

Insurance Law: Requirements for the Validity of Exclusion Clauses

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When Form Trumps Substance

Article 1028(c) of the UAE Civil Code (Federal Law No.5 of 1985) provides that a provision in a policy of insurance is void if it:

1. “relates to a circumstance that leads to the avoidance of the contract or to the lapse of the right [to indemnity] of the assured”; and
2. is not “shown conspicuously”.

Article 28 of the Insurance Regulation Law (Federal Law No.6 of 2007)) has a similar affect, but goes further in its protection of the insured. It requires that “terms discharging [an insurer] from liability in the policy must be highlighted in noticeable writing and contrasting colour and must be approved by the insured”. By “approved” Article 28 appears to mean ‘acknowledged’ by the insured. In practical terms, it means that the insurer should have the policyholder place its initials or signature next to any term that discharges the insurer from liability under the policy.

Compared to Article 1028(c) of the Civil Code, Article 28 of the Insurance Regulation Law imposes a more onerous obligation on insurers. If a provision intends to exclude or limit the liability of the insurer to indemnify the insured, then, in order to be enforceable, the text of that provision must be:

1. in a different font size from other provisions in the policy; and
2. in a different colour from other provisions in the policy; and
3. “approved” by the insured.

All this sounds straightforward enough.

And yet, in most insurance policies issued in the UAE, these requirements are rarely complied with. The result is that any provision in an insurance policy that excludes or limits the insurer’s liability to the insured will not be enforceable if those provisions do not comply with Article 28 of the Insurance Regulation Law and/or Article 2018(c) of the Civil Law.

The law is extremely clear on this point. So it is surprising how many policies in the UAE continue to be entered into that contain provisions that clearly do not comply with Article 28 of the Insurance Regulation Law and/or Article 2018(c) of the Civil Law.

The reason for this near-universal non-compliance is not immediately clear. It may be due to the fact that many insurance wordings used in UAE policies are borrowed from wordings drafted abroad – usually in the UK – which, when incorporated into local policies, are not then amended to comply with local laws. Many local insurers also reinsure 90% or more of their local risks with large offshore reinsurers and often these reinsurers insist upon their own wordings being used in the underlying policy, apparently ignorant of the formatting requirements that UAE law requires exclusion clauses to adopt.

Whatever the explanation, the fact remains that any insurer in the UAE who has denied or reduced, or proposes to deny or reduce, their liability to the insured on the basis of a provision caught by Article 28 of the Insurance Regulation Law and/or Article 2018(c) of the Civil Law is vulnerable to a successful legal challenge by the insured if that provision or those provisions do not comply with the requirements set out

above.

For that reason, UAE insurers would be well advised to review their current policy wordings and, where these wordings do not comply, they should amend them to meet the formatting requirements set out above.

Announced Changes to Minimum Ownership Levels of UAE Insurers

On 14 May 2017 the cabinet of the UAE Federal Government announced changes to the law that previously restricted foreign ownership to not more than 25% of the share capital of a UAE insurance company.

Under Cabinet resolution No.(16) of 2017, non-GCC foreigners will now be able to own 49% of the share capital of a UAE insurer subject to any conditions and regulations set by the UAE Insurance Authority. The Insurance Authority is yet to pass a resolution setting out these conditions and regulations. We will provide a further update once it has done so.

The change is a welcome development for foreign insurers wanting to gain greater exposure to what remains a very underpenetrated insurance market relative to other established insurance markets.

At the same time, the change in the law continues to limit non-GCC foreigners to a minority ownership interest in UAE insurers. For that reason, measures that have been used to date to allow foreign shareholders to exercise practical control over their investees, such as nominee and management agreements, none of which are ideal or without risk, will continue to have a place unless and until a change in the law occurs permitting non-GCC foreigners to own a majority interest in a UAE insurance company.

Al Tamimi & Company's Insurance team regularly advises on the effect and enforceability of exclusion clauses in insurance policies. For further information please contact Yazan Saoudi (y.saoudi@tamimi.com) or Justin Carroll (j.carroll@tamimi.com).