Preface

The past 10 years or so have witnessed tremendous activity in the insurance industry in the UK and Malaysia, in terms of regulatory and infrastructural improvements. This has been a long-time coming, for an industry that has been regulated primarily by Lord Mansfield's 18th century common law pronouncement of utmost good faith as codified in the *Marine Insurance Act 1906* (UK).

The *Marine Insurance Act 1906* (UK)'s application to both insurance and *takaful* contracts in Malaysia has been by virtue of Malaysia's British colonial roots as reinforced by the *Civil Law Act 1956* (Malaysia). Although *takaful* or Islamic insurance is a relatively new entrant compared to its conventional insurance counterpart, it has shown great potential for growth in Malaysia within the dual mainstream mercantile law system of the country subject of course to *Sharia* requirements. This has been due to the Muslim majority population in the country, as well as its strategic positioning by the government as a regional and global Islamic financial hub.

Nevertheless, the insurance and *takaful* industry in Malaysia has been regulated by the *Insurance Act 1996* (Malaysia) and the *Takaful Act 1984* (Malaysia) that have both not explicitly nor adequately addressed the duty of utmost good faith, despite its acknowledged acceptance by case law as forming the cornerstone of such contracts which are *uberrima fidei* in nature.

The Malaysian government has however taken steps over the years to enhance the industry in terms of its infrastructure and education. In 2003, it launched a 10-year Consumer Education Programme to educate consumers of their rights and responsibilities arising under insurance and *takaful* contracts. This was followed by the amalgamation of the Insurance and Banking Mediation Bureaus into the highly effective Financial Mediation Bureau in 2005 which handles the majority of insurance and *takaful* complaints to date. The Law Harmonisation Committee was in turn established in 2010 to facilitate a more conducive legal system to achieve certainty and enforceability of Malaysian Islamic finance laws. This was followed in 2011 by the Central Bank's *Sharia Governance Framework* for Islamic Financial

Institutions in order to enhance the role of the key organs responsible for executing *Sharia* compliance.

Major regulatory reform of the Malaysian insurance and *takaful* industry in the form of the *Financial Services Act 2013* (Malaysia) and the *Islamic Financial Services Act 2013* (Malaysia) however came about following the substantial reforms undertaken in the UK. Both these statutes came into effect on 30 June 2013 following a much awaited repeal of their predecessors, the *Insurance Act 1996* (Malaysia) and the *Takaful Act 1984* (Malaysia).

It is important to note that prior to the Malaysian reforms taking place, the Law Commission of England and Wales and the Scottish Law Commission had, in 2006, commenced a major review of insurance law in the UK. This has since culminated in the enactment of the *Consumer Insurance (Disclosure and Representations) Act 2012* (UK) which came into effect on 6 April 2013, introducing substantial reform with respect to consumer insurance contracts. This in fact formed the basis of the Malaysian reforms undertaken in 2013.

The Law Commissions have since gone on to enact the *Insurance Act 2015* (UK) which is meant primarily but not exclusively for non-consumer insurance contracts. The *Act* received the royal assent on 12 February 2015 and will take effect in August 2016, following an 18-month lead-in period. This was inspired by the urgent need for reform of insurance contract law in the UK which has had numerous calls for reform dating back more than 50 years, as well as the progressive Australian insurance law reform package, the *Insurance Contracts Act 1984 (Cth)*, that has proven to be highly effective.

It is against this backdrop of development in the UK and Australia that this book proposes to evaluate the Malaysian reforms pertaining to utmost good faith in insurance and *takaful* contracts undertaken in 2013, with the aim of achieving reform that serves to strike a fair and workable balance between the competing interests of insurers/*takaful* operators and insureds/*takaful* participants.

Apart from offering a comparative analysis of the law in this area which is hoped would prove useful to its readers, this book serves to highlight the importance of undertaking law reform in a holistic sense. This in turn involves a sociocultural evaluation of Malaysian society as well as the economic efficiency of the reforms proposed, in order to further substantiate the need for and viability of such reform, as insurance and *takaful* contracts are underpinned by social and economic considerations. This is done in the firm belief that a balanced legal framework is crucial to achieving comprehensive and sustained improvement in the law of utmost good faith, like any other law of a commercial nature for that matter.

It remains to be seen what further reforms would be undertaken by the Malaysian government in this respect. It is hoped that some of what is contained herein proves useful in this regard.

I wish to take this opportunity to thank my publishers: Springer and the staff responsible for this project; my mentor and colleagues at Monash University Australia and Malaysia for their support; and Professor Robert Merkin for his gracious and insightful foreword to this book.

Finally, my sincere thanks go to my family—my husband Dinesh, daughters Marisha and Anoushka, son Dravid and my parents, for their love and encouragement.

The research undertaken for this book has been applied to a number of law review articles, and this book draws upon those works as indicated in the text. The law and legal issues analysed herein is as at 30 June 2015.

August 2015 Haemala Thanasegaran

http://www.springer.com/978-981-10-0381-3

Good Faith in Insurance and Takaful Contracts in Malaysia
A Comparative Perspective
Thanasegaran, H.
2016, XXIV, 233 p., Hardcover
ISBN: 978-981-10-0381-3