives. Accordingly, this has resulted in a lack of local

capacity causing a high level of 100 percent fronting and/or reinsurance arrangements. Strictly speaking an insured must notify SAMA of all its foreign reinsurers.

THE KINGDOM OF BAHRAIN

Bahraini law is based on Napoleonic Code and the law relating to insurance is set out in the Legislative Decree No. 19 2001 promulgating the Civil Code. Article 741 of this code sets out insurers' rights to make a subrogated claim against a third party unless the third party is a close family member.

Bahrain is the insurance centre of the Middle East with many international operations managing their Middle Eastern subsidiaries through Bahrain whose law is a more mature than many other onshore and offshore legal frameworks in the Gulf Co-operation Countries.

KUWAIT

The legal system in Kuwait is also based on Napoleonic Code and the constitution of Kuwait directs that local law has to take account of Shari'ah principles and Islamic law. Whilst it may seem contradictory, the principle of subrogation is recognised under Kuwaiti law in the courts and is generally accepted as is the principle of contingency fees.

QATAR

Qatar has blossomed in the legal sense substantially since the Qatari Financial Centre ("QFC") was set up in 2005 in that, unlike the DIFC in Dubai which restricts insurance business to reinsuring local insurers, the QFC permits insurers in the QFC to write business direct for Qatari onshore companies, whether local or foreign. That said, the QFC has a lot of catching up to do compared to the Dubai International Finance Centre.

As is usual in the Middle East, insurance litigation is not prevalent locally in Qatar, not in the least due to the lack of local capacity but also due to the fact that local culture is not generally litigious and non-confrontational. Notwithstanding that, international principles of subrogation are recognised and routinely set out in contracts and are enforceable in Qatari courts.

CONCLUSION

This overview of insurance and subrogation work also provides a flavour of how the concept of insurance is viewed in the Middle East. By and large the law is a work in progress in the region. However, in view of the massive energy and construction projects being undertaken and planned, insurance and insurance related disputes will become more of an issue. With the growth of local capacity, primary and reinsurance, whether it be western style or Shari'ah compliant Takaful, continued insurance growth is forecast. With that, more litigation will follow and thus it is important for interested insurers to have a good understanding of the legal landscape.



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Marko Stamenkovic joined Cozen O'Connor in its London office in March 2010 where his practice includes subrogation, insurance and commercial litigation. He worked for a major international law firm from 2008-2009 in its Dubai and Abu Dhabi offices. He advised on claims applying local law, as well as matters pertaining to insurance in the Kingdom of Saudi Arabia ("KSA") and the Kingdom of Bahrain.

For the last eight months of his time in the UAE, Marko was the sole insurance lawyer for all its Gulf Co-operation Countries' ("GCC") offices and acted for major international insurers and reinsurers as well as Lloyd's syndicates and GCC insurers.

Marko maintains a sound understanding of UAE, KSA and Bahraini insurance law and continues to work with local lawyers, providing our clients with experienced corresponding counsel.

Contentious, commercial, regulatory, and corporate insurance experience:

- Advising on coverage issues for UAE, Bahraini, and other GCC insurers and Lloyd's syndicates in relation to GCC, Afghani, and UAE policy matters;
- Advising reinsurers and Lloyd's syndicates in relation to reinsurance claims arising out of UAE and Bahraini fronted insurance;
- Drafting and advising on third party agreements and insurance policies;
- Advising a major global insurer on the structuring, wording, and Shari'ah compliance of its Takaful products and operations for its financial lines division;
- Advising/drafting in relation to some of the largest UAE projects on insurance contract wordings and insurance/reinsurance arrangements;
- Conducting due diligence and negotiating clauses in SPAs
- Advising a global insurer on aspects of selling/constructing insurance and/or financial products in relation to Central Bank regulatory regime in UAE;
- Advising a U.S. aviation pool on regulatory requirements to establish insurance company branches in both the UAE and Saudi Arabia;
- Advising bodies corporate on insurance and regulatory implications of SPA's and IPO's in the UAE and KSA; and
- Advising and establishing U.S. insurers and insurance brokers on branch set up in the UAE.