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HARMONISATION OF *TAKAFUL* (ISLAMIC INSURANCE) REGULATION—A REALISTIC GOAL OR IMPROBABLE IDEAL?

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Takaful (Islamic insurance) is a form of cooperative insurance involving the allocation and spreading of risk. Its phenomenal growth in Malaysia, Pakistan and the Gulf States and its untapped potential in Indonesia, China and India have resulted in global insurance markets like the United Kingdom (UK) and Australia positioning themselves as leading conventional and Islamic financial centres. This article examines the *takaful* regulations in Muslim-majority jurisdictions where *takaful* is offered on a large scale, such as Malaysia, Bahrain, Pakistan, Saudi Arabia, the United Arab Emirates (UAE), Indonesia, Egypt, Brunei, Sudan and Iran, with respect to the core *takaful* principles of good faith, disclosure, non-misrepresentation, insurable interest, reciprocity in claims handling and the ensuing remedies. This, along with an analysis of the international *takaful* standards set by the Islamic Financial Services Board, will be benchmarked against Australia's and the UK's progressive insurance provisions in assessing the viability of harmonising *takaful* regulations amongst Muslim-majority jurisdictions.

I. INTRODUCTION

Insurance and *takaful* are important vehicles of social and economic growth and sustenance for nations in supporting consumer needs as well as forming the infrastructure facilitating economic activity. Although *takaful* is still in its infancy as compared to conventional insurance in terms of regulatory maturity and market penetration,[1] it has a tremendous potential for growth owing to a widely dispersed global Muslim population of about 1.8 billion, which accounts for 25% of the world's population.[2] This, along with current low market penetration levels, the ethical character and financial stability of Islamic financial products, a rapid Muslim population growth primarily in Asia, the Middle East and North Africa, the Gulf Cooperation Council (GCC) States and Europe, and the further boost by foreign petrodollar support,

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1 Ernst & Young, "Global Takaful Insights 2013: Finding Growth Markets" (October 2013) at 2, online: Ernst & Young <http://www.ey.com/Publication/vwLUAssets/ET_Global_Takaful_Insights_2013/$FILE/EY-global-takaful-insights-2013.pdf> [E&Y, "Global Takaful Insights 2013"].

2 Ernst & Young, "The World Takaful Report 2012: Industry Growth and Preparing for Regulatory Change" (April 2012) at 18, online: Ernst & Young <http://uaelaws.files.wordpress.com/2012/04/the-world-takaful-report-2012.pdf> [E&Y, "The World Takaful Report 2012"].

makes *takaful* an industry worth taking note of.[3] This is indeed what is being done by global insurance giants like the UK, with its progressive regulatory accommodation of Islamic finance via the *Financial Services Act 2012*,[4] and Australia, via the comprehensive review of its taxation laws so as to provide parity of tax treatment with conventional insurance.

Takaful contributions worldwide grew from US$9.4 billion in 2011 to US$11 billion in 2012, with Saudi Arabian cooperatives accounting for 51% of it,[5] followed by Malaysia, which has the world's largest family *takaful* market. Other markets and smaller operators, however, appeared to struggle as a result of pursuing an insufficient number of risks in attempting to increase their gross written contributions.

One of the main challenges facing the industry is the lack of a simplified regulatory framework across borders that can support the development of larger regional players.[6] Although the *takaful* industry has experienced rapid growth in the GCC countries, the development of its *takaful* regulation "varies significantly country by country".[7] This has resulted in varying levels of policyholder protection from one country to another, causing confusion amongst consumers and facilitating arbitrary treatment by *takaful* operators. Hence, there is a strong need for "more consistent application of regulation throughout the region, which has the potential to provide sufficient policyholder protection, and thus safeguard the long-term viability of the takaful industry".[8] Improved regulations in *takaful*-offering nations can therefore go a long way in realising its potential to overtake the conventional insurance market penetration there.[9]

In fact, in terms of *takaful* business risks for 2013, 'evolving regulations' (which are significantly different across jurisdictions and lack uniformity) has been ranked as the second highest risk factor affecting the industry, next only to 'rising competition', with 'political risks' only coming in eighth.[10] In this context, major *takaful*-offering nations have so far focused their attention on operational efficiency and solvency requirements within their jurisdictions. There is therefore a strong need for introducing greater standardisation in regulatory frameworks across jurisdictions[11] in a substantive sense to promote the growth of *takaful* through the fundamentals of consumer confidence and sustainable profitability. This can in turn be achieved by addressing the core principles of *takaful*, as they apply across these jurisdictions in

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3 Ann Black & Kerrie Sadiq, "Good and Bad Sharia: Australia's Mixed Response to Islamic Law" (2011) 34(1) UNSWLJ 383 at 389.

4 (UK), 2012, c 21.

5 E&Y, "Global Takaful Insights 2013", *supra* note 1 at 16.

6 *Ibid* at 20.

7 A M Best, "GCC Takaful Regulation Lags Behind Market Growth" (28 January 2013), online: A M Best <http://www3.ambest.com/ambap/default.asp>.

8 *Ibid*.

9 E&Y, "Global Takaful Insights 2013", *supra* note 1.

10 *Ibid* at 39, 41.

11 E &Y, "The World Takaful Report 2012," *supra* note 2 at 45. This has also been echoed in the context of Malaysia and other jurisdictions having greater alignment with the international regulatory standards and best practices issued by the IFSB: see Dr Zeti Akhtar Aziz, "Finance and the Real Economy: Fostering Sustainability" (Speech delivered at the Islamic Development Bank Regional Lecture Series on Islamic Economics, Finance and Banking, 19 December 2012), online: Bank Negara Malaysia <http://www.bnm.gov.my/index.php?ch=en_speeches&pg=en_speech_all&ac=455&lang=en>.

the legal relationship between *takaful* operators and participants and the resulting remedies.[12]

As *takaful* is similar to a cooperative or mutual form of insurance, with the addition of *Shariah* compliance requirements,[13] the core principles of utmost good faith, disclosure, non-misrepresentation, insurable interest, reciprocity in claims handling and the ensuing remedies, apply to both *takaful* and conventional insurance. In fact, industry experts have stressed the importance of *takaful* following "the best regulatory and compliance practices currently deployed in the insurance sector".[14] This is apparent from the work done by the Islamic Financial Services Board ("IFSB") and the International Association of Insurance Supervisors ("IAIS") towards harmonising *takaful* regulatory standards by adapting IAIS core principles on corporate governance to *takaful*. Such an endeavour is founded on the realisation that a level playing field in terms of standards is crucial for *takaful* operators in all markets in order for continued growth, without having to reinvent the wheel.[15]

The advent of standard-setting bodies like the Bahrain-based Accounting and Auditing Organisation for Islamic Financial Institutions ("AAOIFI") in 1991 and more pertinently, the Kuala Lumpur-based IFSB in 2002, also points towards the industry recognising the importance of the harmonisation of core principles to its sustained growth and development.[16]

Hence, the aim of this article is to examine the viability of harmonisation (or standardisation) of core *takaful* principles across Muslim-majority jurisdictions where *takaful* is offered on a large scale. The issue of whether *takaful* should form part of mainstream mercantile law, as is the case in most of the countries examined herein except for Saudi Arabia and Sudan, where it forms part of *Shariah* law instead, is therefore beyond the scope of this article. It follows therefore that the much-debated philosophical question on the feasibility of the harmonisation of *Shariah* and the common law (and/or civil law for that matter) is also beyond the scope of this article, as it involves a complex analysis which would form the subject matter of another article.[17]

This article is divided into several parts in making the case for the harmonisation of core *takaful* principles among major Muslim-majority *takaful*-offering nations.

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[12] Haemala Thanasegaran, "Making an Entrance—Can Australia Contribute to *Takaful* (Islamic Insurance) Law Reform?" (2013) 24 Insurance Law Journal 104 at 106 [Thanasegaran, "Making an Entrance"].

[13] Hania Masud, "*Takaful*: An Innovative Approach to Insurance and Islamic Finance" (2011) 32(4) University of Pennsylvania Journal of International Law 1133 at 1141; Mark Hoyle, "Takaful Insurance: Squaring the Insurance Circle in Islamic Law" in Julian Burling & Kevin Lazarus, eds, *Research Handbook on International Insurance Law and Regulation* (Cheltenham: Edward Elgar Publishing, 2012) at 525.

[14] William Tsang & Peter Hodgins, "Hong Kong: Asia Insurance Review Takaful Conference 9-10 May 2012" (24 July 2012), online: Mondaq <http://www.mondaq.com/>.

[15] Dr Bassel Hindawi, "Issues in Regulation and Supervision of Takaful (Islamic Insurance)" (Paper delivered at the IAIS General Meeting, 19-21 October 2006), online: IAIS <http://www.iaisweb.org/__temp/issues_in_regulation_and_supervision_of_Takaful.pdf>.

[16] Dahlia El-Hawary, Wafik Grais & Zamir Iqbal, "Diversity in the Regulation of Islamic Financial Institutions" (2007) 46 The Quarterly Review of Economics and Finance 778 at 779.

[17] See Zulkifli Hasan, "Harmonisation of *Shariah* and Common Law in the Implementation of Islamic Banking in Malaysia" (Paper delivered at the International Seminar on Shariah and Common Law, 20-21 September 2006).

This introduction is followed by Part II, which sets out *takaful* in operation *vis-à-vis* conventional insurance. Part III then evaluates the application of the core *takaful* principles as they apply in Malaysia and the other major *takaful* nations mentioned herein. An analysis will be made in Parts IV and V of the extent to which the IFSB standards provide for this, as benchmarked against Australia's and the UK's progressive conventional insurance regulations (subject of course to *Shariah*-based requirements being met where necessary). Part VI concludes by evaluating the realistic potential for harmonisation of these core *takaful* principles amongst the world's *takaful* elite.

II. *Takaful* in Operation

A. *Takaful vis-à-vis Conventional Insurance*

Islamic finance refers to the application of *Shariah* or Islamic law to financial and commercial matters, with *takaful*, or Islamic mutual or cooperative insurance, forming a crucial component. The primary sources of *Shariah* are the *Quran* (Islam's holy book), the *Sunnah* (actions and sayings of Prophet Muhammad) and *Ijmaa* (scholarly consensus in interpreting the *Quran* and *Sunnah*). Islamic finance has developed as a modern alternative vehicle of economic protection and investment for Muslims in place of conventional finance.[18] *Takaful* has likewise developed as an innovative financial instrument in complementing the advent of Islamic banking. *Takaful* is in essence an agreement between participants (insureds) to jointly guarantee themselves against any defined loss or damage. Each participant makes a contribution (premium) to the *takaful* fund corresponding with the risk involved, whereupon the said participant will receive a sum of money from the fund in the event of a loss arising. In terms of *takaful* operations, family *takaful* refers to life insurance and general *takaful* refers to general insurance.

Takaful is essentially a scheme where the participants are the insureds as well as the insurers and therefore share in the profit and loss of the operator, unlike insurance companies, where the risk is borne solely by the insurers. Separation of the participants' and shareholders' funds is also central to *takaful*, with *takaful* operators being paid explicit contractual fees from the return on investments for managing the participants' funds on their behalf. After these fees are deducted, any remaining surplus is shared by the participants, including underwriting profits, which are not available to conventional insurance policyholders (except in mutual insurance).[19]

Takaful is similar to conventional insurance to the extent that both provide financial protection against unforeseen risks, and are based on similar actuarial approaches to mortality rates, morbidity rates, loss ratios, claims experience and discounted cash

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[18] Masud, *supra* note 13 at 1133.

[19] Thanasegaran, "Making an Entrance", *supra* note 12 at 107. See also Nico Swartz & Pieter Coetzer, "*Takaful*: An Islamic Insurance Instrument" (2010) 2(10) Journal of Development and Agricultural Economics 333 at 336, 338.

flows for calculating the price of risk and the evaluation of liabilities.[20] Hence, the concept of insurance where common resources are pooled in order to help the unfortunate does not contradict the teachings of Islam, which in any event propagates solidarity, mutual help and cooperation among members of the community.[21]

As far as conventional insurance at common law is concerned, the development of utmost good faith can be traced back to Lord Mansfield's landmark pronouncement in *Carter v Boehm*,[22] which formed the basis for its subsequent statutory enunciation in s 17 of the *Marine Insurance Act 1906* (UK).[23] The duty of utmost good faith has generally been described as a positive obligation on both parties to act honestly towards each other without deception or underhandedness,[24] which spans throughout the entire course of the insurance contract. This concept has in fact been taken further in the United States (US) and developed into a tort of bad faith giving rise to general and even punitive damages against the insurer where there is a lack of good faith and fair dealing towards the insureds.[25]

When considering *takaful*, on the other hand, it is interesting to note that there is no Islamic contract law as such which recognises the freedom of contract or an explicit pronouncement of good faith for that matter. Nevertheless, the existence of the same has been recognised by academics in the area.[26] Their reason for doing so is primarily because of the fact that the lack of a *Shariah* equivalent to the Western notion of utmost good faith does not necessarily mean that it does not exist in Islamic jurisprudence. The opposite is in fact the case.[27] The fundamental reason for this is that, "Western commercial regimes can be compared as among themselves, as they all aspire to efficiency, but the shari'a aspires primarily to *respect for Islam*."[28]

Hence, where good faith has been explicitly used by Western legal systems to ensure that equity and justice is not overridden by the overarching need for efficiency and certainty in the law, there has been no need for the same in *Shariah*.[29] This is because in *Shariah*, economic efficiency is viewed in the context of religious values, which permeate the entire legal system, wherein fair dealing is viewed as a paramount value resonating throughout the *Shariah*.[30]

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20 Ajmal Bhatty, "Takaful in North America: A Global View for Local Perspective" (July-September 2010), online: New Horizon <http://www.islamic-banking.com/resources/7/NewHorizon%20Previouse%20Issues/NewHorizon_July-Sept-10.pdf>.

21 Thanasegaran, "Making an Entrance", *supra* note 12 at 107.

22 (1766) 3 Burr 1905 at 1909, 1910, 97 ER 1162 at 1164, 1165 (KBD).

23 1906 (UK), 8 Edw VII, c 41.

24 Haemala Thanasegaran, "Insurers' Good Faith in Malaysia: Does a Search for a Fairer Balance in Non-Marine Insurance Contracts lead to Australia?" (2004) 15(2) Insurance Law Journal 143 at 148.

25 John Parks & Robert Heil, "Insurers Beware: 'Bad Faith' is in Full Bloom" (1973) 9(1) *The Forum* 63.

26 See Mohd Ma'sum Billah, "Sources of Law Affecting '*Takaful*' (Islamic Insurance)" (2001) 2(4) International Journal of Islamic Financial Services 1 at 5, 6; Renat Bekkin, "Islamic Insurance: National Features and Legal Regulation" (2007) 21 Arab LQ 109 at 110, 113; Hassan Misbahul, "Good Faith and Fairness in Commercial Transactions: The Common Law, the Civil Law and the Islamic Perspective" (Paper delivered at the International Islamic University Malaysia, 4 April 1996).

27 Nicholas HD Foster, "Islamic Commercial Law (II): An Overview" (2007) InDret 1 at 17, online: <http://www.indret.com/pdf/405_en.pdf>.

28 *Ibid* [emphasis added].

29 *Ibid* at 13.

30 *Ibid* at 14.

Examples of this are aplenty. The *Quran* in *Verse 16:91*, for instance, states, "Fulfill the covenant of God when you have entered into it, and break not your oaths after you have confirmed them." In *Verse 4:29*, it goes on to state, "O you who believe eat not up your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual good will."

It is therefore not surprising that the existence of utmost good faith in *takaful* contracts in a practical sense is apparent from the implicit understanding that claimants should not indulge in profiteering through false or inflated claims; that *takaful* agents receive a salary equivalent to a share of the *takaful* operator's profits instead of a commission *per se*; and that the termination of a *takaful* policy would entitle the insured to a refund of premiums with the corresponding surrender value less only administration fees.[31]

The difference between conventional insurance and *takaful*, however, is that insurance is based on a contract of buying and selling, where one party sells protection and the other party buys it at a certain cost, whereas contributions paid by participants in *takaful* are treated as *tabarru* (donation) and *mudarabah* (silent partnership) in order to remove the element of *gharar* (uncertainty). A bilateral relationship exists in insurance, where the aim is to eliminate risk for the individual, whereas *takaful* is a collective endeavour to eliminate the risk within a given social group.[32]

Fundamentally, however, conventional insurance contracts contain the elements of *Al-gharar* (uncertainties in the operation of the insurance contract), *Al-maisir* (gambling as a consequence of the presence of uncertainty) and *Al-riba* (interest which is strictly prohibited by the *Quran* in *Verse 2:275*),[33] all of which contravene the rules of *Shariah* and are prohibited in *takaful*.[34] Conventional insurance also cannot assure Islamic policyholders that the returns paid out in claims settlement come from investments in companies producing or dealing in *halal* (or permissible), as opposed to *haram* (or prohibited), goods or services like alcohol, gambling, weapons sale, pork, *etc*.[35]

Lastly, all *takaful* operators should have a *Shariah* Supervisory Board within their organisation to advise on the *Shariah* compliance of their *takaful* products and practices, which is not the case with conventional insurance companies that are run like any other corporate entity.

B. *Takaful Models in Operation*

There are currently four types of *takaful* models in operation globally. The *Mudharabah* model is an Islamic commercial profit-sharing contract between the

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31 Ramin Cooper Maysami & John Joseph Williams, "Evidence on the Relationship between Takaful Insurance and Fundamental Perception of Islamic Principles" (2006) 2(4) Applied Financial Economic Letters 229 at 230.

32 Tom Baker & Jonathan Simon, eds, *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago: University of Chicago Press, 2002) at 37, 38.

33 "Allah has permitted trade and has forbidden [interest]." See Masud, *supra* note 13 at 1139.

34 Central Bank of Malaysia, *The Central Bank and the Financial System in Malaysia—A Decade of Change 1989–1999* (Kuala Lumpur: Bank Negara Malaysia, 1999) at 256.

35 Au Pui Khuan & Ramin Cooper Maysami, "Islamic Insurance in Malaysia: A Successful Model in Operation" (1998) 6 (March) Int'l Ins L Rev 79 at 79.

participants and the *takaful* operators, who actually manage the investment and underwriting functions.[36] Net surplus in the *takaful* pool is shared between the participants and the *takaful* operator based on an agreed ratio. This model is used in Brunei, the UAE and Indonesia.[37]

The *Wakalah* model is in turn fee-driven, where the participants collectively own the *takaful* fund, while the *takaful* operator manages the investment and underwriting functions for a fixed fee (irrespective of the returns) and does not share in the surplus of funds, which reverts to the participants.[38] This model is used in Sudan, the UAE and the UK.

The Hybrid or Combined model is an amalgam of the *Mudharabah* and *Wakalah* models, where the *Wakalah* contract is used for underwriting activities, while the *Mudharabah* contract is adopted for investment management activities, with the participant being entitled to enjoy a return on the premium paid and the *takaful* operator being paid a fee for its services.[39] This model has been successfully offered in Malaysia and Bahrain with a growing consensus amongst international standard-setting bodies like the AAOIFI and IFSB that it should be the leading practice, as it leverages on the strengths of both the *Mudharabah* and *Wakalah* models.[40]

The *Wakalah Waqf* model in turn requires the setting up of a legal entity through an initial donation from the shareholders for the benefit of the participants. Only the investment and returns from the fund (not the donation itself) may be used to pay claims, with the other characteristics being similar to the *Wakalah* model.[41] This model is widely used in Pakistan.

The Cooperative Insurance model is the only permissible model applicable in Saudi Arabia from January 2012, as a result of a directive from the Saudi Arabian Monetary Authority ("SAMA"). According to the Cooperative model, the policyholders are entitled to 10% of the net surplus (with no *Wakalah* fee). However, if a company makes losses, it will not be transferred to the policyholders. This model differs slightly from *takaful per se* in that there is no need for separation of the policyholders' and shareholders' funds; investments are not required to be held in accordance with the principles of *Shariah* (but in general are); and a *Shariah* Board is technically not required.[42]

III. Application of the Core *Takaful* Principles

A. *Takaful Regulations in Place*

It would be useful to first set out the principal regulations governing *takaful* in the countries examined herein, before proceeding to evaluate the application of the core *takaful* principles therein.

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36 Central Bank of Malaysia, *supra* note 34 at 257.

37 Saudi Arabia used to follow this model but has from 2012 moved to the Cooperative Insurance model following a directive from the SAMA.

38 E&Y, "Global Takaful Insights 2013", *supra* note 1 at 77.

39 *Ibid* at 78.

40 Swiss Re, "Islamic Insurance Revisited" (September 2011) at 6, online: Swiss Re <http://www.biztositasiszemle.hu/files/201110/islamic_insurance_revisited_final[1].pdf>.

41 E&Y, "Global Takaful Insights 2013", *supra* note 1 at 78.

42 *Ibid* at 79.

Malaysia is amongst the forerunners in the industry in terms of *takaful* regulation and market share, with a dual mainstream mercantile law system where *takaful* and insurance operate alongside each other.[43] *Takaful*, like conventional insurance, is therefore subject to the civil law and civil court structure of Malaysia[44] and not *Shariah* or Islamic law *per se*, although it has *Shariah*-based rules in some areas to reflect certain fundamental differences from conventional insurance. Both the *takaful* and conventional insurance industries are regulated by the Central Bank of Malaysia through the *Islamic Financial Services Act 2013* ("*IFSA 2013*")[45] (which repeals the *Takaful Act 1984*)[46] and the *Insurance Act 1996*[47] respectively. All *takaful* operators are, however, required to establish a *Shariah* Advisory Council to ensure *Shariah* compliance by the operator; are subject to the National *Shariah* Advisory Council of the Central Bank ("NSAC")'s rulings on *Shariah* issues pertaining to Islamic finance; are subject to the *Shariah Governance Framework* and *Takaful Operating Framework* established by the Central Bank in 2011 and 2012 respectively; and are now required to separate their life and general business with a minimum capital of RM100 million, via s 16 of the *IFSA 2013*. The *IFSA 2013* nevertheless retains much of the licensing and *takaful* fund establishment requirements originally set out in the repealed *Takaful Act 1984*.

This dual mainstream mercantile law system is similar to that practised in Pakistan, Bahrain, Egypt, Indonesia, Iran, the UAE and Brunei. Saudi Arabia and Sudan, on the other hand, have adopted a more conservative form of *takaful* which is subject to *Shariah* law *per se*.[48]

Bahrain enacted its *Central Bank of Bahrain and Financial Institutions Law*[49] in 2006, which is separated into modules regulating both conventional insurance and *takaful* by extensively covering business conduct, intermediaries and enforcement. The Central Bank of Bahrain and the Bahrain Insurance Association have actively promoted clear regulation and strong industry association and look to further improve standards and attract new business by releasing a new regulatory framework for *takaful* in 2014. This has helped in positioning Bahrain as a major *takaful* hub in the region.[50]

Pakistan has two separate enactments, namely the *Takaful Rules 2012*[51] and the *Insurance Ordinance 2000*,[52] with the former establishing a Central *Shariah* Board to

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43 As at 31 January 2014, there are 14 *takaful* operators in Malaysia: see International Cooperative and Mutual Insurance Federation, online: <http://www.*takaful*.coop/index.php?option=com_content&view=article&id=46&Itemid=40>.

44 See *Federal Constitution of Malaysia*, arts 73, 74, 75, 121(1), 121(1A), the Ninth Schedule; Mohamed Ismail bin Mohamed Shariff, "The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law" [2005] 3 MLJ cv.

45 Act 758, Malaysia

46 Act 312, Malaysia. See *IFSA 2013*, *supra* note 45, s 282, which repeals and replaces both the *Takaful Act 1984* and the *Islamic Banking Act 1983*, Act 276, Malaysia.

47 Act 553, Malaysia.

48 Haemala Thanasegaran, "Growth of Islamic Insurance (*Takaful*) in Malaysia: A Model for the Region?" [2008] SJLS 143 at 148, 149.

49 Decree No 64 of 2006, Bahrain.

50 See Bernardo Vizcaino, "Analysis—Slower Takaful Growth Prompts Strategy Rethink" (18 April 2012), online: Reuters <http://uk.reuters.com/>. As at 31 January 2014, there are 10 *takaful* operators in Bahrain: *supra* note 43.

51 SRO 877(I) of 2012, Pakistan.

52 XXXIX of 2000, Pakistan.

oversee *Shariah* issues; permitting conventional insurance companies to have *takaful* windows; establishing more formal risk management procedures; and regulating investments by *takaful* operators. Unlike Malaysia, however, *takaful* operators in Pakistan have to comply with both the *Takaful Rules* and the *Insurance Ordinance*, with the latter having more extensive provisions for insurance market conduct to fill in any gaps left by the former.[53]

Like Malaysia, Egypt is based on the civil law system with *Shariah* governing only inheritance and personal matters; but Egypt has no separate *takaful* regulation to govern the same.[54] The *Supervision and Control of Insurance in Egypt Act*[55] and the *Executive Regulations of 1981*[56] as amended by *Act No 91 of 1995* and *Act No 156 of 1998* regulate its conventional insurance and *takaful* industries, which are in turn monitored by the Egyptian Financial Supervisory Authority under the auspices of the Ministry of Investment.

Both conventional insurance and *takaful* in the UAE are regulated by the *Federal Law No 6 of 2007.* It is complemented by *Board Resolution No 3 of 2010 on Professional Practice and Code of Conduct for Insurance Companies* and *Board Resolution No 4 of 2010 on Takaful Regulation.* The former sets out desirable market practice, whilst the latter provides for the phasing out of *takaful* windows; endorses the *Mudharabah*, *Wakalah* and Hybrid *takaful* models; and sets up a Supreme Committee for *Fatwa* and *Shariah* Supervision, which issues binding legal opinions for the *takaful* industry.[57]

Brunei introduced the *Takaful Order 2008*[58] to regulate and supervise *takaful* operations in the country, monitored by the Brunei Monetary Authority.[59]

Under the Iranian Islamic insurance model, on the other hand, companies operate in a conventional way within the Islamic financial system, with both *takaful* and conventional insurance being regulated by the *Iran Insurance Act 1937*.[60]

Indonesia's conventional insurance and *takaful* industry are regulated by the *Law of the Republic of Indonesia No 2 of 1992*, with *takaful* development still in its infancy. Although Indonesia with its large Muslim population is a potential gold mine for *takaful* growth, it requires time to achieve sustained growth due to its large rural population and the developing stage of its regulations.[61] In 2011, Indonesia's Capital Market and Financial Institution Supervisory Agency, BAPEPAM-LK, published a

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53 As at 31 January 2014, there are 5 *takaful* operators in Pakistan: *supra* note 43.

54 As at 31 January 2014, Egypt has 8 *takaful* operators: *ibid*.

55 Act No 10 of 1981, Egypt.

56 Decree No 322 of 1981, Egypt.

57 Peter Hodgins, "Board Resolution No. 4 of 2010 Concerning Takaful Insurance—UAE" (20 September 2010), online: Mondaq <http://www.mondaq.com/>. As at 31 January 2014, UAE has 12 *takaful* operators: *supra* note 43.

58 S 100 of 2008, Brunei.

59 See Syazwan Sadikin, "Order to Expand and Strengthen Islamic Banking and Takaful" (25 November 2008), online: The Brunei Times <http://www.bt.com.bn/>. As at 31 January 2014, there are 2 *takaful* operators in Brunei: *supra* note 43.

60 As at 31 January 2014, there are 16 operators in Iran offering *takaful* and insurance: *ibid.*

61 Thanasegaran, "Making an Entrance", *supra* note 12 at 111, 112. As at 31 January 2014, Indonesia has 5 *takaful* operators: *supra* note 43.

draft regulation concerning the *Shariah* Supervisory Board's role in *takaful*[62] and proposed to phase out *takaful* windows within the next three years.

Takaful in Saudi Arabia and Sudan, on the other hand, is regulated by *Shariah per se*. The *Insurance and Takaful Act 2003* governs both industries in Sudan, with *takaful* requiring *Shariah* compliance through its *Shariah* Supervisory Board.

The SAMA, which is Saudi Arabia's governing authority for both industries, passed the *Cooperative Insurance Companies Control Law 2003*,[63] the *Implementing Rules for the Cooperative Insurance Companies Control Law 2003*[64] and the *Insurance Market Code of Conduct Regulation 2008*, which officially allow foreign and local insurance companies to establish and register both insurance and *takaful* operators in the country so long as they are conducted in accordance with *Shariah*. From January 2012, however, it has moved from the pure *takaful* model to the cooperative insurance model, motivated primarily by a comprehensive health insurance programme.[65]

A review of the comparatively more progressive *takaful* regulations found in Pakistan and Bahrain shows that much emphasis has generally been given to licensing requirements, *Shariah* governance and compliance, risk assessment and audit management aspects of *takaful* rather than clear provisions on the core *takaful* principles and remedies involved.[66] Up until the recent enactment of the *IFSA 2013*, Malaysia was in the same boat under the *Takaful Act 1984*'s regulatory regime.

Due to the competitive global insurance market and *takaful*'s largely untapped potential for growth, it is crucial that regulations addressing key substantive *takaful* principles are introduced, preferably in a harmonised manner to promote sustained growth of the industry. In addressing this, the following segment will set out the core *takaful* principles mentioned herein as they relate to Malaysia's *IFSA 2013,* as a useful guide. This will set the stage for an examination of the application of the said principles in the rest of the jurisdictions identified herein.

B. *Malaysia*

Although infrastructural and operational initiatives have been introduced by the Malaysian government over the years, the *IFSA 2013* marks the first substantive review (and consequent repeal) of the *Takaful Act 1984,* which was saddled with numerous shortcomings.

The *Takaful Act 1984* lacked an express provision that sets out the fundamental duty of utmost good faith owed by both parties to a *takaful* contract as a result of being *uberrimae fidei* in nature.[67] Instead, the common law principle codified in s

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62 See BAPEPAM, *Draft Regulation for Takaful and Retakaful*, online: Islamic Finance Indonesia <http://islamicfinanceindonesia.blogspot.com/2011/03/regularions-bapepam-draft-regulation.html>.

63 Royal Decree No M/32, 2 Jumada II 1424, Saudi Arabia.

64 Royal Decree No M/32 of 2/6/1424H, Saudi Arabia.

65 Deena Barakah & Shakir Ahmed Alsaleh, "The Cooperative Insurance in Saudi Arabia: A Nucleus to Health Reform Policy" (2001) 21 International Proceedings of Economics Development Research 6 at 6.

66 Thanasegaran, "Making an Entrance", *supra* note 12 at 112.

67 *Uberrimae fidei* contracts or contracts of utmost good faith refer to a class of contracts where certain material facts to the contract are within the exclusive knowledge of one party and hence, the other party depends upon the good faith of the party with knowledge to disclose it.

17 of the *Marine Insurance Act 1906* (UK) formed the basis for Malaysian *takaful* (and insurance law).[68] Section 17 provides that: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

The *Marine Insurance Act 1906* (UK) and the common law have been applicable to Malaysia with respect to *takaful* and insurance (mercantile matters) as a result of the legal framework of Malaysia (a former colony) being based on English common law, save where it is inconsistent with specific Malaysian legislation to that effect.[69] Paragraph 5(9) of Schedule 9 to the *IFSA 2013* now provides a marked improvement to this with respect to consumer *takaful* contracts,[70] in that it explicitly requires "the *duty of utmost good faith* to be exercised *by a consumer and licensed takaful operator* in their *dealings* with each other, *including the making and paying of a claim*, after a contract of *takaful* has been entered into, varied or renewed".[71] The explicit imposition of a general duty of utmost good faith which encompasses claims handling as well is a welcome improvement. However, the provision would have been more comprehensive had it applied to **all** *takaful* contracts and not just consumer contracts (as utmost good faith is a fundamental principle of *takaful* and insurance) and provided for a remedy in the event of its breach by either party. As a result, a few uncertainties in the law remain.

First, what is the remedy for a breach of para 5(9) of Schedule 9 to the *IFSA 2013* with respect to consumer *takaful* contracts? Is it avoidance of the contract or damages proportionate to the loss suffered? Secondly, would s 17 of the *Marine Insurance Act 1906* (UK) still form the basis for the application of the duty of utmost good faith in *non-consumer takaful* contracts, in which case participants would be bound by the solitary draconian remedy of avoidance of the contract with only a refund of premium paid in the event of breach, which is a grossly inadequate remedy from their perspective?

The *Takaful Act 1984* also lacked any provision setting out the participant's pre-contractual duty of disclosure and duty to refrain from making misrepresentations. As a result, the said duties were governed by the common law and ss 18 and 20 of the *Marine Insurance Act 1906* (UK). These provisions require the insured to disclose information and refrain from making misrepresentations that the *insurer* would deem

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[68] It is a common law principle which was introduced in *Carter v Boehm*, *supra* note 22, and also forms the basis for marine and non-marine insurance contracts in most Commonwealth jurisdictions. The Law Commission and Scottish Law Commission have, however, since enacted the *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), 2012, c 6, which came into force on 6th April 2013. Sections 2(5)(a) and 2(2) of the new Act now modify the duty of utmost good faith with respect to consumers in consumer insurance contracts to a duty to take reasonable care not to make misrepresentations to the insurer.

[69] *Civil Law Act 1956*, Act 67, s 5. See Nik Ramlah Mahmood, *Insurance Law in Malaysia* (Malaysia: Butterworths, 1992) at 43. Judicial acknowledgement of the application of s 17 of the *Marine Insurance Act 1906* (UK), *supra* note 23, in Malaysia is apparent in cases like *Leong Kum Whay v QBE Insurance (M) Sdn Bhd* [2006] 1 MLJ 710 (Putrajaya CA) and *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v Capital Insurance Bhd* [2004] 1 MLJ 353 (Kuala Lumpur CA).

[70] Paragraph 2 of Schedule 9 defines a "consumer *takaful* contract" as "a contract of takaful entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business or profession".

[71] *Supra* note 45 [emphasis added].

material, which imposes the onerous 'prudent insurer' and 'mere influence' tests of materiality of information to be disclosed on the participant of a *takaful* product.[72]

To compound matters, the *Takaful Act 1984* also failed to address the remedies available in the event of breach of these obligations, thus leaving the all-or-nothing common law remedy of avoidance of contract and a refund of premium paid as the only recourse available, instead of a more balanced remedy that is commensurate with the loss suffered.

The *IFSA 2013* addresses this shortcoming in the following manner. Section 141(1) sets the stage by providing that "Schedule 9 sets out the pre-contractual duty of disclosure and representations for *contracts of takaful* in Part 2, and the remedies for misrepresentations relating to *contracts of takaful* in Part 3."[73] Paragraph 4 of Schedule 9, which relates to *non-consumer takaful contracts*, essentially adopts the (Australian)[74] voluntary disclosure mechanism requiring the participant (before the contract is entered into) to disclose matters he or she knows to be relevant to the *takaful* operator in accepting the risk or the rates and terms to be applied or that which "a reasonable person in the circumstances" could be expected to know to be relevant. Paragraph 5 of Schedule 9, which relates to *consumer takaful contracts*, in turn adopts the inquiry-based disclosure mechanism requiring the participant (before the contract is entered into) to take reasonable care not to misrepresent to the *takaful* operator when answering specific questions posed by the operator or when confirming or amending any matters previously disclosed as provided by the *takaful* operator in writing, with the standard of care required being "what a reasonable consumer in the circumstances would have known".[75]

Paragraphs 4(3), 5(5) and 5(6) of Schedule 9 go on to provide that the *takaful* operator is deemed to have waived any non-disclosure or incomplete disclosure by proposers if the non-compliance was not pursued further by them.

The *IFSA 2013*'s provisions pertaining to pre-contractual non-disclosure appear to be fairly comprehensive and should be lauded, as they tackle the obligations clearly and address both consumer and non-consumer *takaful* contracts as envisioned by s 141 of the Act. The drawback, however, is that the remedies for breach of the duty are not clearly set out. It may have been presumably intended to be covered by the remedies appearing in Part 3 of Schedule 9, which apply to misrepresentations. However, the headings and the provisions in Part 3 only make specific reference to remedies for misrepresentation. Although it could be argued that many alleged non-disclosures would in essence amount to misrepresentations, especially with respect to consumer *takaful* contracts requiring inquiry-based disclosure, it might nevertheless be best to provide for a residual remedy for a breach of the duty of disclosure *per se*, as (it will be shown in the following paragraphs) the remedies for misrepresentation in Part 3 are in themselves not comprehensive in their coverage.

With respect to pre-contractual misrepresentation by consumers, para 7(3) of Schedule 9 classifies it as deliberate or reckless, careless, and innocent. Paragraph

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72 Thanasegaran, "Making an Entrance", *supra* note 12 at 114, 115.

73 *Supra* note 45 [emphasis added].

74 See *Insurance Contracts Act 1984* (Cth), s 21.

75 *IFSA 2013*, *supra* note 45, para 6(2) of Schedule 9, which is based on s 3 of the *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), *supra* note 68, and s 21A of the *Insurance Contracts Act 1984* (Cth).

7(4) provides that a deliberate or reckless misrepresentation is where the consumer knew that the misrepresentation was untrue or misleading or did not care if it was *and* knew that the misrepresentation was relevant to the *takaful* operator or did not care if it was. It is for the *takaful* operator to prove on a balance of probability that a misrepresentation is deliberate or reckless, with a dishonest representation being regarded as being made deliberately or recklessly.[76] On the other hand, a misrepresentation is careless or innocent under para 7(6) if it is not deliberate or reckless.

Pursuant to para 13(2), misrepresentations made in family *takaful* contracts (whether consumer or non-consumer) in effect for more than 2 years cannot entitle the *takaful* operator to avoid the contract, unless the "*takaful* operator shows that the statement was on a material matter or suppressed a material fact *and* that it was *fraudulently* made or omitted".[77] Materiality of the matter is dependent on whether if it was known by the *takaful* operator, it would have led to its refusal to issue a *takaful* certificate or the imposition of terms less favourable to the participant; and should the *takaful* operator be permitted to avoid the contract, it must refund payments received thereunder.[78]

As for misrepresentations made in a *consumer* family *takaful* contract in effect for 2 years or less or in a *consumer* general *takaful* contract, para 15 entitles the *takaful* operator to avoid the contract, refund payments received thereunder and refuse all claims, should the misrepresentation be deliberate or reckless. If the misrepresentation was careless or innocent, then para 16 goes on to provide that if the *takaful* operator would not have entered into or renewed the contract on any terms, it may avoid the contract, refund payments received thereunder and refuse all claims; but if it would have entered into or renewed the contract on different terms (other than on the contribution amount), the contract is treated as being on those terms; and if it would have entered into or renewed the contract by charging a higher *takaful* contribution, then it may proportionately reduce the amount payable under the claim.

The explicit imposition of a duty not to make pre-contractual misrepresentation along with a detailed set of remedies for its breach is indeed a welcome improvement. However, the provisions would have been more comprehensive had they applied to **all** *takaful* contracts instead of omitting non-consumer general *takaful* contracts and non-consumer family *takaful* contracts in effect for 2 years or less, in which case there appear to be no residual remedies applicable in the event of misrepresentations in such contracts. As a result, would s 20 of the *Marine Insurance Act 1906* (UK) apply to those *takaful* contracts, in which case participants would again be bound by the sole remedy of avoidance of the contract with only a refund of premium paid in the event of breach, which is a grossly inadequate remedy?

Stemming from the duty of disclosure is the requirement for *takaful* operators to provide a clear warning in *takaful* proposal forms to prospective participants of the

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[76] *IFSA 2013*, *supra* note 45, paras 7(7) and 7(5) of Schedule 9 respectively. It should be noted that para 7(8) contains a balanced provision that unless the contrary is shown, it is presumed that the consumer knew that a matter about which the *takaful* operator asked a clear and specific question was relevant to the *takaful* operator.

[77] *Ibid* [emphasis added].

[78] *Ibid*, paras 13(4) and 13(3) of Schedule 9 respectively.

consequences of pre-contractual non-disclosure on the *takaful* contract. Although the *Takaful Act 1984* is silent on this obligation, paras 4(4) and 5(7) of Schedule 9 to the *IFSA 2013* adequately provide for this (with respect to non-consumer and consumer *takaful* contracts respectively) by requiring *takaful* operators, before a *takaful* contract is entered into, varied or renewed, to *clearly inform* a proposer *in writing* of the pre-contractual duty of disclosure, and that it shall *continue until* the contract is entered into, varied or renewed.[79]

Related to this is the question of the relationship between the *takaful* operator and the *takaful* agent and the effect of information and knowledge received by the *takaful* agent during negotiations for the purposes of formation or variation of the *takaful* contract. Paragraph 12(1) rightly reiterates the previous position in s 66 of the *Takaful Act 1984* that the *takaful* agent is deemed to be the *takaful* operator's agent in this regard and hence, the agent's knowledge is deemed to be that of the *takaful* operator.

A major drawback in *takaful* contracts thus far has been the inclusion of the 'basis of contract' clause in *takaful* proposal forms that has the effect of turning answers and information provided by participants into warranties, thereby severely reducing the requirement for *takaful* operators to have been 'induced' by any misrepresentation for it to be actionable. Almost all *takaful* proposal forms in Malaysia contain 'basis of contract' clauses, which prove detrimental to unwary participants. Nevertheless, this has been the lopsided position in favour of *takaful* operators in Malaysia, despite there being no juridical basis for its use. Paragraph 10 of Schedule 9 addresses this problem by abolishing the use of 'basis of contract' clauses in *consumer takaful* contracts. This provision appears to have been based on s 6(2) of the *Consumer Insurance (Disclosure and Representations) Act 2012* (UK) which, as its name and scope suggests, rightly applies to only consumer insurance contracts. The *IFSA 2013*, on the other hand, in replacing the *Takaful Act 1984*, is an Act which should be applicable to all types of *takaful* contracts in Malaysia and hence, should cover both consumer and *non-consumer takaful* contracts. Section 24 of the *Insurance Contracts Act 1984* (Cth) would, in this sense, be a better provision to emulate in that it abolishes 'basis of contract' clauses in *all* contracts of insurance.

Insurable interest is a crucial principle in *takaful* which is necessary to ensure that adequate compensation is paid out should a genuine loss arise. The Task Force to Study the Establishment of an Islamic Insurance Company in Malaysia had, in 1982, recommended its inclusion into the *Takaful Act 1984* but it was omitted when the legislation was drafted. This is yet another serious omission in *takaful*, which has only been partially rectified by the *IFSA 2013*. Paragraph 3 of Schedule 8 provides that a *takaful* participant should have a "permissible *takaful* interest" in the person whose life is covered in the family *takaful* contract, at the time the contract is entered into and at the time the benefits are payable. The lack of a permissible *takaful* interest at the time of contract would render the contract void but if it was lacking after the conclusion of the *takaful* contract, the *takaful* operator shall pay the participant such moneys as specified by the Central Bank, after which the family *takaful* contract shall terminate. There is, however, no provision setting out a general requirement or

[79] This provision takes into account the improvement made to s 22 of the *Insurance Contracts Act 1984* (Cth) by the *Insurance Contracts Amendment Act 2013* (Cth).

otherwise[80] for the existence of a permissible *takaful* interest in *all takaful* contracts with consequences stipulated for its non-compliance. By default therefore, ss 4–6 of the *Marine Insurance Act 1906* (UK) may in turn apply by virtue of s 5 of the *Civil Law Act 1956* (Malaysia), requiring a permissible *takaful* interest to exist in the subject matter of the (general) *takaful* contract at the time of loss, but some clarity on the application of these provisions to *takaful* is long overdue.

The lack of an explicit utmost good faith provision for *takaful* thus far has also contributed to the widespread use of exclusion clauses and strict construction of policy terms by *takaful* operators in defeating participants' otherwise legitimate claims, as well as other claims settlement practices such as undue delay, rejection and reduced settlement of claims, as a matter of course.[81] In fact, this is evident from the case of *Seah Cheoh Wah v Malayan Banking Bhd*,[82] where the *takaful* operator, which issued a Mortgage Redemption Term Assurance ("MRTA") policy under a housing loan taken by the insured, refused to settle the outstanding loan upon the insured's death 6 months later, on the basis that despite there being an official receipt issued to the insured for payment of the premium, a *takaful* policy had yet to be issued at the time of insured's death, thereby preventing a valid *takaful* contract from coming into existence. This was rejected by the High Court, which held that the payment of the premium, followed by the acceptance thereof and the issuance of an official receipt by the *takaful* operator, was sufficient to give rise to a valid *takaful* contract, as there was no declaration in the MRTA form that the policy will only take effect once a policy is issued.[83]

This decision in favour of the participant is only a partial vindication as it has raised the possibility of *takaful* operators in the future being able to avoid liability by inserting a declaration in *takaful* proposal forms to the effect that *takaful* contracts shall only be effective once a policy is issued. For a *takaful* operator to be entitled to do this after accepting the risk and premium paid would surely amount to a lack of good faith on its part. This is because the participant would have at that point of time performed all his or her obligations in good faith and have no control over the duration of time it may take the *takaful* operator to issue a policy.

As explained earlier in the article, para 5(9) of Schedule 9 to the *IFSA 2013* provides a marked improvement to this with respect to *consumer takaful* contracts, in that it explicitly requires "the *duty of utmost good faith* to be exercised *by a consumer and licensed takaful operator* in their *dealings* with each other, *including the making and paying of a claim*, after a contract of *takaful* has been entered into, varied or renewed".[84] The explicit imposition of a general duty of utmost good faith which encompasses claims handling as well is a welcome improvement, but it would have been more effective had it applied to **all** *takaful* contracts and not just consumer contracts, and provided for a remedy in the event of its breach by either party. As a result, participants making a claim under *non-consumer takaful* contracts would appear to be at a disadvantage.

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80 As is the case with respect to general insurance contracts in Australia pursuant to ss 16, 17 of the *Insurance Contracts Act 1984* (Cth).

81 Thanasegaran, "Making an Entrance", *supra* note 12 at 116.

82 [2009] 7 MLJ 485 (Johor Bahru HC).

83 Thanasegaran, "Making an Entrance", *supra* note 12 at 115, 116.

84 *Supra* note 45 [emphasis added].

Malaysia, which has positioned itself as a leader in *takaful* regulation and market practice, needs to pave the way in addressing this in a comprehensive manner and not discriminating between consumer and non-consumer *takaful* contracts with respect to utmost good faith in general and claims handling in particular. Non-consumer contracts cannot be left to rely merely on the Central Bank's *Guidelines on Claims Settlement Practices*, as amended in 2003, directing *takaful* operators to conduct themselves in a fair and reasonable manner in settling claims,[85] and on the flexible and proactive way in which the Mediators of the Financial Mediation Bureau of Malaysia have resolved the disputes appearing before them.[86]

Having set out the core *takaful* principles in question along with the recent legislative improvements made in Malaysia, this will form a useful guide for the article to now examine and set out the application of the said principles in the other Muslim-majority jurisdictions herein. The ensuing analysis is followed by a snapshot of the position in a tabular form in Appendix 1, for ease of reference.

C. *Bahrain, Pakistan, Brunei, Indonesia and Egypt*

An examination of the laws regulating *takaful* in Bahrain, Pakistan, Brunei, Indonesia and Egypt reveals that they focus primarily on licensing requirements, *Shariah* governance and compliance, risk assessment and audit management aspects of *takaful*. There are no provisions dealing with the core *takaful* principles and remedies discussed herein, despite utmost good faith being a fundamental principle of *takaful* (and insurance). This is particularly surprising in the case of Bahrain and Pakistan, as they are considered to have in place comparatively more progressive *takaful* regulations (along with Malaysia) than the other jurisdictions examined herein.

D. *United Arab Emirates*

Conventional insurance and *takaful* in the UAE are regulated by the *Federal Law No 6 of 2007* as complemented by *Board Resolution No 3 of 2010 on Professional Practice and Code of Conduct for Insurance Companies* and *Board Resolution No 4 of 2010 on Takaful Regulation*. Only *Board Resolution No 3 of 2010 on Professional Practice and Code of Conduct for Insurance Companies*, however, refers to some of the core *takaful* principles discussed herein, in that it has provisions relating to the duty of utmost good faith and the need for a statutory warning to be given to prospective participants of the consequences of non-disclosure and misrepresentation.

Article 3(2) provides that:

> The insurance company shall... perform its works on basis of the *absolute good faith as key principle* of carrying out works of insurance and *adopt disclosure and transparency* when operating in the insurance market and *dealing with the clients*

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[85] See *Guidelines on Claims Settlement Practices*, clause 3.4. A major drawback is that the Guidelines have no clear sanctions set out as being applicable in the event of non-compliance.

[86] See Financial Mediation Bureau, "Annual Report 2008" at 20.

> and the relevant official entities particularly, in respect of all the documents, advertisements, propaganda, declarations and researches.[87]

Article 6(3) goes on to provide that:

> The insurance specimen application as well *shall include a warning* on *consequences of not giving information or giving incorrect or inaccurate information* or contrary to reality or true state of affairs as to legal effects with respect to the insured rights.[88]

Both these provisions indicate that the duty of utmost good faith is important to *takaful* (and insurance) in the UAE, albeit the provisions could have been further clarified by the inclusion of consequences or remedies for non-compliance with them. The scope of art 3(2) could have also been broadened to cover the insurers' conduct during claims settlement, as well as address the insureds' reciprocal obligation of good faith towards insurers in terms of making pre-contractual disclosure and refraining from making misrepresentations.

E. *Sudan*

Both insurance and *takaful* in Sudan are regulated by the *Insurance and Takaful Act 2003* ("*ITA 2003*"), with *takaful* requiring *Shariah* compliance through its *Shariah* Supervisory Board.

The only core *takaful* principle addressed therein pertains to insurable interest. Section 99 provides that:

> (1) No policy of insurance shall be issued to any person on the life of any person where that person has no insurable interest in the life or event.
> (2) For the purposes of subsection (1) the following persons shall have, an insurable interest:-
> (a) A parent of a minor or the guardian of a minor on the life of a minor;
> (b) A husband, on the life of his wife;
> (c) A wife, on the life of her husband;
> (d) Any person on the life of another upon whom he is wholly or in part dependent for support or education;
> (e) A company or other person, on the life of an officer or employee of the company or that other person;
> (f) A person who has a pecuniary interest in the duration of the life of another person, in the life of that person to the extent of that pecuniary interest at the outset only.

This is a positive step towards ensuring that adequate compensation is paid out in the event of a genuine loss arising. However, addressing the existence or otherwise of insurable interest in general *takaful* (and insurance) as well as the other core principles of good faith, disclosure, remedies, *etc*. would go a long way in strengthening consumer confidence in the industry.

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87 [emphasis added].
88 [emphasis added].

F. *Saudi Arabia*

The *Cooperative Insurance Companies Control Law 2003* ("*CICCL 2003*"), the *Implementing Rules for the Cooperative Insurance Companies Control Law 2003* ("*IR 2003*") and the *Insurance Market Code of Conduct Regulation 2008* ("*IMCCR 2008*") regulate both insurance and *takaful* in Saudi Arabia, which have, since 2012, moved to the cooperative insurance model. Only the latter two regulations, however, refer to some of the core *takaful* principles discussed herein, namely 'basis of contract' clauses, insurable interest, disclosure and misrepresentation, statutory warnings and claims handling.

Article 55 of the *IR 2003* refers to 'basis of contract' clauses and insurable interest by providing that:

> An application submitted by a client or his representative shall provide *the basis for the information contained in the policy*. When an application is filled out, the following must be taken into account:
>
> (1) The existence of an *insurance interest on the part of the insured party* consisting of the possibility of his incurrence of a loss or liability due to damage to the object of the insurance.
> (2) A statement of all substantive facts pertaining to the object of the insurance.
> (3) The objective or purpose of the insurance *to restore the insured party to his financial position immediately preceding the loss*.
> (4) The insurance shall not be in violation of laws, regulations and instructions.[89]

The reference to "insurance interest" or insurable interest is a positive measure in the regulation which goes so far as to stipulate as its objective the restoration of the insured to his or her financial position immediately preceding the loss.

Unfortunately, however, it also provides that the cooperative insurance proposal form must form the basis of the information in the policy, which could be used by insurers or operators to establish misrepresentation by insureds/participants without having to prove reliance on it by them. It is unlikely, however, that this was the intention of the regulation that it would be used in such a manner, in view of the following detailed provisions on disclosure and misrepresentation.

The *IMCCR 2008* has provisions dealing with disclosure, misrepresentation, statutory warnings and claims handling.

Article 42 provides:

> Prior to entering into an insurance contract, the *companies must inform customers of their key obligations under the insurance contract* to pay premiums in a timely manner and *to provide full and honest disclosure of all relevant information needed to* determine the insurance needs and *underwrite the risk*. The customer should only be expected to advise the companies of *information that a reasonable person* would regard to be *relevant*.[90]

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89 *Supra* note 64 [emphasis added].

90 [emphasis added].

Article 32 provides:

> *Customers should be informed of their duty to disclose relevant and accurate information at every stage* of the business relationship (e.g., applications, renewal, claim requests, etc.).[91]

The combined effect of these two provisions is that it sets out the insurers' obligation to provide a warning to prospective insureds/participants of their pre-contractual duty to disclose information that a reasonable person would deem relevant and refrain from making such misrepresentations at key stages of a contract. By implication, it also imposes a duty on the insureds/participants to make relevant pre-contractual disclosure and refrain from making misrepresentations. This is a welcome provision and would be better served if the consequences of breach or remedies available to both parties were also addressed.

Articles 52 and 53, in turn, make comprehensive reference to the insurers' conduct in claims handling.

Article 52 provides that:

> For companies whose licensed activities includes claims handling, they *must*:
> (a) *Respond* to claims filing *in a prompt manner*.
> …
> (c) Acknowledge to the insured customer the receipt of the claim and any missing information and documents within seven (7) calendar days from receiving the claim's application form.
> …
> (e) Inform insured customers of the progress of filed claims, at least every fifteen (15) working days (as per *article 44 of the Implementing Regulations*).[92]
> (f) *Handle claims in a fair manner*.
> …
> (i) *Notify* the customer in writing of the claim *acceptance or refusal promptly* after completing the investigation, stating the following:
> (1) For accepted claims (full or partial acceptance):
> — Settlement amount.
> — How the settlement amount was reached.
> — Justification if reduced settlement is offered or any part of the claim is not accepted.
> (2) For denied claims:
> — Written reason for denying the claim under question.
> — Copies of documents or information that were used in reaching the decision, if requested.
> …

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91 [emphasis added].

92 Article 44 of the *IR 2003*, *supra* note 64, provides that valid claims must be settled within 15 days of the receipt of full documentation, with an extension of another 15 days, in which case the controller shall be notified. The claims settlement period must not exceed 45 days from the receipt of all necessary documents and the report of the appraiser, who must be appointed by the company within one week of the date on which the incident is reported, failing which the controller must be provided with a statement of the justifications for the delay.

(k) For accepted claims, forward the *claim settlement payment without undue delay* upon receiving all required information and documentation (as per *article 44 of the Implementing Regulations*).[93]

Article 53 provides that:

> Insurance companies *must settle claims* within the time period indicated in *article 44 of the Implementing Regulations*, and when that is not possible, provide an explanation, with *reason(s) for such delay*.[94]

G. *Iran*

The *Iran Insurance Act 1937* ("*IIA 1937*") regulates both conventional insurance and *takaful* within its Islamic financial system. It addresses the core *takaful* principles of pre-contractual disclosure, non-misrepresentation and its ensuing remedies, as well as insurable interest.

Articles 4 and 5 provide for insurable interest in life (family) and general insurance and *takaful* contracts as follows:

> The subject of insurance may be *property of any kind*, whether material or interest, or financial rights, or any type of legal liability as long as the *insured has a bona fide interest* in the subject insured. Also, the insurance may be against an event or risk the occurrence of which would cause *loss to the insured*.[95]

> The insured may be the actual owner of the property, or may be an agent of the owner or interested party, or bailee.

The provisions, however, do not stipulate the consequences of the insured's lack of insurable interest on the policy.

The pre-contractual duty of disclosure, duty not to misrepresent and the ensuing remedies are addressed in arts 12 and 13 below in a comprehensive manner, detailing the consequences to the insured in terms of the policy monies and premiums, based on whether the non-disclosure or misrepresentation by the insured is intentional or unintentional. The only drawback, however, is that the materiality or relevance of the undisclosed or false information is judged from the insurer's perspective instead of that of a reasonable person in the circumstances (of the insured), which would be less onerous on the insured/participant.

Article 12 provides that:

> In the case the insured *intentionally withholds information*, or *makes false statements*, and the information withheld be of such a nature that *alters the risks or decreases its importance from the point of view of the insurer*, the insurance contract ensuing thereon shall be *void* even if the abovementioned alterations do *not affect the occurrence of the event insured* against. In such cases the *premium* paid shall *not be returnable*, and the insurer shall have the right to claim the unpaid installments due up to the date of the discrepancy.[96]

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93 [emphasis added].
94 [emphasis added].
95 [emphasis added].
96 [emphasis added].

Article 13 in turn provides that:

> In the case of *unintentional withholding of information* or *false statements* the policy shall *not be void*. In the case of the occurrence of the event insured against, the insurer shall have the right to *continue* the policy *after receipt of the extra premium agreed* to by the insured, *or cancel the policy*. In case of cancellation, the insurer shall notify the insured in writing through a letter or statement sent by registered post obtaining a receipt of delivery. The cancellation shall be effective 10 days after the receipt of the letter by the insured, and the insurer shall *return the unearned premium* from the date of cancellation.
>
> Should the *withheld information or false statement be discovered after materialization of the risk*, the *indemnity payable shall be reduced in proportion* to the premium paid and the amount that would have been payable if the full facts of the risk had been stated.[97]

IV. IFSB AND THE CORE *TAKAFUL* PRINCIPLES

Having set out the application of the core *takaful* principles in question in the jurisdictions above, an assessment will in turn be made of its coverage by the IFSB.[98]

The Malaysia-based IFSB is an international financial standard-setting body for Islamic regulatory and supervisory agencies in operation since 2003. It has extensive reach in a practical sense, in that, as at December 2013, the IFSB has 185 members comprising 58 regulatory and supervisory authorities, 8 international intergovernmental organisations, 112 financial institutions and professional firms, and 7 self-regulatory industry associations operating in 45 jurisdictions, inclusive of the jurisdictions examined herein.[99] Its aim is to ensure a sound and stable Islamic financial services industry that encompasses banking, capital markets and *takaful*. To this end, the IFSB promotes the development and adoption of prudential regulation and transparency in the industry by introducing new or adapting existing international standards which are *Shariah*-compliant, and with respect to *takaful*, complements the work of the IAIS. Thus far, the IFSB has issued 19 *Standards, Guiding Principles and Technical Notes* for the Islamic financial services industry which are primarily in the areas of risk management, capital adequacy, corporate governance, transparency and *Shariah* compliance and governance. Its guidelines and standards, however, form a persuasive guide and are not binding *per se* on individual jurisdictions.

The IFSB guidelines that involve *takaful* are the *Guiding Principles on Governance for Islamic Insurance (Takaful) Operations (IFSB-8)*, *Standard on Solvency Requirements for Takaful (Islamic Insurance) Undertakings (IFSB-11)* and *Guidance Note on the Recognition of Ratings by External Credit Assessment Institutions (ECAIS) on Takaful and ReTakaful Undertakings (GN-5)*. Of these, however, only

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97 [emphasis added].

98 The Bahrain-based AAOIFI, however, is beyond the scope of this article as it is essentially an international accounting and auditing standard-setting body for Islamic finance and does not involve the core *takaful* principles examined herein.

99 Islamic Financial Services Board, online: <http://www.ifsb.org/membership.php> (last accessed 31 January 2014).

the *Guiding Principles on Governance for Islamic Insurance (Takaful) Operations (IFSB-8)* is examined in this article as arguably being relevant to the core *takaful* principles espoused herein. The *IFSB-8* ("*Guidelines*") was in fact developed in December 2009, as a result of the IFSB working with and adapting the IAIS's *Insurance Core Principles* in corporate governance to *takaful,* in order to keep abreast of developments in the industry without having to reinvent the wheel.[100]

Although strictly speaking, the *Guidelines* relate to corporate governance issues in *takaful* and not the core *takaful* principles envisaged herein, some broad principles which concern the latter can be gleaned from it. For a start, the *Guidelines* are based on the premise that:

> Conventional insurance exists and is regulated in all jurisdictions where *Takaful* undertakings have been established in recent years. Thus, the IFSB takes as a starting point the existing internationally recognised frameworks, codes or standards on corporate governance best practices for conventional insurance that are considered to be relevant and useful for *Takaful* undertakings. On this premise, the Guiding Principles on Governance for *Takaful* (Islamic Insurance) Operations aim to *adapt and reinforce the existing internationally recognised frameworks or standards for Takaful undertakings so that they stand on a level playing field with their conventional counterparts*.[101]

The main objectives of the *Guidelines* are to *provide benchmarks for takaful supervisors in adapting, improving and establishing appropriate regulatory regimes*, address regulatory issues like risk management and financial stability, *provide appropriate consumer protection in terms of risk and disclosure*, and support the orderly development of the *takaful* industry in terms of business models, product design and marketing.[102] In addressing this, the *Guidelines*' emphasis is not on the form that the regulations should take but the substance through which the aims can be achieved in the respective jurisdictions.[103]

The *Guidelines* broadly address some of the core *takaful* principles espoused in this article in the sense that they acknowledge the need for *takaful* operators to explain the "core *Takaful* principles" to prospective participants in terms of their rights and responsibilities "at the point of contract" via a pre-contract illustration understandable to a layman.[104] The importance of appropriate disclosure of material and relevant information by *takaful* operators to the participants is addressed, in light of most *takaful* products (except for compulsory lines like health and motor) being "sold" rather than "bought",[105] but the requirement of pre-contractual disclosure and the duty not to misrepresent by participants, along with the consequences arising from a failure thereof, are, however, not addressed. Lastly, there is a broad obligation on *takaful* operators to act honestly and fairly[106] but with no clear guideline as to its scope and consequences.

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[100] See Hindawi, *supra* note 15.
[101] IFSB, *Guidelines* (December 2009), clause 6 [emphasis added].
[102] *Ibid*, clause 2.
[103] *Ibid*, clause 18.
[104] *Ibid*, clauses 39, 40.
[105] *Ibid*, clauses 55, 58.
[106] *Ibid*, clause 78.

The *Guidelines* conclude by recommending that appropriate standards and guidelines on *takaful* best practices are expected to be developed in due course, which involve solvency, financial and prudential regulation, transparency and disclosure, business conduct and supervisory review process.[107] It is in this vein that the following paragraphs seek to rely on the core insurance principles which apply in Australia's and the UK's progressive conventional insurance framework as a benchmark to recommending the same for *takaful* (subject of course to *Shariah*-based requirements being met where necessary) in a harmonised manner through the aid of the IFSB.

V. Benchmarking Against Core Insurance Principles in Australia and UK

The lack of a principle or duty of utmost good faith explicitly stated to apply to **all** types of *takaful* contracts (consumer and non-consumer) can easily be addressed by a statutory term implied into all *takaful* contracts which gives rise to damages as a remedy, and which would not be available to a party not acting in good faith, as is the case in ss 13, 14, 28 and 29 of the *Insurance Contracts Act 1984* (Cth), as well as empowers the regulators to take action for breach by the operators.[108] A simple provision of this nature can set the stage to address the numerous issues involving moral hazard that affect consumer protection and confidence, as well as industry commitment throughout the various stages of a *takaful* contract, from pre-contractual negotiations right up to claims settlement. Malaysia and the UAE have their own versions of this but they are not wide enough in scope and lack remedies for a breach thereof.

Likewise, the absence of a clear pre-contractual duty of disclosure in *takaful* contracts could be addressed by provisions similar to paras 4 and 5 of Schedule 9 to the *IFSA 2013*, provided the ensuing remedies for breach are clearly set out, as in ss 28 and 29 of the *Insurance Contracts Act 1984* (Cth). The duty not to misrepresent

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[107] *Ibid*, clause 79.

[108] This is along the lines of ss 13 and 14 of the *Insurance Contracts Act 1984* (Cth), which has proven to be an effective way of enforcing this duty, coupled with its appropriate remedies in ss 28 and 29. Section 13(1): "A contract of insurance is a contract based on utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with utmost good faith." Section 14(1): "If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision." Section 28 requires as a prerequisite to remedy in general insurance contracts that the insurer must have been induced to enter into the contract due to the insured's non-disclosure or misrepresentation, with avoidance of the contract only being an option where fraud is involved, failing which the insurer is only entitled to contractual damages to the extent of the prejudice suffered as a result of the breach. Section 29 provides that other than where fraud is involved or within the first 3 years of a life policy, if the insurer would not have issued the policy had it known of the non-disclosure or misrepresentation (where avoidance of contract is possible), the insurer is only entitled to a proportionate reduction of the claim to the extent of the prejudice suffered. The new ss 13(2)-(4) inserted by the *Insurance Contracts Amendment Act 2013* (Cth) provide for a breach of utmost good faith to be a breach of the Act entitling the Australian Securities and Investments Commission (ASIC) to take action against the insurer, and also extend the good faith obligation to a third party beneficiary under the contract, from the time the contract is entered into. Section 14A inserted by the amendment goes on to provide that the ASIC may exercise its powers under the *Corporations Act 2001* against the insurer for failure "to comply with the *duty of utmost good faith in the handling or settlement of a claim*" [emphasis added].

in *takaful* contracts could in turn be addressed by provisions similar to paras 7, 13, 15 and 16 of Schedule 9 to the *IFSA 2013*, provided they are made applicable to **all** *takaful* contracts and not just consumer contracts.

Apart from Malaysia, only Iran and Saudi Arabia address this issue but also in an incomplete manner. Iran has a fairly comprehensive version of this obligation with ensuing remedies which could also be a guide, save for the fact that materiality of the undisclosed or false information is judged from the insurer's perspective, which might be too onerous on insureds. Saudi Arabia, on the other hand, although providing for the disclosure of information that a reasonable person would regard as relevant, lacks any remedy for a breach thereof. Hence, a clear provision setting out this fundamental duty and the appropriate consequences for its breach would bode well for consumer confidence in *takaful*.

In this context it is worth noting that Australia has retained the pre-contractual duty of disclosure by insureds coupled with a statutory warning to be given by insurers of the insureds' duty (except for "eligible contracts of insurance" under s 21A of the *Insurance Contracts Act 1984* (Cth)). The UK, on the other hand, has veered towards an inquiry-based disclosure, where consumers need only take reasonable care to answer insurers' questions fully and accurately.[109] The Malaysian *IFSA 2013* has adopted both of these in an innovative manner incorporating the former in non-consumer and the latter in consumer *takaful* contracts. A look at insurance regulations in the other jurisdictions examined herein, namely Saudi Arabia and Iran, indicates a preference for voluntary disclosure, with Saudi Arabia and the UAE requiring insurers to provide prospective insureds with a prior warning on the importance of disclosure and its consequences. There are, however, no remedies stipulated in any of the jurisdictions for the insurers' non-compliance with this.

It appears likely that the Australian system of controlled voluntary disclosure would be more viable because a version of it is already in use in the jurisdictions highlighted above. The *takaful* industry, being less mature than the British insurance market, may also pose a greater resistance to an inquiry-based disclosure, as it would place a greater burden and cost on the operators to substantially amend proposal forms in order to address the types of material information which they would require to be disclosed.[110] Alternatively, the innovative Malaysian approach incorporating both could be adopted, with the ensuing remedies explicitly addressed.

The issue of the widespread use of 'basis of contract' clauses in *takaful* proposal forms, which enable *takaful* operators to take action for misrepresentation by insureds without having to be induced by it, has not been addressed in any of the jurisdictions examined herein except Malaysia, which has recently abolished such clauses in consumer *takaful* contracts. Such clauses are commonly found in most *takaful* proposal forms and contracts. In fact, Saudi Arabian regulations actually prescribe for a *takaful* application form (proposal) to form the basis for the information contained in the policy. This is the case although it appears unlikely to have been intended for this

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[109] *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), *supra* note 68, ss 2-5, Schedule 1, provide that a deliberate or reckless misrepresentation would entitle the insurer to avoid the policy, whereas a careless answer by consumers would provide the insurer with a proportionate reduction in claims paid, and an honest and careful answer would be indemnified in full.

[110] Thanasegaran, "Making an Entrance", *supra* note 12 at 117, 118.

purpose, in light of the other progressive provisions therein on disclosure, misrepresentation and pre-contractual warnings required to be provided by insurers/*takaful* operators to insureds/participants. Hence, it is best that such clauses are abolished to avoid confusion, along the lines of international insurance practices as evidenced in Australia, UK and Malaysia.[111]

Insurable interest, which is a key principle in insurance and *takaful* contracts, is only addressed with respect to *takaful* in Saudi Arabia, Sudan and Iran. The Iranian provision highlighted earlier in this article is fairly clear and simple to adopt,[112] except that a remedy in the event of non-compliance should be incorporated, to the effect that the contract would become void for lack of an insurable interest in the subject matter of *takaful*, with a refund of premiums paid.

As for good claims settlement practices, it could be adequately addressed by the general implied term of utmost good faith stipulated above in this article, coupled with a proportionate remedy of damages or avoidance of contract, depending on the severity of the breach and its effect on the loss suffered. Amongst the jurisdictions examined herein, only Saudi Arabia has addressed this in a comprehensive manner.[113] Australia's recent amendment via s 14A of the *Insurance Contracts Act 1984* (Cth) (introduced by the *Insurance Contracts Amendment Act 2013* (Cth)), which explicitly entitles the ASIC to exercise its powers against insurers who do not comply with the duty of utmost good faith in the "handling or settlement of a claim or potential claim under the contract", could prove a useful guide in this regard. Such an explicit provision would go a long way in clarifying the obligations arising on the part of both parties (albeit primarily on the *takaful* operator/insurer) during claims settlement.

VI. Conclusion

There is no denying the tremendous growth potential for *takaful* as evidenced by its current low market penetration levels, fast growing global Muslim population, ethical appeal and financial stability, coupled with Middle-Eastern petrodollar support. Such is its potential that global insurance giants like the UK and Australia have taken pro-active steps to position themselves as Islamic financial hubs by regulating their financial services and taxation regime in a progressive and inclusive manner accommodating Islamic finance (and *takaful*) based on economic substance rather than form.[114]

The IFSB, which is an international Islamic financial standard-setting body, has also recommended that appropriate standards and guidelines on *takaful* best practices be developed, and in so doing, has in the past worked with and adapted the IAIS's

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[111] See *Insurance Contracts Act 1984* (Cth), s 24; *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), *supra* note 68, s 6(2); *IFSA 2013* (Malaysia), *supra* note 45, para 10 of Schedule 9, albeit the Malaysian provision should have been made applicable to all *takaful* contracts and not just consumer *takaful*.

[112] *IIA 1937*, arts 4, 5.

[113] *IMCCR 2008*, ss 52, 53; *IR 2003*, *supra* note 64, art 44.

[114] The UK and Australia are ranked first and second by the World Economic Forum amongst the world's financial centres: see Kerrie Sadiq & Ann Black, "Embracing *Sharia*-Compliant Products through Regulatory Amendment to Achieve Parity of Treatment" (2012) 34 Sydney L Rev 189 at 189, 197.

Insurance Core Principles to *takaful*, so that it can stand on a level playing field with its conventional counterparts.[115]

An examination of the Muslim-majority jurisdictions offering *takaful* on a large scale herein, however, shows that the core *takaful* principles necessary to instill consumer confidence and prudential market development are at best addressed in only a handful of the jurisdictions and even so, in a fragmented manner. Much of the regulations thus far, even amongst the *takaful* elite like Bahrain and Pakistan have been focused primarily on licensing and solvency requirements rather than key substantive provisions and remedies. Malaysia has in this regard, however, recently undertaken a positive review and revamp of its substantive *takaful* laws. Despite this fragmented backdrop, the need for harmonisation of *takaful* laws is nevertheless clearly recognised:

> In the early phases of development, Malaysia had looked into the legal impediments that might hinder Islamic finance. What lies ahead is to *harmonise existing laws* such that it accommodates and facilitates Islamic finance in the most *legally efficient* way possible… Countries that intend to promote Islamic finance must also have *laws that are clear and easily enforceable*. In this respect, *having common laws, or a reference point* for laws on Islamic finance, would serve to benefit the industry worldwide.[116]

Hence, addressing the explicit introduction of the core *takaful* principles herein as benchmarked against Australia's and the UK's progressive conventional insurance framework, through the auspices of the IFSB, could be viewed as a realistic possibility which would go a long way in promoting *takaful* in a harmonised manner in the Muslim-majority part of the world. All that is required is a concerted political will to do so.

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115 See *Guidelines*, *supra* note 101.

116 Mohammad bin Ibrahim, "Islamic Finance and Malaysia's Role" (Paper delivered at the 21st Conference of Presidents of Law Associations in Asia, 27 July 2010) [emphasis added].

Core Takaful Principles	Countries									
	Malaysia	Bahrain	Pakistan	Brunei	Indonesia	UAE	Egypt	Saudi Arabia	Sudan	Iran
Utmost Good Faith	Para 5 (9) Schedule 9 IFSA 2013 & Common Law	X	X	X	X	Art 3(2) Fed Reso No 3 2010	X	X	X	X
Pre-contractual Duty of Disclosure	Para 4 Schedule 9 IFSA 2013	X	X	X	X	X	X	Art 42 IMCCR 2008	X	Arts 12 & 13 IIA 1937
Pre-contractual Duty Not to Misrepresent	Paras 5, 6 & 7 Schedule 9 IFSA 2013	X	X	X	X	X	X	Art 42 IMCCR 2008	X	Arts 12 & 13 IIA 1937
Proportionate Remedies	Paras 13-17 Schedule 9 IFSA 2013 & Common Law	X	X	X	X	X	X	X	X	Arts 12 & 13 IIA 1937
Statutory Warning in Proposal Form	Paras 4 (4) & 5 (7) Schedule 9 IFSA 2013	X	X	X	X	Art 6(3) Fed Reso No 3 2010	X	Arts 42 & 32 IMCCR 2008	X	X
Abolition of Basis of Contract Clause	Para 10 Schedule 9 IFSA 2013	X	X	X	X	X	X	X (Note: Art 55 IR 2003)	X	X
Insurable/Takaful Interest	Para 3 Schedule 8 IFSA 2013 & Common Law	X	X	X	X	X	X	Art 55 IR 2003	Section 99 ITA 2003	Art 4 IIA 1937
Good Claims Settlement Practices	Para 5 (9) Schedule 9 IFSA 2013 (Note: Clause 3.4 Claims Settlement Guidelines)	X	X	X	X	X	X	Arts 52, 53 IMCCR 2008 & Art 44 IR 2003	X	X