

Insurance claims under Sharia Law

- Easy to decipher?

Sharia

Everyone has heard the phrase 'Sharia' but what does it actually mean when referring to insurance. Unlike Common Law, which is based on legal precedence, Sharia Law takes an alternative route. Sharia Law is considered by Muslims to be divine. The two main sources of Sharia Law are (i) the Holy Qur'an (a divine revelation to the prophet Mohamed) and (ii) Sunnah (the writings detailing the prophet Mohamed's sayings and actions).

Much has been done to create free zones¹ within jurisdictions influenced or based on Sharia Law in an attempt to ensure that entities can have matters resolved according to internationally recognized contractual and commercial norms. For example Dubai International Finance Center (DIFC) and Abu Dhabi Global Market and the Qatar International Court and Dispute resolution Centre (QICDRC) for QFC (Qatar Financial Centre) companies.

Insurance Contracts

An Insurance policy is a contract where the Insurer accepts a transfer of risk and agrees to pay for any loss or damage in exchange for a premium, subject to the terms and conditions of the policy.

Traditional (Western) insurance involves a high level of interest (Riba²) due to the types of products insurance premiums are invested in to provide a steady and safe return in the form of interest. Sharia Law also views traditional non Sharia insurance to contain too much contractual uncertainty. A Sharia compliant response was "takaful" insurance which seeks to remove any unfair or unjust advantage to

the Insurer by refunding surplus premium or using it as a provision for future claims.

Under Sharia, contracting parties are free to negotiate the terms of their contracts unless those terms relate to activities that are expressly prohibited or considered as unlawful under Shariah (Haram) such as uncertainty, alcohol, gambling, speculation and interest.

There should be no element of deception or excessive uncertainty (gharar) in the contract. Where there is uncertainty as to the fundamental terms of a contract, such as the subject matter and price, such contracts could be considered void.

Therefore, well established exclusion clauses, warranties and conditions precedent within insurance policies are generally enforceable provided they don't contain Haram elements.

Sharia & Insurance

Sharia Law lacks the concept of binding precedent meaning there is a wide discretion available to the judges in how they apply the law, rendering published rulings of limited practical value. This unpredictability makes it difficult to determine litigious matters from the outset.

Common issues during claims include betterment, where an Insured seek to profit from their loss, fraudulent claims being made, lack of insurance knowledge to understand fair settlement, insurers refusal to pay valid claims and lack of good faith whether intentional or not. The examples below highlight some of the common issues faced in insurance claims and how Sharia Law and Common Law would view them.

¹ An economic area ruled by its own specific regulations that do not apply to businesses outside the zone. Generally, GCC free zone environments are based on common law and fall entirely under the jurisdiction of the free zone. This allows businesses accustomed to operating in a non Sharia Law jurisdiction to conduct business under a legal framework they understand and are familiar with

² In Arabic, Riba literally means to increase or exceed and is used to refer to unequal exchanges, charges or fees for borrowing. It is deemed as an unjust and exploitative gain and such practice is strictly forbidden under Sharia Law. The most common form of Riba is interest charged on a loan or debt.

Examples

Acting in Good Faith - Villaggio Mall Owner (claimant) vs Qatari Insurer

This example shows how the courts and Qatari Civil Code expect Insurers to practice "good faith" and ensure Insured parties are made aware of pertinent clauses or exclusions.

A claim was submitted before Qatari courts following a fire which broke out in a mall owned by the claimant resulting in severe damage. The policy contained an arbitration clause within the general terms which Insurers referred to resulting in the case being initially dismissed.

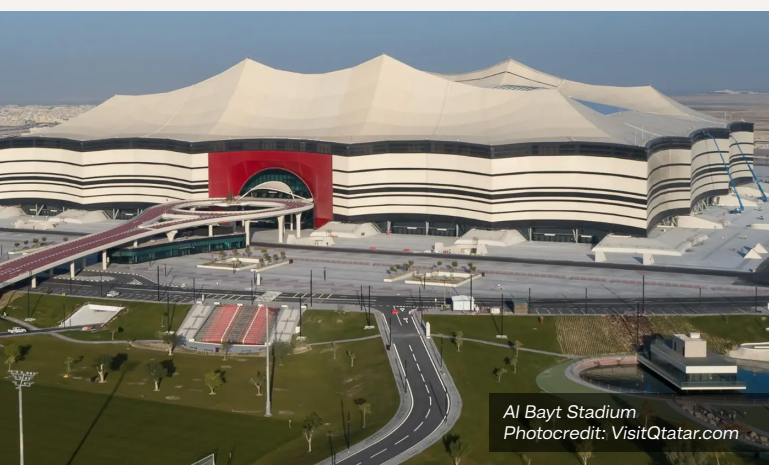
Subsequently, the court of appeal held that the arbitration clause should have been contained separately within the insurance policy to be enforceable and the Insured made aware of its inclusion.

Article 775 of Qatari Civil Procedure Code was cited by the claimant and potentially derives back to the Sharia concept of "good faith" to ensure all parties are treated equitably and made aware of the terms and conditions of any contract.

There is also no concept of "caveat emptor"³ in Sharia Law; if something has been found to cause harm or put another party at a gross disadvantage the law seeks to compensate the affected party; this can be brought back to the concept "defect option" which allows the buyer to return an item after the sale of the contract⁴.

Relevance: Take extra steps to ensure you have acted in good faith - Always make the policy holder aware of the arbitration clause.

Source: Qatar- Insurers and Arbitration Clauses | Al Tamimi & Company



Al Bayt Stadium
Photocredit: VisitQatar.com

Statute Bar - A claim never dies under Sharia Law

Sharia based courts do not consider time limits for claims to be made although, in recent years, many GCC Sharia based jurisdictions have imposed time bars within their Civil Codes⁵. However, these cannot be used as a sole defense and depending on the circumstances judges may decide that certain claims will not be subject to these clauses⁶.

Under Common Law, the *Pirelli General Cable Works Ltd V Oscar Faber & Partners* (1983)⁷ case was considered "statute barred" due to the length of time it took to be brought to court. The claim arose due to a chimney constructed with defective material in 1969 but was only brought to court in 1977.

Under Sharia Law, the verdict for the case above, would have been most likely in favour of the claimant on the premise that if a tort has occurred then the party affected should be compensated, regardless of the time elapsed.

A Sharia based court may refuse to dismiss a claim on the basis of a time bar where it is considered unfair to the claimant, and if rights are lost with the passage of time; this would contravene the principles of Sharia Law. Fraud and bad faith do not have time limits and are ageless.

Saudi Arabia has recently introduced a decennial liability which shows some appreciation of Common Law, as recoveries after 10 years are often impractical and difficult to pursue.

Appreciation of any limitations and how judges would interpret and apply them should be considered carefully when examining Insurance claims in Sharia based jurisdictions.

Relevance: Always appreciate that a lawful claim may never die under Sharia Law until it has been rectified irrespective of any contractual clauses or statutes.

Unjust enrichment – A Sharia version of Betterment

Castellain v Preston (1883) determined that the Insured "shall be fully indemnified but shall never be more than fully indemnified".

Case 205/2015 in Qatar shows an instance where the judge agreed the Insured be compensated for the total loss of their vehicle based on the declared value contained within the policy and not the actual value at the time of loss.

³ Buyer Beware – A person cannot seek the assistance of a court of law merely because a bad bargain has been made (David Barker, *Law Made Simple*, 13th Edition)

⁴ Different jurisprudential schools specify a time period of 1 or 2 days after the purchase depending on the nature of the item and context of the transaction

⁵ See cases such as *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* (2022) DIFC CA 016

⁶ See Articles 880 and 883 of the UAE Civil Code – Defects need to be discovered within 10 years from final handover and claims made within three years of notifying the defendant of the defect

⁷ *Law Made Simple Edition 13 2014 Page 243 - Actions in tort must be brought within six years of the cause of the action accruing*

In doing so “*unjust enrichment*” occurred allowing the Insured to effectively profit from the loss. Although this contravenes the Sharia, it highlights some of the potential irregularities and uncertainties faced when Insurance disputes are escalated to Sharia based courts. Sharia Law considers unjust enrichment as a form of interest which is strictly forbidden. The Sharia views interest charged on loans or debts as a reason which prevents people from being exposed to the normal uncertainties of business and life in general - the lender in effect is perceived as having a risk free investment.

Similarly under Common Law, the principle of indemnity would apply and the Insured would have received compensation according to the actual value of their vehicle at the time of loss.

Relevance: Ensure that the declared value of a vehicle is correct and that mention of depreciation is contained separately within the policy.

Source: <https://www.almeezan.qa/RulingPage.aspx?id=1601&language=ar&selection=>

Liquidated Damages after contract termination or Unjust Enrichment

Under Sharia Law the legal basis for claiming compensation will be based on tortious liability and not contractual liability.

In this landmark case brought to the Abu Dhabi courts, the claimant granted rights to the defendant to build a tower on a plot of land and use it in return for a premium and according to the terms of the contract. The defendant only paid 50% of the premium prompting the claimant to file a successful case with the courts to terminate the contract and claim AED 64,048,522 for loss of profit sustained due to the defendant's failure to execute the contract.

Usually the UAE courts would not apply LD (liquidated damage) and penalty clauses after termination of the contract; the claimant is required to prove the actual damages sustained, contrary to many Common Law⁸ cases.

Under Sharia Law LD clauses are not inherently enforceable because they seek to penalise⁹ someone for a speculative or uncertain loss, which goes against the principles of Sharia Law.

Relevance: LD or penalty clauses can be applied under Sharia Law as long as (i) the loss was not due to force majeure, (ii) the loss has actually been incurred due to the delay, for example loss of rental income, (iii) pre-agreed (an independent agreement is present granting damages in the event the contract is terminated and an actual loss incurred)

Source - <https://www.tamimi.com/law-update-articles/abu-dhabi-court-of-cassation-judgment-on-liquidated-damages-clauses-after-termination/>

Summary

Systems are being evolved in Sharia Law based jurisdictions to accommodate well established commercial and construction contractual norms such as the IDC (Insurance Dispute Council) in Saudi Arabia.

In conclusion, and as demonstrated within the examples above, it is vital that parties to insurance contracts pay close attention to the terms and conditions agreed to and understand their implications within Sharia Law jurisdictions. Parties should fully consider that such insurance contracts are governed ultimately by Sharia Law, not Common Law, and be aware of any applicable articles within the respective civil code relating to insurance. Acceptable practice and norms under Common Law based insurance contracts will not always apply or be permissible within Sharia based jurisdictions.

Works cited:

1. Najraj Aarti, 26 October 2019 - Explainer: What is the state of the GCC's legal industry?, www.gulfbusiness.com
2. Salma Waheed, 1 September 2021, Islamic Sharia in the Legal Orders of Saudi Arabia and Kuwait – pages 1-22
3. Faizah Syihab, June 2016, THE DOCTRINE OF KHIYAR AL-AYB IN PROTECTING THE CUSTOMER'S RIGHTS – pages 1-14
4. Pavel Kostyuchenko, Herry Setiadie, Adrian Pradana – PWC Indonesia, August 2017, Sharia Insurance Reserving
5. Najraj Aarti, 24 August 2019 Explainer: Understanding Saudi Arabia's new decennial liability law www.gulfbusiness.com
6. Alfred Thornton, 13 January 2022, Clyde & Co - Saudi Arabia: Changes in the construction liability regime and the introduction of a mandatory inherent defects insurance scheme www.clydeco.com
7. (George Vlavianos, Hasan El Shafiey – 30 August 2020 - DLA Piper - Recoverability of damages under Qatari Law – www.dlapiper.com)
8. Malcolm Hyde, Brendan McCarthy, James Deacon - CILA Property Insurance Law and Claim, 2010 edition
9. Barker, Law Made Simple Edition 13 2014
10. Andrew Jones, Paul Prescott, Gabriel Olufemi – 15 June 2023 – Dentons - Notices and Time Bar: key considerations from Panther v. MESC



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⁸ See cases such as *Dunlop Pneumatic Tyre Co V New Garage (1915)* and *Cellulose Acetate v Widnes Foundries (1933)*

⁹ (George Vlavianos, Hasan El Shafiey – 30 August 2020 - DLA Piper - Recoverability of damages under Qatari Law – www.dlapiper.com)