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INSURANCE DEVELOPMENTS IN THE KINGDOM OF SAUDI ARABIA - A NEW INSURANCE AUTHORITY AND CIVIL TRANSACTIONS LAW.

The wholesale modern transformation of socio-economics within the Kingdom of Saudi Arabia is widely reported these days, with new updates on change and development filling the news pages on a daily basis.

To date, some two hundred foreign companies are reported to have established a regional headquarters in the Kingdom in procuring governmental work. Alongside this are key and major developments in the insurance sector, which is seen as a significant contributor to economic growth and development, and within Saudi law.

Insurance and reinsurance in Saudi Arabia is primarily governed by Shari'ah Law and by the 2003 Co-operative Insurance Companies Control Law, Royal Decree No M/32 ('The Insurance Law'). The Insurance Law applies to all registered companies undertaking insurance/reinsurance business in Saudi Arabia, including brokers and service providers. It is supplemented by the Implementing Regulations 2003, by the Insurance Market Code of Conduct, and by other regulations and circulars issued and published by the Saudi Central Bank (SAMA).

Insurance Authority

On 23 November 2023, a new independent regulatory body for the insurance sector, the 'Insurance Authority' (IA), commenced operations with the aim of enhancing the efficiency and stability of the insurance market, in line with Vision 2030. The establishment of the IA can be seen as a clear indicator of the importance of the insurance sector in the Kingdom.

The IA's key objectives include comprehensive regulation and supervision of the sector, safeguarding policyholders and beneficiaries' rights, establishing robust principles for contractual relationships, promoting innovation in products, and fostering greater awareness of practices.

The IA has convened its inaugural meeting with the CEOs of insurance companies, and is currently drafting a national insurance strategy to provide guidance for the industry.

Civil Transactions Law

In parallel, on 16 December 2023 the Civil Transactions Law, that was enacted by Royal Decree M/191 on 19 June 2023, came into effect with retrospective application.

The Civil Transactions Law ('CTL') contains more than seven hundred codified articles and is a considerable development on the primary legal foundations laid by Shari'ah principles. It will likely have a substantial impact on contractual interpretation. It may also have considerable impact on interpretation of contracts of insurance.

Insurance contracts are expressly referenced in the CTL at Part 5 of Section 2 'Nominate Contracts', with Article 607 stating that an *'Insurance contract is governed by the statutory provisions therein'*.

At Article 30 of the CTL, nominate contracts (such as insurance) are expressly governed by the contractual obligation provisions of Section 1 Chapter 1, which sets out various articles addressing contractual principles and elements such as, inter alia, formation and termination, defect, mistake, good faith and agency within contracting.

The CTL also provides that it applies to all cases except where any other statutory provisions contradict the CTL; and that where there is no relevant statutory provision, then Islamic Shari'ah principles shall be applied.

Thus, whilst the Insurance Law and Implementing Regulations governing insurance contracts are to prevail over any statutory conflict with the CTL, the CTL is likely to have bearing on the judicial interpretation of insurance contracts, as within the overarching principles of Shari'ah.

There are a number of provisions within the CTL that may be relevant to the interpretation of insurance principles and policies.

Utmost good faith and fair presentation of risk

Uberrimae fidei, i.e. the doctrine of utmost good faith, is the legal pre-contractual obligation on all parties to act honestly, not mislead, and to disclose and not withhold material information from the other party. It fundamentally underpins all insurance contracts.

There is no express provision referencing the insurer's and the insured's duty of utmost good faith in the Insurance Law. However, the Implementing Regulations do impose some relevant obligations on the insurer and the insured, and on brokers and agents, as follows:

- Article 24 provides that insurance brokers and agents *'shall provide sound advice to the insured and shall disclose all facts and risks associated with the insurance policy.'*
- Article 25 provides that insurance brokers and agents *'shall provide the insured with adequate information regarding the insurance policy and that there must be no inducement or deception.'*
- Article 53 provides that the insurer *'shall, before issuing an insurance policy, give the policyholder access to the terms, conditions and exclusions of the policy.'*
- Article 55 provides that *'the basis of information provided in the policy shall be the application submitted by the policyholder' including 'all material facts related to the insurance policy'.*

There are further provisions regarding insurers and insureds in the Insurance Market Code of Conduct. Regarding insurers:

- Article 11 provides that insurers must act with integrity in *'an honest, transparent and fair manner.'*
- Article 15 states that insurers *'must all communicate all relevant information to customers in a timely manner to enable them to make informed decisions.'*
- Article 16 provides that insurers *'must take reasonable measures to ensure the accuracy and clarity of the information provided to customers.'*
- Article 42 states that, prior to entering into an insurance contract, insurers *'must inform customers to provide full and honest disclosure of all relevant information needed to determine the insurance needs and underwrite the risk'.*

Regarding policyholders:

- Article 42 also states that *'the customer should only be expected to advise the insurer of information that a reasonable person would regard to be relevant'.*

There is no provision for remedy in the event that there is a breach of the duty.

In terms of fair presentation, Article 28 of the Code of Conduct imposes an *'honest representation'* obligation on insurers to *'not communicate any statements or advertising, directly or indirectly, that are inaccurate, misleading, exaggerated or deceptive'* and to provide insureds with certain information.

Whilst there is no equivalent honest presentation on insureds (other than Article 42 above), the CTL now builds on the above provisions by imposing equal obligations on both contracting parties pursuant to Article 41(2) whereby *'failure to inform any substantial term of the contract to the other party'* constitutes bad faith.

Article 61(2) of the CTL also provides that *'deliberate silence on a fact or circumstance constitutes a deceit if it established that the victim of deceit would not have concluded the contract had he known of this fact or circumstance'.*

Article 41(1) of the CTL may appear to provide a potential remedy insofar that *'the defaulting party, under bad faith, shall compensate the other party against any loss incurred.'* However, such compensation excludes *'the expected profit of the contract'*, and may therefore be of little assistance to insureds.

Good faith

In addition to the overarching Shari'ah principle of fairness, the CTL now codifies and supports the Shari'ah principle of good faith, which is implied into the performance of every contract including that of insurance.

Article 95(1) of the CTL provides that *'the contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith'.*

Article 95(2) of the CTL also provides that *'the contract shall not be limited to the obligations of the contracting party expressly contained in it but shall also embrace those which are appurtenant to it by virtue of the law, custom, and the nature of the contract'.*

Contracts of Adhesion

Article 40 of the CTL addresses contracts of adhesion and provides that *'acceptance in the case of a contract of adhesion is confined to adhesion of standard conditions which are drawn up by the offeror and which are not subject to review.'*

There are standard form wordings in relation to a number of products in KSA, such as co-operative health; inherent defects; medical malpractice and professional indemnity for auditors; and the Implementing Regulations require written approval from the regulator before any insurance products can be marketed.

Article 40 could conceivably include certain policies with standard conditions when it is the insurance company with superior bargaining power that determines the terms and conditions of the policy; and when the insured has no capability to modify and negotiate such terms, but rather just to accept or reject the wording as written.

Article 40 appears to imply that any non-standard conditions that may be found within a contract of adhesion are not deemed to be accepted, particularly if drawn up by the insurer and not reviewed by the policyholder.

And Article 96 of the CTL provides that, regarding contracts of adhesion that contain unfair provisions, *'it shall be permissible for the judge to vary those provisions to exempt the adhering party therefrom in accordance with the requirements of justice, and any agreement to the contrary shall be void'.*

Policy Interpretation

Article 104 (1) of the CTL states that *'if the phrase of a contract is clear, its meaning is not altered under the pretext of interpreting it in seek of the will of the contracting parties'.*

Article 104 (2) then states that *'if there is a chance for interpreting the contract, the common will of the contracting parties shall be sought, without being satisfied with the literal meaning of the words. This shall be guided by customs, the circumstances of the contract, the nature of the transaction, customary dealing between the contracting parties, their condition, and what should prevail of the trust between them. The terms of the contract interpret each other by giving each condition a meaning that does not conflict with other conditions'.*

In the event that Article 104 is applied to interpreting any policy ambiguity, it is likely that it will be in respect of seeking to ascertain what were the common intentions of the underwriters and the insured at the time of entering into the policy.

Article 42 of the CTL may have relevance to interpreting insurance contracts insofar that it provides that *'where the contracting parties have agreed on all the essential terms of the contract and have left certain details to be agreed later, the contract shall be concluded. Agreement on such details shall not effect the formation of the contract, unless otherwise stated.'* In the case of policy endorsements to be agreed, clear policy wording is, as always, necessary to avoid disputes arising from details.

In terms of contractual mistake, Article 57 of the CTL provides that contracts may only be rescinded if a mistake is a matter of substance, such as the object of the contract, or if the capacity of the other contracting party affected the consent. And pursuant to Article 59 *'mere arithmetical mistakes or clerical mistakes may not affect the validity of a contract'.*

These provisions may come to be read together with the Insurance Law and supporting regulations that provide that insurance policies must meet certain requirements. For instance, policies must be written in Arabic (and made available in English upon the customer's request), use simple language and sentence structure and be printed in clear, readable text, with no fine print; and they must bear the insurance company's signature and seal. Policies must specify all coverage benefits, general terms, conditions and exclusions. They must contain a schedule that specifies certain minimum information, including policy number, policyholder name and address, coverage period, coverage descriptions and limits, deductibles, conditions and exclusions. And they must also contain a description of the insured's duties after a loss, as well as a description of the claims handling and dispute resolution processes.

In the absence of clear policy wordings, there may be disputes, pursuant to the CTL provisions, as to what is a matter of substance as opposed to mere arithmetical or clerical error; and there may be disputes as to what precisely a policyholder had consented.

Where there is ambiguity, Article 104(3) of the CTL provides that *'doubt shall be interpreted in favour of the one who bears the burden of the obligation of the condition. As well as it is interpreted in favour of the compliant party in contracts of adhesion'.* Whereas the first limb of this clause may go in favour of either the insurer or insured (subject to the specifics of the dispute); the latter limb of the clause indicates that doubt will be resolved in favour of the insured as the compliant party to a contract of adhesion.

Agency

Articles 87 to 93 of the CTL deal with agency in contracting and confirm that such agency in contract may be conventional, legal or statutory. These articles set out provisions governing the scope and bounds of authority. Accordingly, and unsurprisingly, an agent may not act beyond the scope of authority, and a principal is bound by an agent acting within the scope of authority. Articles 87 to 93 will be of interest to insurance agents and brokers who should seek to clearly and unambiguously define and act within their authority, not least so as to avoid disputes.

Acts causing harm

The CTL also sets out various articles regarding tortious liability arising from harmful acts. Whilst these provisions would not directly concern an insurer-insured contractual dispute, they will be of relevance to liability policies and in subrogated claims where an insurer steps into the shoes of an insured against a liable third party.

Limitation

Pursuant to Article 143(1) of the CTL claims for compensation arising from harmful acts *'shall not be heard after the lapse of three years from the date of the damage's knowledge of the occurrence of the damage and the person responsible for it'*. Article 143 (1) also provides a longstop whereby *'in all cases, the lawsuit shall not be heard after the lapse of ten years from the date of the occurrence of the damage'*.

In terms of any insurer-insured dispute, the provisions of the 2014 Rules and Regulations for the Operation of the Committees for the Resolution of Insurance Disputes and Violations will remain, whereby insurance claims are time-barred five years from the date of loss crystallisation or the date the loss is demanded. The court can however disapply this limitation period if there is a reasonable excuse for not issuing within the period, such reasonable excuse being fact specific.

In terms of specific facts and circumstances it is perhaps also important to remember that Shari'ah law does not recognise the termination of a legal right by the passage of time.

Insurance Disputes Committee

Disputes relating to insurance contracts in Saudi Arabia are heard by the Insurance Disputes Committee (IDC) which composes a Primary Committee and an Appeal Committee.

Whilst exclusions, warranties and conditions precedent are recognised in law, the IDC is likely to disregard any terms that are seen as inequitable or unfair on one of the parties. In keeping with Shari'ah principles, the IDC is likely to disapprove of a party seeking to place excessive reliance on restricting clauses in striving to balance such with the principle of fairness.

The IDC also has the ability to look to foreign jurisprudence in the event that KSA law is silent on a particular point, with No.11 of the General Secretariat of the Committees for Resolution of Insurance Disputes and Violations providing that the IDC may *'settle suits in accordance with the nature of dispute and applicable rules and as agreed upon according to the law, comparative jurisprudence and international practices adopted in the insurance industry'*.

The CTL in many ways mirrors other civil codes within the Middle East, and regard may therefore be given to jurisprudence from such regional jurisdictions, as well as from further afield internationally. If so, any interpretation of comparative jurisprudence will again be carried out in accordance with the principles of Shari'ah.

Summary

The Kingdom of Saudi Arabia is undergoing vast and unprecedented socio-economic transformation and it is rapidly opening up to a global audience. The insurance and legal sectors are integral components to such dynamics, and this is being recognised with the establishment of a new Insurance Authority and the introduction of a new codified Civil Transactions Law to govern contractual relationships. It is also fair to say that, looking ahead, we can anticipate further important insurance and legal sector developments.

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