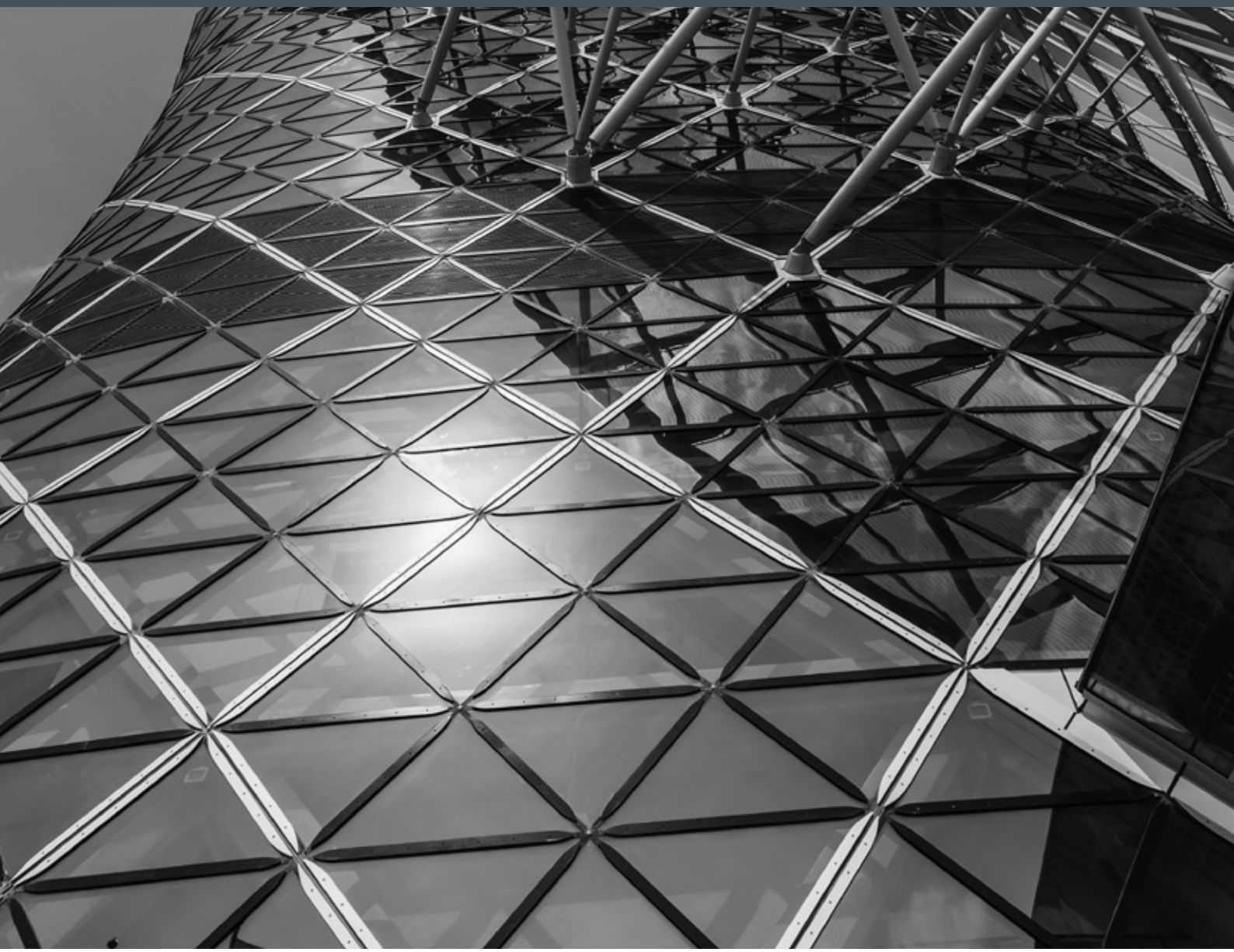

GOOD FAITH IN THE UAE - AN INSURANCE FOCUS

The concept of good faith differs between common law and civil law systems, particularly in relation to insurance and reinsurance contracts. This article highlights the key points to bear in mind in relation to good faith in the UAE and how this can impact on claims.

Please note that this article has been updated to take into account developments in the law since the originally published version.

All-Encompassing Duty

The concept of good faith is enshrined within UAE in relation to all contracts; parties must perform a contract "*in accordance with its contents and in a manner consistent with the requirements of good faith*." (Article 246 of the UAE Civil Code (Federal Law No. 5 of 1985)).

Although the concept of good faith is not expressly defined, Article 246 explains that the contract is not restricted to an obligation on the parties to simply abide by the express terms but also "*embraces that which is appurtenant to it by virtue of the law, custom and the nature of the transaction*". Amongst other things, parties must not seek to treat each other unfairly by reliance on the strict wording of a contract.

Obligations of the Insured – Non-Marine

The UAE Civil Code contains further specific requirements in the provisions relating to insurance. Although historically they have not expressly applied to reinsurance contracts, it was generally understood that the UAE Courts would likely apply these provisions to insurance and reinsurance contracts alike. In 2019, the UAE Insurance Authority (IA) issued Board of Directors' Decision No. 23 of 2019 (Concerning Instructions Organising Reinsurance Operations), which included a general provision that all legislation governing direct insurance business will be applied to reinsurance companies as far as they are consistent with the nature of reinsurance business and appears to clarify the position.

Disclosure

Pre-contract, Article 1032(b) of the UAE Civil Code makes it clear that an Insured must disclose all information that Insurers would wish to know when evaluating the risk. However, this obligation is tempered slightly by a corresponding requirement on Insurers to provide a proposal form, in which Insurers must set out questions on the matters that Insurers consider to be material to underwriting the risk (Article 6(2) of the Insurance Authority Board of Directors' Resolution No. 3 of 2010).

An Insured's duties don't end there; Article 1032(c) also provides that an Insured has an on-going duty of disclosure, post-contract, to notify Insurers of any matters occurring during the policy period that would lead to an increase in risk. This is of some comfort to Insurers; although most policies will contain wording putting an Insured under this obligation anyway, in the UAE the obligation is one of law and not merely one of contract (which may be subject to interpretation).

Consequences

If an Insured does not act in good faith and fails to disclose any information, or provides incorrect information, Insurers can require that the policy be cancelled from the date of the Insured's failure to disclose the relevant information (absent express wording in the Policy, this likely requires an application to Court) (Article 1033(1) of the UAE Civil Code).

If the failure is pre-contract, then the Policy will be void *ab initio*, but if the failure occurred during the policy period then the cancellation will take effect from a later date, most likely from the date the Insured knew or ought to have known the information that it should have disclosed to Insurers. Although we are not aware of any reported cases on this specific point it is likely that ultimately the remedy will be fact-specific and at the discretion of the Court (following advice from a Court-appointed expert).

If Insurers can prove bad faith by an Insured then Insurers can retain the premium paid by the Insured. If Insurers cannot prove bad faith, then Insurers must return the premium, or any part of it for the period that Insurers were not on risk.

Marine Insurance

Turning to marine insurance, the consequences to an Insured are slightly different.

Per Article 385(b)-(c) of the UAE Maritime Code (Federal Law No 26 of 1981), an Insured must still (pre-contract) accurately disclose all information that will enable Insurers to evaluate the risks and (post-contract) notify Insurers of any known increase in risks during the policy period.

If an Insured has given any incorrect information, or not disclosed matters that ought to have been disclosed, such that Insurers underestimated the risk, Insurers can require that the policy be rescinded (Article 388(1) of the UAE Maritime Code). Again, this likely requires an application to the Court, absent express wording in the policy.

Key differences to non-marine insurance are that:

- The UAE Maritime Code expressly provides that a Court can order rescission of the policy even if the non-disclosure/mis-representation has not affected the damage/loss (Article 388(2)).
- If Insurers can prove bad faith by the Insured, then Insurers can retain the whole premium. However, if Insurers cannot prove bad faith by the Insured, then Insurers may still retain half of the premium (Article 388(3)).

Unlike non-marine insurance law, the provisions of the UAE Maritime Code expressly apply to both insurance and reinsurance contracts (Article 370(2)).

Obligations of the Insurer

The obligations on Insurers set out in the UAE Civil Code are not phrased as starkly in terms of good faith / bad faith. By contrast, Article 3(2) of the IA Resolution 3 of 2010 provides that Insurers undertake to carry out their insurance practices on the basis of absolute good faith. Pursuant to IA Board of Directors Decision No. 7 of 2019 (Concerning the Administrative Fines Imposed by the Insurance Authority), Insurers can be fined AED50,000 for any breach of IA Resolution No. 3 of 2010.

Claims Handling

Article 1034 of the UAE Civil Code requires Insurers to pay the indemnity or sum due to the assured/beneficiary "*in the manner agreed upon when the risk materialises or when the time specified in the contract comes*".

Article 9(2) of IA Resolution No. 3 of 2010 provides that Insurers must decide on claims without "*unjustified delay*". This is not further defined and of course arguments can be made

as to whether delays are justified. Article 9 goes on to state that Insurers must make a decision within 15 days of receiving a full set of documents, although, again whether a set of documents is "full" may depend on a case by case basis.

Insurers must be mindful that it is, in theory, possible for Insureds to bring a damages claim against Insurers if they consider that a claim has been mishandled, or possibly incorrectly/wrongfully declined. Again, Insurers could potentially face a fine of AED50,000 from the IA if they do not comply with their obligations under IA Resolution No. 3 of 2010. Additionally, the IA may impose a fine of AED50,000 for failing to pay a claim once an insured loss has arisen (which we would argue must be subject to a reasonableness test).

Documents

More generally, Insurers are also subject to other provisions linked to the concept of good faith. For example, Article 7(2) of IA Resolution No. 3 of 2010 requires that the policy is printed clearly and in readable font, identifying exclusion clauses (or other clauses allowing Insurers to avoid a claim) in a different font or colour. Article 28(2) of the UAE Insurance Law (Federal Law No. 6 of 2007, as amended by Federal Law No. 3 of 2018) also requires that these clause should be counter-signed by the Insured. Indeed, as per the UAE Civil Code (Article 1028(c)), if these clauses are not "*shown conspicuously*" then they will be void.

This can be seen as an extension of the principle of good faith; Insurers must not/cannot seek to rely on illegible or inconspicuous terms to avoid liability; a point to bear in mind when preparing standard policy documentation.

As above, Insurers should also be careful to ensure that, at the time of contracting, proposal forms are provided that clearly request all information that Insurers consider material to the risk and which also set out the consequences of failing to provide such information (Article 6(3) of IA Resolution No. 3 of 2010).

Again, in the event of a failure to comply with any obligations under IA Resolution No. 3 of 2010, Insurers could incur a fine of AED50,000. There are also further specific fines that could be levied, for example: AED50,000 for failing to have clauses allowing Insurers to avoid a claim in bold letters, a different colour and endorsed/counter-signed and AED20,000 for failing to comply with the obligations of disclosure and transparency with clients in provision of information.

Note on IA fines

IA Decision No. 7 of 2019 also sets out a number of qualifying provisions relating to the imposition of fines.

Fines are to be doubled if the violation is repeated within one year, with a maximum fine amount of AED2million. It is not clear if the fines continue to double until they reach that sum or if there is just one "doubling", with all fines thereafter to be at first doubled value.

It is possible for any interested person to appeal the fines provided this is done within a deadline of 15 days. Supporting documents are required.

It is important to note that IA Decision No. 7 of 2019 does not just affect Insurers but applies to a wide variety of insurance professionals, who should ensure that they are familiar with this Decision and its ramifications.

DIFC Insurance Law

As the DIFC is a common law jurisdiction, the express insurance provisions of DIFC law are relatively limited and are set out within Part 4 of the DIFC Law of Obligations (DIFC Law No. 5 of 2005).

Article 62 of this law expressly provides that all parties to a contract of insurance are under a duty to act honestly and with the utmost good faith in relation to insurance contracts.

The duty will be satisfied where parties disclose all relevant facts, make no misrepresentations and both intend to, and do, carry out obligations with the utmost good faith. In the event of a failure to act in good faith, the other party may avoid the policy provided the breach of duty is material to the claim (Article 63).

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