

# **Juxtaposition of Motor Vehicle Insurance Scheme and Motor *Takaaful* as Islamic Law Alternative**

By

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## **ABSTRACT**

*The concept of insurance is not new in any environment. It is essentially a mechanism to mitigate any risk attached to properties. Thus, insurance scheme is put in place to serve as fall back on in the event of risk or calamity occurrence. Nigerian Statutes require that every motor vehicle owner must possess at least third party insurance policy. However, the conventional insurance contradicts certain elements of Islamic law which make it unlawful and unacceptable. Thus, majority of Muslims (believers) and other adherents have refused to adopt the conventional insurance and subsequently, called for alternative Shariah compliant products. Subsequently, National Insurance Commission (NAICOM) in 2013 released Takaful Guideline for the operators. This paper considered the guideline in juxtaposition with to the conventional motor insurance scheme in force, prior to the release of the guideline. In addition, the paper identified certain similarities and dissimilarities between the two. In the final analysis, it is observed that majority of the insurance policy holders could not differentiate between vehicle insurance policy under conventional insurance and that of Takaaful. To others, it is just a means to fulfil statutory requirement. The paper recommends that there is need for more sensitization generally on importance of vehicle insurance and specifically on the new Shari'ah compliant products of insurance known as Takaful as approved in the guideline.*

**KEYWORDS:** Takaful, Insurance, Policy, Premium, Indemnity.

## **Introduction**

The primary purpose of having insurance scheme in place is to ensure security against any future risks or loss. In other words, insurance policy alleviates or reduces the burden of responsibility of the insured upon the occurrence of risks<sup>3</sup>. This purpose is encompassing and cut across all the sphere of our lives. It is therefore interesting to state here that just as it is important to have insurance

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<sup>3</sup>Irukwu J.O. *Insurance Law and Practice in Nigeria*, (Heinemann Educational Books Nigeria Plc, Ibadan, 1991), pp 8-9, Achike, O. "Commercial Law in Nigeria, Fourth Dimension Publishing Co. Ltd, (1985), p. 318.

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policy (which is compulsory in some specific areas)<sup>4</sup> under Nigerian law, so also it is relevant to know what contract of insurance is, as well as its constituents elements, in order to observe them and give life to the intention of parties to the contract of insurance. Failure to observe or meet the relevant elements of the contract of insurance may vitiate the entire contract and render any benefit therein unenforceable<sup>5</sup>. Since motor vehicle insurance scheme is a category of contract of insurance, those elements required for the contract of insurance are also applicable here and should therefore be considered. Thus, it is of high interest and for ease of understanding to consider the basic fundamentals and basic elements of contract of insurance under Nigerian statutes before considering specifically motor vehicle insurance and its types.

### **General Principles and Basic Fundamentals of Contract of Insurance**

Generally, contract of insurance is governed by principles of common law of contract<sup>6</sup>. However, due to their peculiar and special nature, contract of insurance (of whatever type) are, in addition to the general principles of contract, governable by special or fundamental principles, which shall be discussed later in this chapter. The reference to general principles of insurance contract here means those principles of contract generally, that are also applicable to the contract of insurance.<sup>7</sup> Thus, the following general principles of contract are also applicable to contract of insurance: Offer and Acceptance, Consideration, Capacity of parties to enter in to contact and intention to create legal relations.<sup>8</sup>

### ***Offer and Acceptance***

Offer has been generally described and defined as “definite undertaking or promise made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed”.<sup>9</sup> Acceptance on the other hand is defined as “a final and unqualified expression of

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<sup>4</sup> The summary of various compulsory insurance policies are: (a) Statutory Group life Insurance as required by section 9(3) of the Pension Reform Act, Cap. P11 Laws of the Federation of Nigeria, 2014. (b) Employee’s insurance for Compensation as required by section 33 of the Employee’s Compensation Act 2010, (c) Builder’s Liability Insurance as required under section 64 of Insurance Act, Cap. I 17, Laws of the Federation 2004. (d) Occupier’s Liability Insurance as required under Section 65 of Insurance Act. (e) Motor Vehicles (Third Party) insurance as required by section 68 of Insurance Act, and section 3 (1) of Motor Vehicle (Third Party) Insurance Act, Cap. M22, Laws of Federation 2004(the subject matter of this work). (f) Health Care Professional Indemnity Insurance as required by section 45 of the National Health Insurance Act, Cap. N 42 Laws of the Federation of Nigeria, 2004.

<sup>5</sup>Yerokun, O., Op.cit., p.69, Okanny, M.C., Op.cit., pp.624-625.

<sup>6</sup> Ibid.

<sup>7</sup> Yerokun, O., op.cit. p. 70.

<sup>8</sup> See Omoeboh, O., Op.cit., p.78, for elaboration on the essential elements of contract see Sagay, I. E., ((2000), *Nigerian Law of Contract*, Spectrum Law Publishing, Ibadan, 2<sup>nd</sup> Edition, pp. 20- 45.

<sup>9</sup> Sagay, I. E., op.cit. p. 20.

assent to the terms of the offer”<sup>10</sup>. It is therefore important that the acceptance must correspond with the terms and condition of offer.

### ***Parties***

Be that as it may, in the contract of insurance just like in any other contract, there must be parties. Parties to contract of insurance are insurer and insured. An insurer is the party that undertakes to pay the other (party), on condition of payment of consideration (known as premium), on the occurrence or happening of a specified events/risks. The insured on the other hand, is simply referred to as the policy holder of the insurance.<sup>11</sup>

It is interesting to note that, just like other commercial contract; no particular form is required for the contract of insurance. What is important is to prove the existence of the contract (of insurance). Thus, contract of insurance can be made orally.<sup>12</sup> The exception to the permissibility or legality of orally made contract of insurance is that of marine insurance. It is the requirement of law that contact of marine insurance must be in writing.<sup>13</sup>

Valid and reasonable the above position of the law may appear, it may be difficult if not impossible to prove the existence of contract of insurance in oral form, particularly in our courts in this 21st Century. This is because disputes or litigations (arising out of contracts) may be easily proved and determined by our courts, with the aids of documentary evidence which must have spelt out conditions and obligations of the parties to the contract of insurance. This is further strengthened by the general principle that insurance is a contract of adhesion-that is one whose terms and conditions are dictated by statutory regulations or insurer’s requirement.<sup>14</sup>

Currently, the practice is that the offer and acceptance usually take the form of obtaining and filling of proposal form mostly by the insured and acceptance and processing of such form by the insurer (company).<sup>15</sup>

### ***Proposal Form***

Proposal form represents the offer (from the insured to the insurer) and if same is accepted after thorough evaluation of the information supplied by the proposed

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<sup>10</sup> Ibid

<sup>11</sup> Omoeboh, O.,op.cit.p. 80.

<sup>12</sup> See the decision of the court in *Asewe vs Asiemo Face to Face Assurance Ltd* (1975) N.C.L.R. 433 at 439, where the court held that a contact of insurance need not be in writing.

<sup>13</sup> See Section 24 (1) of the Marine Insurance Act, Cap. M2 Laws of the Federation of Nigeria 2004. In the case of *Ngillari vs National Insurance Corp of Nigeria* (1998) 8 NWLR (pt.560) 1 at p. 24the supreme court (per Iguh JSC) held that “although writing is necessary in marine insurance, in other forms of insurance there is no legal necessity. Any positive act indicative of an intention to create a contract may be sufficient.”

<sup>14</sup> Yerokun, O.,Op.cit. p. 68, Omogbai., O., Op.Cit. p. 99.

<sup>15</sup> Omoeboh, O., op.cit. p.83.

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insured therein, the later will issue insurance policy to the former. To this extent, it has been established that in law, proposal form is regarded as basis of the contract of insurance.<sup>16</sup> The Proposal Form is the basis in the sense that it set the contract of insurance in motion or in place for other constituent elements to follow. This position is further fortified by the decision of a State High Court in the case of *Babalole vs. Harmony Insurance Co.*<sup>17</sup>, where the court held thus:

A contract of insurance, like any other kind of contracts, must be constituted by offer and acceptance and a consideration. The offer is normally contained in a proposal form, duly filled and signed by the assured or the proposer and acceptance is signified by a formal acceptance or by the issuance of policy or by the acceptance of the premium paid by the proposer, or by conduct on the part of insurers.

As a result of the vital role of Proposal Form to the formation of insurance contract, a proposed insured should be conscious and careful as regard to the information supplied in the form. This is so important that all relevant information to the subject matter of the insurance, consideration, and the condition of the subject matter as well as other necessary particulars must be accurately supplied with utmost good faith. It has been rightly observed thus:

The proposal form is the usual means by which the prospective insured makes his offer for insurance cover. Proposal forms are fairly standard mass produced documents prepared by insurers. Insurers elicit in proposal forms various information from prospective insured regarding the risk or subject-matter of insurance, the amount of cover requested, and other information regarding the insurance to enable them to evaluate the risk and decide whether or not to accept it. The proposal form, for a number of reasons to be outlined, constitutes an important document in the insurance transaction.<sup>18</sup>

It is imperative to note that once the insurers accept the completed proposal form filled by the proposed insured, without any condition, the contract of insurance is considered complete, consequent upon which the insured can benefit from the contract, if the terms therein are honoured and not being breached. To buttress this point, the Supreme Court in the case of *Ngilara vs. N.I.C.O.N*<sup>19</sup> held thus:

Where therefore a proposal form, containing the materials terms, upon which the insurers are prepared to contract is accepted unconditionally, the contract is

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<sup>16</sup>Achike, O., Op.cit., p.319, Yerokun, O., op.cit. p. 80.

<sup>17</sup>(1982) 1 O.Y.H.C. 1 at P.9. 6, as quoted by Omoehoh, O., Op.Cit, at P.82.

<sup>18</sup>Omoehoh, O., op.cit.p. 83.

<sup>19</sup> (1998) 8 NWLR PT. 560, P.1 at p. 23.

deemed complete and the insurers are bound to issue and the proposer to accept, a policy of insurance in accordance with the terms stipulated in the proposal form.

It is common practice for the insurer (i.e. insurance companies) to insert a clause: “I further agree to accept a policy subject to the terms, provisions and conditions of the company” in the proposal form. The implication of this clause is that having executed the proposal form with the clause, the insured is deemed to have agreed to the usual terms and conditions to be found in the insurer’s policy, even if he is ignorant of the terms. The clause is referred to as “*doctrine of incorporation by reference*” in insurance parlance<sup>20</sup>. The doctrine is actually perceived as great injustice caused the insured to suffer for not complying with terms and conditions not known to him at the time of execution of the proposal form. However, the doctrine has been sanctioned and confirmed as part of our law of insurance, by Supreme Courts in a number of cases<sup>21</sup>.

Thus, once the insured has signed a proposal form, referring to the existence of a policy notwithstanding that he (insured) has not received a copy of the policy, he is bound by the terms and conditions of the policy<sup>22</sup>. This injustice (as perceived mostly by laymen) has not yet been cured by the law<sup>23</sup> because the helpless proposed insureds who are hurriedly desirous of having insurance policy, often in most time, do not take time to read carefully and comprehend the content of the form before endorsement.

However, the only way out is for the proposed insured to carefully read the proposal form clause by clause and if the clause of incorporation by reference is contained, he has the right to demand for the insurers’ policies, practices and other relevant documents of the insurer that contained the terms, conditions and warranties expected to be observed by the insured, before signing the proposal form, which would constitute the contract of insurance. This is a solution for now. Hence, once the proposed insured sign the proposal form, the contract has

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<sup>20</sup>Omoebob, O.,Op.Cit, P. 86.

<sup>21</sup> These cases include *Northern Assurance Co. Ltd Vs. Wuraola* (1969) N.C.L.R. 4, *Nasidi Vs Mercury Assurance Co. LTD* (1971) 1. N.C.L.R. 387. This was reinstated in the case of *Nigillari Vs N.I.C.O.N* (1998) 8 N.W.L.R. (PT. 560) P.1 at 21 and 24, where the Supreme Court applied the Principle in Wuraola’s case and held that once the contract of insurance is established, the terms in the proposal form constitute part of the contractual relationship between the parties, and it will make no difference that the insurer has not yet issued a policy to the insured.

<sup>22</sup>Omoebob, O.,op. Cit, P.86

<sup>23</sup> *Ibid*, p.g. 87-88, where the learned author opined that despite the provision of Section 15 of Insurance Act, Cap I17, L.F.N. 2004, which obligated the insurers to deliver the Policy Document to the insured, the document is not the proposal form and insurers ‘practices that contained the terms, conditions and warranties to be observed by the insured.

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been constituted, he cannot rescind only for the reason that he was not aware of the terms.

### **2.4 Policy of Insurance**

Policy of insurance is simply described as the formal document evidencing the contract of insurance usually executed by the insurer. In *Thawardes vs. British General Insurance Co. Ltd*<sup>24</sup>, it was held that a policy of insurance is not the contract of insurance arising from the agreement reached by the parties, but merely evidences that contract.”

The reference to policy of insurance is just to make a point that policy of insurance only evidence contract of insurance which has already been formed upon the execution of proposal form by the proposed insured and unconditional acceptance of same by the insurers<sup>25</sup> as well as stipulation of consideration-premium. Proposal form therefore is so important to be taken seriously as same constitutes the basis of insurance contract not even cover note or certificate of insurance.

#### ***Cover Notes***

Cover notes represents a temporary insurance from the insurers to the insured as a kind of assurance and protection to the proposed insured pending the time the proposed form is fully and completely accepted or policy is issued. Cover notes are commonly and predominantly used in motor vehicle insurance in Nigeria<sup>26</sup>. The reason is not far-fetched as the Motor Vehicle Third Party Act requires the evidence of having insurance (at least third party type) by all car users. Since at this stage the policy is under processing and certificate cannot be issued yet, the cover notes should and always serve the purpose.<sup>27</sup> Thus, when the checking authority (ies) is presented with the cover notes, they deemed it as compliance with the requirement of law, at least for some period pending the issuance of policy or certificate of insurance.

#### ***Certificate of Insurance***

By virtue of section 6(4) of the Motor vehicle (Third party) Act, certificate of insurance is required from the car users as evidence of having insurance policy in place. This underscores the importance of certificate of insurance. This has necessitated the general practice of having/obtaining insurance certificate from the vehicle inspectors (V.I) office(s) along with other vehicle particulars. Research has shown that most of the certificate of insurance brandishing by most car users are fake<sup>28</sup> or mere papers which has no basis of contract of insurance-

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<sup>24</sup>(1974) N. C. L. R. 304 at 309.

<sup>25</sup> See the supreme court decision in *Yadis Nigeria Limited vs Great Nigeria Insurance Company Limited* (2007) ALLFWLR PT.370, P.1348 at 1378.

<sup>26</sup>Omoeboh, O., Op.cit, p.88.

<sup>27</sup>Irukwu, J. O., op.cit. pp.83-84

<sup>28</sup> See The Nation, Monday 6<sup>th</sup> July 2015, p.28 wherein the Division Police Officer, Sapo Police Station, Lagos stated that 90% of motor insurance Certificates are fake,

offer and acceptance, particularly proposal forms were not filed or executed and as such no contract of insurance at all between the insurers and the carriers of these certificates.

However, it is important to state here that certificate of insurance is not the same as insurance contract just as we stated earlier. The certificate only evidences contract but contract of insurance itself has its basis in the proposal form and other constituent elements.<sup>29</sup> Therefore, parading the certificate of insurance when in fact there is no insurance contract, will only entitle the owner to no claim in case of accident or happening of risk. This accounts for failure of most of these fake certificate-carriers, to file a claim from the insurers whose certificates were issued to them.

### ***Consideration***

As stated earlier, since contract of insurance is a form of contract, it is required as an element of contract that there must be consideration. In other words something of value in the eyes of law must be given for a promise in order to make it enforceable.<sup>30</sup>

In the contract of insurance, the consideration given by the insured to the insurer is known as the ***premium***. In the same vein, the consideration from the insurer to the insured is the promise to indemnify the insured in the event of loss or happening of risk.<sup>31</sup> The general common law position is that the liability of the insurer commences immediately acceptance is communicated to the insured and it is immaterial that the premium has not been paid<sup>32</sup>.

However, the requirement of the law of insurance in Nigeria in respect of payment of premium has changed. It is now required by the law that for the insured to claim the insurance benefit, he must show proof that he has fully paid his premium and in advance, before the happening of risk insured against.<sup>33</sup> The law particularly on Motor vehicle was considered by the Court of Appeal in the case of *Industrial and General Insurance Company Limited vs. Kechinyere (Mrs.)*<sup>34</sup>, where the court held that the provision of section 50(1) of Insurance

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see also Gam-Ikon, E.O., How Regulators underdeveloped the Insurance Industry in Nigeria- available @ <http://www.proshareng.com/news/18757> accessed on 12/04/13. at 1:30p.m, Nike Popoola, Ensuring Compliance with Insurance Laws- available at <http://www.nigerianbestforum.com/generaltopic/wp-content/> accessed on 24/2/2013 by 3:30p.m

<sup>29</sup> In *Chime vs United Nigeria Insurance Company Ltd* (1972) E.C. S. L. R. 808 at 439, it was held that the policy, not the certificate, is a document in which is contained the terms of the contract. The certificate is evidence, not conclusive of the existence of a policy of insurance.

<sup>30</sup>Sagay, I. E. op cit. p.59.

<sup>31</sup>Irukwu, J. O.,op. cit. p.84.

<sup>32</sup>Ibid.

<sup>33</sup> See section 50(1) of Insurance Act, Cap I17 L.F.N. 2004.

<sup>34</sup> (2010) 1 N.M.L.R. 249 at 258-259.

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Act is clear and unambiguous. It is to the effect that receipt of an insurance premium shall be a condition precedent to a valid contract of insurance, failure of which there will be no cover in respect of an insurance risk, unless the premium is paid in advance.

In that case, The Mercedes Benz was insured by insured on 18th December 2002, for a period of twelve months for a premium of N520,000:00(Five Hundred and Twenty Thousand Naira). A deposit of N220, 000:00 (Two Hundred and Twenty Thousand Naira) was paid. The car was robbed at gun point on 15th February 2003. It is a fact not in dispute that at the time the car was robbed the respondent has not paid up the premium of N520, 000:0 0, she was to pay at the time the contract was entered into. It was also not in dispute that the insured only went back to the insurer two (2) day after the robbery, to pay the balance of the premium<sup>35</sup>.

Therefore, the premium under Nigerian Insurance law must be paid in advance before the insured is entitled to claims, should the risk fall due.

### ***Capacity of parties to enter into contact***

The general rule is that any person may enter into any form of contract provided such a contract is legal. However, there are certain classes of persons whose rights to freedom of contract have been curtailed by the law<sup>36</sup>. These include illiterates, infants, insane and drunken persons. The contractual capacity of the categories of the above mentioned persons has been discussed in details in the contract law text<sup>37</sup>, brief reference will only be made to them, and only in relation to the contract of insurance.

#### **(a) *Illiterates***

The general rule is that contract made by an illiterate person is binding on him if the contract is oral<sup>38</sup>. This is because illiteracy would not come in given such situation. However, if the contract is written, the illiterates' protection laws<sup>39</sup> would be applicable. The protection is to safeguard the interest of such person in the contract.

Notable legislation is the Illiterates Protection Act/Laws of various states which contain provisions to the effect that the writer of any such document must indicate his name, address and state therein that the content of the document was read to the illiterate and he understood it before affixing his signature, mark or thumb.

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<sup>35</sup>Ibid, at p. 259.

<sup>36</sup>Irukwu, J. O., op.cit.p.85

<sup>37</sup> For example see Sagay, I. E., op.cit pp. 457-488.

<sup>38</sup>Ibid, p.458.

<sup>39</sup> These include illiterates' protection Act/Laws of various states, the jurat clause to be inserted in such agreement.

The effect is that the illiterate after the fulfilment and complying with the provision of the law would be deemed to have consented to the contract and is thereafter bound by it. Applying this requirement of law to the insurance contract, the insurer who mostly prepare the proposal form is duty bound to make sure that the illiterate insured party understood the content of the form and consented to the contract before affixing his mark. However, where the insurer deals with the insured through an agent/broker, such/similar duty is imposed on the agent.<sup>40</sup> Otherwise, the illiterate insured may rely on the provision of the illiterate law to challenge the contract.

Furthermore, illiterate person has capacity to enter into contract of insurance, but for him to be bound by the terms of contract as contained in the policy form/proposal form; insurer is imposed with the duty of complying with the illiterate protection law.

It must be noted here that the illiterate protection laws are only meant to protect a person illiterate in the language of a contractual document from being cheated and not in all language. For instance, Section 2 of the Illiterates Protection Law, Cap 67, 1994, Laws of Lagos States, provides thus:

Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter, or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement-

That he was instructed to write such letter or document by the person for whom it purports to have been written and that letter or document fully and correctly represents his instruction; and

If the letter or document purports to be signed with the signature or mark of the illiterate person, that prior to its being signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person.

It is worthy of note that the above provision of the law is contained in other various states laws.<sup>41</sup> Thus, the substance of law applicable to illiterates' contract is uniform throughout Nigeria. The whole essence of the protection of law to

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<sup>40</sup>Okany, M. C., op.cit.p. 625.

<sup>41</sup>For example see section 2 of Illiterate Law of Kwara State, Cap I 1 Laws of Kwara State, (2007), section 2 of Illiterates Protection Act, Cap I1 Laws of Federal Capital Territory, Abuja, which have similar content with the provision of Lagos state illiterate law.

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illiterates is to ensure that illiterates are not cheated or defrauded by the content of the document they execute and to prove that the illiterates actually prepared to be bound by the contract, after he has understood same. The Court of Appeal (per Sulu Gambari JCA, (as he then was) emphasised this need, in the case of *Salami vs. Savannah Bank*<sup>42</sup>, when he held thus:

“The illiterate must not only be informed of the content of the document before he signed it, the explanation must also be correct, it must not be extraneous, misconceived so as to convey a different meaning of the undertaking than was intended by the parties.”

Failure to comply with the provision of illiterates’ protection laws may result to different legal effects. It can make the contract illegal, void, voidable or enforceable<sup>43</sup>, depending on the nature of the contract. It is essential obligation on the insurer to make sure that the illiterate insured understand the nature of the contract of insurance or the proposal form before execution/signing, most especially, if he (illiterate insured) signed the form in the insurer’s office without his lawyer, relatives, or witness in attendance(which is common occurrence in practice). This is to ensure the compliance with the illiterates’ protection law.

It should be noted that the illiterates’ protection laws are only shield for the illiterates (to protect their interests) but not a sword. Thus, if there is proof that the illiterate understands the nature of the contract; the contract would be made valid, even if the other party has failed to comply with the illiterates’ protection law<sup>44</sup>.

### **(b) Infant**

There are arguments as to what is the age of maturity or majority, when a person is ceased to be an infant. Some favours eighteen (18) years of age while others argued in favour of Twenty-one (21)<sup>45</sup>. The general rule of common law is that contracts made by an infant are voidable at his option (that is not binding on the infant but binding on the other party)<sup>46</sup>. However, the above position of common law has been modified by infants Relief Act and Sales of Goods Act<sup>47</sup> which made

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<sup>42</sup>(1990) 2 N.W.L.R. Pt. 130 p. 125.

<sup>43</sup>See Sagay, I. E., op.cit. p.472.

<sup>44</sup>Sagay, I. E. op. cit. 468.

<sup>45</sup> Ibid, pp.475-478.

<sup>46</sup> Ibid.

<sup>47</sup> Infant Relief Act of 1874 and Sale of Goods Act 1893. Both Acts are Statutes of General Application in force in England before 1 January 1900, and therefore, by virtue of Section 45 of the Interpretation Act, Cap. I 9 Laws of the Federation of Nigeria, 2004, are applicable in Nigeria

provision for necessities or contracts of necessities and made such a binding one for the benefit of the infant<sup>48</sup>.

It may be rightly correct to state that since the contract of insurance is necessary and by provision of the law compulsory for all car user/owner, if an infant possess a car, insurance contract is compulsory. Entry into such contract that is beneficial to him (infant) is necessary and as such he is deemed to have possessed/has capacity to enter in such contract, particularly Third (3) party car insurance, which is mainly for the benefit of the affected third party (ies).

**(c) Lunatic and Drunken persons**

The position of law has since been settled that a contract made by an insane or drunken person is binding on him only, if the contract is for necessities<sup>49</sup>. In addition to that, just like mentally disordered person, a person in a state of drunkenness has the advantage of law as the contract would be regarded voidable at his instance.<sup>50</sup>

It is therefore submitted that the contract of insurance entered into with the lunatic and drunken person would be regarded as valid, provided that necessary elements of the contract are present, and no fraud or misrepresentation is found in the contract. However, it has been observed that insurers in this country rarely have occasion to do business with insane and drunken person, but insurance policies are issued from time to time to infants.<sup>51</sup>

***Intention to create legal relation***

In common law, it is clear that the requirement of intention is essential to the formation of contract, particularly commercial contract as opposed to social and domestic contracts.<sup>52</sup> However, the law presumes the presence of the contractual intention in commercial agreement.<sup>53</sup> Thus, the court will presume the presence of intention of parties from surrounding circumstance of the contract and arrives that there is consensus ad idem.<sup>54</sup>

Therefore, contract of insurance, being commercial in nature, requires the presence of intention of both the insured and insurer to create a legal relation. The intention can be easily deduced from the acts of the parties- filling and processing of the proposal form, payment/acceptance of premium, etc.

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<sup>48</sup>Etomi, G., (2014), An introduction to Commercial law in Nigeria, Text, Cases & Materials (MIJ Professional Publishers Limited), pp. 24-25, see also Achike, O. op.cit, pp.34-35.

<sup>49</sup>Irukwu, J. O., op.cit. p.85, Sagay, I. E., Op.cit, pp.487-488.

<sup>50</sup>Sagay, I. E., op.cit. p.488.

<sup>51</sup>Irukwu, O., Op.cit.p.85.

<sup>52</sup>Sagay, I. E, Op.cit, pp.113-117.

<sup>53</sup> Ibid.

<sup>54</sup>Iruwu, J. O., Op.cit.p. 85.

### **Basic Principles of Insurance Contract**

Due to special and peculiar nature of Insurance, contracts of insurance are governable by basic/fundamental principles, in addition to general contract principles<sup>55</sup>. These Principles are:

- ✓ The Doctrine of *uberrima Fides*-Utmost Good Faith.
- ✓ The requirement of an insurable interest.
- ✓ The Principle of indemnity and subrogation.

### ***The Doctrine of Uberrima Fides-Utmost-Good Faith***

This doctrine imposes duties on parties to the contract of insurance to declare/supply necessary information relevant to the formation of the contract. Unlike in other contracts, where the doctrine of Caveat emptor-buyer be aware applies and where the seller is not bound to make any representations to the buyer with respect to the quality of the goods, the subject matter of the transaction, the law imposed a duty on the assured/insured to make a disclosure of material facts of the contract, which will enable the insurer to make his judgment to accept the contract.<sup>56</sup>

This doctrine is also known as non-concealment of material facts and showing of utmost good faith by the insured is the hall mark of all contracts *uberrima fides*.<sup>57</sup> The principle of utmost good faith is very important in the sense that the material facts supplied by the insured would be the basis for the decision of insurer either to accept or refuse the offer or to insist on higher premium.<sup>58</sup> Therefore, correct and accurate information must be supplied. In the case of *Yadis Nig. Ltd vs. C.N. I.C. Ltd*,<sup>59</sup> the supreme court (Per Akintan JSC (as he then was) reiterated the essence of utmost good faith in insurance contract, when he stated thus: “The position of the law is that the contract of insurance must be one of utmost good faith.”

Since the information is required from the insured via proposal form, the insured is duty bound by this doctrine of utmost good faith to supply all required information truly and genuinely. Generally, a fact is deemed to be material if it will influence the decision of the insurers in accepting the premium payable or avoid the contract entirely.<sup>60</sup> However, each case with its peculiar circumstance, will determine what constitute materiality of any fact.

It must be pointed out here that the duty of disclosure of material facts is limited to those facts actually known or ought to be reasonably within the knowledge of the insured at the time of contracting and applicable to latter emerged facts.<sup>61</sup>

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<sup>55</sup>Ackike, O, Op.cit.p.321, Okany, M. C., op.cit. p. 630.

<sup>56</sup>Ackike, O., Op.cit. p. 630.

<sup>57</sup>Okany, M. C.,Op.cit, p.322.

<sup>58</sup> Ibid.

<sup>59</sup>(2007) ALL FWLR pt.370, P. 1348 at p. 1378 paras E.

<sup>60</sup>Achike, O., op.cit.p.g.323.

<sup>61</sup>Okany, M. C., Op.cit, p.631.

The doctrine of utmost good faith brings about treating a particular item/clause as condition or warranties and failure to observe them may vitiate the contract or make it voidable at the instance of the other party. Since, the duty to disclose is not implied term of the contract, non-disclosure does not by itself give rise to a claim in damages; the remedy lies in the avoidance of the contract.<sup>62</sup>

### ***Insurable Interest***

It is also fundamental and essential in any contract of insurance that the insured must show that he has an insurable interest in the subject matter of insurance. Section 56 of the Insurance Act provided thus:

A policy of insurance made by a person on the life of any other or any other event whatsoever shall be null and void where the person for whose benefit or on whose account the policy of insurance is made has no insurable interest in the policy of insurance or where it is made by gambling or wagering.

Consequently, where the insured cannot establish that he will suffer financial loss in the event of the destruction of the subject matter of insurance, there would not be insurable interest and the contract would be declared invalid<sup>63</sup>. To this end, in the case of *Law Union and Rock Insurance of Nigeria Ltd vs. Onuoha*,<sup>64</sup> per Oguntade JCA(as he then was) explained insurable interest as very elastic and not always coterminous with ownership, wholly or partly of the particular goods insured. He held that a court called upon to determine whether or not a particular claimant has an insurable interest in the property concerned will need to consider the issue whether the destruction or diminution in value of the property will result in a loss to the claimant.

Insurable interest is applicable in all types of insurance. In the area of property, it is factual and natural that a person would have interest in his properties of whatever kind.<sup>65</sup> For example person would have insurable interest in his car, house or business. Therefore, there is insurable interest on those properties.

From the above, it is discernible that ownership plays a vital role in evaluating insurable interest. Furthermore, only a person who has direct legal or equitable interest in the subject matter of insurance policy can be said to have an insurable interest on such subject. Having said that, it is important to put to record here that time for ascertaining the existence of insurable interest has legal implication.

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<sup>62</sup>Ibid, p.630.

<sup>63</sup>Achike, O., op. cit, p.324

<sup>64</sup> (1998) 6 N.W.L.R., Pt. 555, p. 576

<sup>65</sup> Ibid,p.326

### **Time for Ascertaining the Existence of Insurable Interest**

In determining the effect of this, distinction must be made between life insurance and other insurance. In life insurance, the insured must have an insurable interest at the time at which the contract of insurance is concluded and it is not compulsory that the interest existed at the time of maturity of the policy or at the time of death.

In contract of insurance for fire or accident, the insured must establish his insurable interest on the destroyed object not only at the time of effecting the insurance policy but must also exist at the time of loss. This distinction is important and has legal effect in connection with benefit from insurance policy.<sup>66</sup> The illustration of the erudite commercial law writer, on this distinction, is apposite, where he stated thus:

If Chikwado has planned to buy a motor car on September 15th, it is permissible for him to arrange in advance, say on 10th July, with the insurance company whereby the policy takes effect from September 15th, so long as he has purchased the car by that date. If for example, Chikwado obtains a good offer from Amachi on 4th November and sells the car to him on the same day but the car is involved in a ghastly accident on December 18th, it is obvious that having sold the car, Chikwado will not recover from the insurance company the sum payable under the policy. Therefore, by the sale of the car, Chikwado's interest terminates. Amachi, on his part, cannot rely on the policy taken on the car by Chikwado to make a claim, unless he has taken a new policy or there has been a proper legal assignment of the policy to him.<sup>67</sup>

### ***Indemnity and Subrogation***

#### **(a) *Indemnity***

Indemnity means a guarantee or assurance to put the insured in the same position in which he was immediately prior to the happening of the uncertain event. The insurer undertakes to make good the loss.

All types of insurance contracts (except life and personal accident insurance) are contract of indemnity<sup>68</sup>. Accordingly, the insurer undertakes to indemnify the insured against a loss of the subject matter of insurance due to insured cause. In other words, contract of insurance is of two (2) types, namely indemnity insurance and contingency insurance (i.e. insurance contract in respect of life and personal accident).<sup>69</sup>

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<sup>66</sup>Achike, O., op.cit. P.327.

<sup>67</sup>Okany, M. C., op.cit. p. 639.

<sup>68</sup>Ibid.

<sup>69</sup>Achike, O., Op.cit., p. 327.

The principle of indemnity is based on the idea that the assured/insured in the case of loss shall only be compensated against the actual total loss. However, in contract of insurance of life and accident, the insurer simply undertakes to pay certain stipulated sum of money in the event of death or personal accident.<sup>70</sup>

The whole essence of indemnity principle is to ensure that the insured does not make a profit out of his loss. To this end, Achike observed thus:

Therefore under this principle, it is illegal for the insured to recover more than the value of his actual loss, because the dictates of public policy frown on the insured making a profit over and above the amount of his actual loss.<sup>71</sup>

It is important to point out here that in case of property insurance, and the property is damaged or destroyed beyond repairs, the insurer must indemnify the insured to the full value of the insurance (market value), and in that case, the insured must surrender the salvage of the chattel to the insurer.<sup>72</sup>

**(b) Subrogation**

This doctrine is a correspondent right to the doctrine of indemnity. By this doctrine, the insurer, having indemnified the insured in respect of the loss, is conferred with a right and benefit which the insured is ordinarily entitled to.

Therefore, subrogation is the transfer of rights from the insured to the insurer who has satisfied and settled the loss or damage to the property or any subject matter of insurance contract.<sup>73</sup> In exercising the right of subrogation, the insurers become entitled to the benefit of rights and remedies which are available to the insured and which will go in extinction or diminution of the loss that they are obliged to bear. Consequently, the insurer (under the doctrine of subrogation) is entitled to maintain actions in the name of the insured for any claim from a third party, who is negligent or caused the act that brought the loss or damage the insured property.

By way of illustration, if “A” insures his car with “B” company and thereafter, the car involved in an accident of collusion or negligence of C. With the principle of indemnity, B Company must indemnify A on the car and under the doctrine of subrogation, B Company can maintain claim against C for tort of negligence but such action must be maintained in A’s name.

***Double Insurance and Doctrine of contribution***

To further build upon the doctrine of indemnity, subrogation and rule against double portion, this doctrine operates in the event or situation where a person takes two (2) or more insurance policies upon the same subject and in respect of the same insurable interest.

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<sup>70</sup> Ibid.

<sup>71</sup> Achike, op.cit.p.327.

<sup>72</sup> Okany, M. C., op.cit. p.640.

<sup>73</sup> Achike, O.,op.cit. p.327.

## Juxtaposition of Motor Vehicle Insurance Scheme and Motor Takaaful as Islamic Law Alternative

An insured is allowed and at liberty to have double insurance. However, the total amount of insurance on the subject of insurance (if materialized) must not exceed the value of the loss.<sup>74</sup> In such situation, the insured is allowed to recover the total value of the loss from any of the insurers up to the amount of the policy. The insurer who settles the total value can claim contribution from the other insurer(s) in the ratio of the amount with each insurer.<sup>75</sup>

The above principle would be better understood with the following illustration: Mr Okon insured his car against accident with X Company for the sum of N20, 000:00 (Twenty Thousand Naira only) and at the same time with Y Company for another N30, 000:00 (Thirty Thousand Naira). Thereafter, the car was involved in an accident with a damage claim of N10,000:00 (Ten Thousand Naira). Mr. Okon can claim the entire N10, 000:00 (Ten Thousand) from X or Y Company. In this situation, either company can reimburse itself from the other in proportion to the amount of the policy with each one of them. Therefore, if X paid the whole N10, 000:00, it could claim the contribution from Y in the following calculation =  $30,000/50,000 \times 10,000 = N6, 000: 00$ . In essence, X will claim N6, 000:00 (Six Thousand Naira only) from Y.

Conversely, if Y paid the whole loss, it could claim the contribution from X, in the following calculation =  $20,000/50,000 \times 10,000 = N4, 000:00$  Therefore, Y will claim the sum of N4, 000:00 (Four Thousand Naira only) from X.

It should be noted that the rule is based on the principle of fairness and equity. It is important to note lastly that the insured must not wilfully destroyed the property, to be entitled to the policy benefit and the burden of proving that the conduct of the insured was deliberate is on the insurer.<sup>76</sup>

It should be also noted that just like any other contract, contract of insurance must be a legal one and not to insured illegal items/property.

### **Relevant Motor Vehicle Insurance Laws, Regulation and Administration Under Nigerian Statutes**

It is generally acceptable that life is full of risks; in fact life itself is a risk. Thus, almost every activity of our lives involves risk. In other word, every human being is faced with risks to life or property, including businesses. This is because as individual has risks staring in his face, so economic enterprise faces business risks<sup>77</sup>. It is therefore prudent to make relevant preparation to alleviate the effect of risk. This formed the basis of insurance law or contract of insurance. Furthermore, the need for insurance is more relevant in the modern time as a

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<sup>74</sup>Ibid, pp.331-332.

<sup>75</sup>Okany, M.C., *op.cit.*pp.639- 640.

<sup>76</sup>Achike, O., *op.cit.*p .646.

<sup>77</sup>Yerokun, O., *Op.cit*p.1

result of our involvement in hazard and risky activities.<sup>78</sup> This necessitated the need for insurance policy and as a result, the Country witnessed the existence of Mushroom or Kangaroo insurance Co-operations/companies.<sup>79</sup> To curb this situation, the Federal Military Government promulgated the insurance Decree No. 59, 1976.<sup>80</sup> This enactment was regarded as the first comprehensive law regulating insurance and those transacting insurance business in Nigeria. Thus, subsequent laws have largely followed pattern of the 1976 Insurance Act (which came in to operation on 1st December 1976).

Since the date thereof, insurance generally and motor insurance specifically has been regulated by statutes and agencies involved such as National Insurance Commission (NAICOM)<sup>81</sup> and Nigeria Council for Registered Insurance Brokers (NCRIB)<sup>82</sup>. The cumulative efforts of the agencies, in implementing the laws, contributed to success and tremendous improvement recorded in the field. Prior to this time, the insurance business and industries were regarded as forum for fraud.

It is to be noted here that reference to statutes mean laws enacted by the legislature (i.e the legislative arm of government either National Assembly or State Houses of Assembly.<sup>83</sup> Since insurance is under the exclusive legislative list, only the National Assembly can make law on it.<sup>84</sup>

Consequently, the following statutes have been identified to have either directly or indirectly governed the regulation of the motor vehicle insurance in Nigeria.

#### **(i) Insurance Act**

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<sup>78</sup>Achike, O., Op.cit.,p.316

<sup>79</sup>Achike,O.,Commercial law, Op.Cit. p.g. 319.

<sup>80</sup> This Act has been severally amended. The current one is insurance Act Cap 117, Laws of Federation of Nigeria Laws of .the Federation of Nigeria 2004. On several amendments, see Omo-eboh, O., (2012), *The Law of Insurance Contract in Nigeria*, West African Book Publishers Limited, p.2.

<sup>81</sup> This is current regulatory and supervisory agency of government for insurance industry in Nigeria. It was created by NAICOM Act, Cap.N53, Laws of the Federation of Nigeria, 2004. Section 7 of the Act spelt out the functions of the Commission.

<sup>82</sup> NCRIB was created by NCRIB Act, 2003 which is contained in Cap.N148 Laws of the Federation of Nigeria, 2004. For the Duties of the Council see section 2 of the Act. See also the Decision of the Court of Appeal in *NAICOM VS NCRIB (2006) 7 C.L.R.N. P.105* to the effect that both NAICOM and NCRIB are empowered to regulate insurance brokers though NCRIB has more extensive powers because it regulates both natural and artificial persons.

<sup>83</sup> On various nomenclature of law in consideration of the bodies that passed them, see Obilade, A. O., (1979), *The Nigerian Legal System*, Spectrum Law Publishing, Ibadan, 1979, pp. 64-68.

<sup>84</sup> See item 33 of second schedule to the constitution of Federal Republic of Nigeria, 1999 (as amended).

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The apposite provision of this legislation to motor vehicle insurance is section 68 which provides thus:

No person shall use or permit any other person to use a motor vehicle on a road unless a liability which he may thereby incur in respect of damage to the property of third parties is insured with an insurer registered under this Act.

The insurance taken out pursuant to subsection (1) of this section shall cover liability of not less than N1Million.

The insurance under this section shall be in addition to the liabilities required to be insured under the Motor Vehicle (Third party) Insurance Act, 1950 and shall be regulated mutatis mutandis by the provision of this Act

The Act regulates all form of insurance business except mutual co-operative insurance and foreign company engaging in reinsurance.<sup>85</sup> The Act also provided that before any company commences the business of insurance, it must be incorporated in line with Companies and Allied Matter Act, and also register with National Insurance Commission.<sup>86</sup>

Certain minimum share capital are required for various categories of insurance business and insurers are also mandated to deposit 50% (Fifty percent) of the paid up share capital with the Central Bank of Nigeria.<sup>87</sup> The essence of insurance Act is to free the insurance business (sector) from all sort of fraud and safeguard the interest of insured or policy holders.

It is interesting to point out that the provision of Section 68(3) of the Insurance Act made reference to Motor vehicle insurance Act, and mandatorily required that the former should regulate the latter. Therefore, by implication National Insurance Commission also regulates Vehicle insurance.<sup>88</sup>

### **(ii) Motor Vehicle (Third Party) Insurance Act Cap. M22. L.F.N.2004**

This is a specific law on motor vehicle insurance policy. It provides that all car users/owners must have at least insurance against third party.<sup>89</sup> There are categories of people exempted from the provision of the Act.<sup>90</sup>The policy must

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<sup>85</sup> See 1 section of the insurance Act, Cap. I 17 Laws of Federation of Nigeria 2004

<sup>86</sup> Ibid, Sections 3 & 4.

<sup>87</sup> Sections 9 & 10 of Insurance Act Op.cit.

<sup>88</sup> See section 102 which is interpretation section wherein the body is referred to as NAICOM.

<sup>89</sup> See section 3 of the Motor vehicle insurance Act Cap. M22, L,F.N. 2004.

<sup>90</sup> See section 5 of the Act. They include Government owing vehicle, police vehicle and other vehicles declared by minister to be so exempted. See also various regulations to

be issued by an approved insurer, otherwise known as registered insurer under the insurance Act.

In a nut shell, the focus of the provisions of this Act is on third party protection under the insurance cover in respect of any injury caused by assured or his servant.<sup>91</sup>

Furthermore, the following legislations are also relevant to the regulation and administration of motor vehicle insurance policy.

**(iii) National Insurance Commission**

The Commission was established by section 1 of the National Insurance Commission Act.<sup>92</sup> The commission is saddled with responsibility of establishing standards for the conduct of insurance business in Nigeria, approving rates of insurance premium to be paid in respect of all classes of insurance business, protecting insurance policy holders and beneficiaries and third parties to insurance contract and other such activities connected or incidental in its other functions under the Act<sup>93</sup>.

**(iv) Nigerian Council of Registered Insurance Brokers**

By virtue of section 36 (3) (a) of the Insurance Act, only companies that meet the required qualifications that would be specified to be registered. The Nigerian Council of Registered Insurance Brokers is a creation of statute,<sup>94</sup> and is a body responsible for dealing with qualification of insurance Brokers while the National Insurance Commission is the body that registers the bodies so qualified for business.<sup>95</sup>

Other relevant laws that enhance administration and regulation of motor vehicle insurance include:

**(v) Road Traffic Act/Law**

Road traffic Act in respect of federal road or high way made provision for production of some relevant documents to the police or other authorized officer. Those documents include evidence of compliance with the provision of motor

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the Act that exempted some special vehicles, e.g. Local Government vehicles, foreign vehicles, e.t.c.

<sup>91</sup>Yerokun, O.op.cit. p. 19.

<sup>92</sup> Cap. N53, Laws of Federation of Nigeria, 2004.

<sup>93</sup> For details of functions of the Commission, see S. 7 of the National Insurance Commission Act, Cap. N53, Laws of Federation of Nigeria, 2004.

<sup>94</sup> Nigerian Council for Registered Insurance Brokers Act, Cap. N148 Laws of Federation of Nigeria 2004

<sup>95</sup> See the decision of court of Appeal in the case of *National Insurance Commission Vs National Council for Registered Insurance Broker* (2006) 7 C.L.R.N., P. 105 at P.117.

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vehicle insurance policy. Similar provisions were found in traffic law in respect of states roads.<sup>96</sup>

The totality of all these laws is to enforce the law on motor vehicle insurance policy as required by the law.

### (vi) Federal Road Safety Commission Act

By virtue of section of 11(4) (i) & (ii) of Federal Road Safety Commission Act,<sup>97</sup> members of the Corps have power to arrest and prosecute offence of being on road without possessing a valid driving license or any other licenses or permit required by law or for operating a vehicle with forged driving license or insurance papers. Section 12 of the Act also enumerates the rank or designation of the members of the Corps as route commander, Vehicle inspection Marshal, and Road Marshal.

### (vii) Police Act

With omnibus power conferred on police,<sup>98</sup> it may therefore be right to state that the police also have power to enforce and prosecute breach of insurance law. The above position is fortified by provision of section 18 of Road Traffic Act, which provides thus:

“Where a motor vehicle is found plying or being driven or used in any highway within the Federal Capital Territory, without the necessary particulars, a police officer may impound the vehicle and cause vehicle to be removed to a removed vehicle park.”

## Nature of Contract of Insurance on Motor Vehicle

Motor vehicle insurance otherwise known as **Car insurance** or **automotive insurance** constitutes the largest section in insurance market in Nigeria.<sup>99</sup> This is because the law makes it compulsory for every motorist to possess a policy of insurance in respect of third party risks.<sup>100</sup>

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<sup>96</sup>For instance section 9 of Road Traffic law of Kwara State, Cap. R 5, Laws of Kwara State, 2007, provided for the appointment of principal Inspector of Motor Vehicle to perform such duties which may include demanding for necessary documents required for car users by the laws.

<sup>97</sup> Cap F19 Laws of Federation of Nigeria, 2004.

<sup>98</sup>Section 4 of the Police Act, Cap. P19, Laws of Federation of Nigeria, 2004, empowered the police to preserve law and order and enforce all laws.

<sup>99</sup>Yerokun, O., op.cit p. 389, Agomo, C.K., (2013), *Modern Nigerian Law of Insurance* (2<sup>nd</sup> Edition) Concept Publication Ltd, p. 217.

<sup>100</sup> See section 3, Motor vehicle (Third party) Insurance Act, Op.cit, Section 86 Insurance Act, Op.cit.

Third party insurance as a minimum policy provides cover only for death or bodily injury of other road user-third party.<sup>101</sup> However, it does not cover damages to property of a third party, the insured's property or vehicle or to injury to his person.<sup>102</sup>

Car insurance is an absolute necessity for everyone who drives car. That apart, coverage is essential, the potential cost surrounding an accident-whether for repair or replacement cost of the car or other property, medical costs of the victim, may be too huge for the car owner, without adequate coverage.

### ***Definition of Motor Vehicle Insurance***

The contract of insurance of whatever type can be accommodated by definition of insurance contract earlier given in this work.<sup>103</sup> However, motor vehicle insurance can be easily and simply referred to as “a contract by which an insurer assumes the risk of, or any loss the owner or operator of a vehicle may incur through damage to property or persons due to an accident”.<sup>104</sup>

The law provides that anyone who uses or cause or permits another to use a motor vehicle on a road must have insurance to cover the liability to pay damages for death or bodily injury caused by or arising out of the use of such vehicle.

Exemption to section 3 as provided by section 5 is to the effect that the obligation to insure under section 3(1) does not apply in the following circumstances:

- i. In respect of vehicles belonging to the Government of the Federation or a State while they are being used or operated for the purposes of the Government.
- ii. In respect of motor vehicles used by a person who has deposited N10,000:00 (Ten Thousand Naira) with the Accountant-General of the Federation in respect of such motor vehicles.
- iii. With respect to motor vehicles which are being driven for police purposes.
- iv. In respect of any person declared by the president to be exempted from the provisions of this Act.
- v. In respect of any motor vehicles declared by the president to be exempted from the provision of the Act.

It should be noted that certain categories of persons are exempted from benefiting from liability cover under the Act. Such persons include injuries sustained or death arising out of, in the course of employment of the insured employee and persons in passenger vehicle without remuneration (i.e not on hire or reward) persons on any contractual liability.<sup>105</sup>

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<sup>101</sup>Achike, O., op.cit. p.. 345.

<sup>102</sup>Okany, M. C.,op.cit. P.665.

<sup>103</sup> See chapter 1.

<sup>104</sup>Aigbokhavbo, V., *Law of Banking and Insurance II*, Course Book (Course Code-Law 432 (2010) for School of law, National Open University of Nigeria, p.72.

<sup>105</sup>Okany, M. C.,op.cit p.665.

***Motor Vehicle Defined***

Section 2 (1) of the Motor Vehicle (third party) Insurance Act, defined motor vehicle thus: “Motor vehicle means, a vehicle propelled by mechanical power other than a vehicle constructed to run on rail and includes a motor cycle”. By the wording of the definition above (which is descriptive in nature than definitive), motor vehicles include car, motor cycle, lorries, crane, motor scooter or graders, trailer, Agricultural machine, tractor etc.<sup>106</sup>

***Forms /Types of Motor Vehicle Insurance Scheme***

It must be emphasized here that Motor Vehicle (Third Party) Insurance Act, does not restrict the terms of the policy cover, but merely specified minimum policy, a car user must have. Therefore, the assured/insured may extend the scope of the risk to be covered by the policy.<sup>107</sup>

Consequently, the followings are forms of Motor Vehicle insurance Scheme:

- i. Third party Insurance Policy (Compulsory Insurance)
- ii. Comprehensive
- iii. Third Party, Fire & Theft<sup>108</sup>

**(i) Third Party Insurance Policy (Compulsory Insurance)**

This policy insures the owner of the vehicle against liability which is incurred in respect of the death or bodily injury caused to third parties while using the vehicle or in permitting the use of the motor vehicle. This is the minimum required by the law. The policy provides indemnity for death and bodily injuries occasioned to 3<sup>rd</sup> parties or their properties.

By virtue of Section 13 Motor Vehicle (Third Party) Insurance Act, no settlement made by an insurer in respect of a claim which might be made by a third party in respect of any liability that is required to be covered by a policy issued under the provisions of the Act is valid, unless such third party is a party to such settlement. It is similarly provided that a policy issued under the Act shall remain in force and be available to third parties notwithstanding the death of any person issued under such policy as if such insured person were still alive.

Therefore, third party policy only protects the interest of the third party, but neither protects the insured against damage to others nor provides protection to the policy holder.<sup>109</sup>

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<sup>106</sup> The list is not exhaustive. The list is gleaned by the writer from provision of section 22 of the Federal Road Safety Commission Act, Cap. F19, L.F.N. 2004. This is because, license is required for those vehicles, it therefore analogically deducted that insurance policy would be required for them.

<sup>107</sup> Okany, M. C., Op. Cit. p.665.

<sup>108</sup> Agomo, C.K., Op.cit., p.216.

<sup>109</sup> Yerokun, O., op.cit. 393

It is relevant to state here that, since the insurer always dictate the terms of the insurance contract, certain restrictions which may affect the interest of third party (who is a beneficiary) of the policy may be inserted to the proposal form or policy. To protect the third party interest, the Act (Motor Vehicle Third Party) Insurance Act, made adequate provisions whereby certain restrictions if placed on prices (to cover third party) will be void, as against third party.<sup>110</sup>

Section 9 of the Act also voided some provisions if incorporated in the policy to the extent that they affect the benefit of the third party. They include provisions that relate to:

- i. The age or physical or mental condition of persons driving the motor vehicle.
- ii. The condition of the motor vehicle
- iii. The number of persons that the motor vehicle carries,
- iv. The weight and nature of good carried;
- v. Time at which or the areas within which the motor vehicle is used and other relevant information on the vehicle.<sup>111</sup>

It should be noted that where the restrictions are placed on the insurance policy as to the usage of the vehicle and the insurer breached such provision, the insurer would still be liable for any injury sustained by a third party. However, the insurer is entitled to recover such sum from the insured.<sup>112</sup>

## **ii. Comprehensive Policy**

As the name implies, this is more extensive than the other ones. It is designed to cover wider risks, under the third party policy and covers the risks of damage to the insured's own motor vehicle. It also covers expenses incurred for medical expenses, for treatment of the injury sustained by the insured. It covers also the driver, or anybody permitted by the owner to drive, or any occupant of the vehicle when an accident occurred.<sup>113</sup>

## **iii. Third Party Fire & Theft Policy**

This provides cover for accidental damage to the insured's vehicle arising out of fire or theft. It would also cover loss or damage to third party property or bodily injury or death to third party. It also cover legal fees incurred in defending actions emanating from an accident for which a claim is being made as well as towing fee for conveying the damaged or stolen vehicle from the scene of accident or place of discovery to the nearest mechanic for safe place of custody.<sup>114</sup>

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<sup>110</sup> See for instance s. 8 of the Motor Vehicle (Third Party) Insurance Act, provides that failure of the insured to report an accident causing injury to the third party does not bar the third party to recover

<sup>111</sup> See section 9 of Motor vehicle (Third party) insurance Act, for comprehensive list.

<sup>112</sup>Okany, M. C., op.cit. 1992, p.666, Achike, O., Op.cit, p.346.

<sup>113</sup>Yerokun, O., op.cit.p.393

<sup>114</sup>Aigbokhavbo, V., op.cit. p. 74.

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It must be stated here that motor vehicle insurance policy covers obtained in Nigeria is inapplicable to accidents, damage or loss which occurs outside the territory. However, if the policy explicitly stated that the policy be extended to accident outside the Nigerian shore, same shall cover such accident.<sup>115</sup>

### **Contrasting Takaaful (As Islamic Alternative To Insurance) Operation With Conventional Motor Vehicle Insurance Scheme Under Nigeria Statutes**

It is generally believed that, there is no objection from Islamic Points of view to the Conceptual Aspect of motor insurance Scheme (which is asset protection). However, due the involvement of certain unlawful elements (such usury, gambling, uncertainty and cheating), in the operation of the scheme, Islamic Law experts and jurist have formulated some models to be adopted in operating the scheme that would make it to be *shariah* compliant and achieve the purpose of protecting the property-vehicle.

#### ***Takaaful Guideline 2013***

It is a general knowledge that prior to the release of Takaful Guideline in March 2013, there is no specific legal frame and recognition for the operation of *Takaaful* business in Nigeria. It has also been discovered that, unlike what is obtainable in other developing Countries, insurance industry did not contribute to the Nation's Gross Domestic Product (GDP). In an attempt to improve on the situation and diversification in the industry, NAICOM embarked on research and discovered that there is need to provide alternative opportunity in the industry for those that disregarded the conventional insurance as result of some of the reasons provided above.<sup>116</sup>

Consequently, the Commission came up with the guideline for Takaful tagged "Operational Guidelines 2013 for Takaful-Insurance operators". Thus Guideline was to take effect from March 2013.<sup>117</sup>

Darazo has aptly captured the objectives of the guideline when he said:

*The Guideline provides a framework that regulates the conduct of Takaful Insurance business in Nigeria. This will provide a platform within which the intending Takaful Companies can operate. The objective is to set-out requirements and minimum standards for operations and disclosure that aims to protect the interest of consumers/participants. It is also aimed at providing a framework for the establishment and growth of Takaful-*

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<sup>115</sup> Ibid, 75.

<sup>116</sup> Ibid.

<sup>117</sup>Section 1.9 of the Guideline.

*insurance business that is efficient and leads to financially sound and sustainable Takaful-Insurance funds.*<sup>118</sup>

It is of great help and convenience to briefly highlight key issues raised by the Guideline.

**a.** Takaful insurance operators are required to obtain the approval of the commission (NAICOM) on the operational model, they intend to use.

In a bid to obtain the consent, the intending operator must submit its application along with other necessary documents such as product model, approval of its Advisory Council of Experts (ACE) and Board of Directors, contract between Takaful insurance and Participants, etc.

**b. Registration Requirement for Takaful Operator**

The applicant must be a limited Liability Company registered under the Company and Allied Matters Act (CAMA), which must have as part of its name such words or terminology that connotes takaful operation, and with minimum deposit of N100, 000,000.00 (One Hundred Million Naira, in case of General Takaful ) to be kept with Central Bank of Nigeria.

The Guideline apart from the above highlighted procedures provides for Shariah Governance/Advisory Council of Experts who shall be reporting directly to the Board of Directors of the Takaful Company. It also stipulates duties imposed on Takaful operators, funds segregation, surplus distribution, Financial Reporting, Expenses, Minimum Disclosures and Auditor's Report.<sup>119</sup> As regards to Corporate Governance, in addition to what it is contained in the Guideline, Takaful operators are required to comply with normal Governance requirements obtainable in Conventional Insurance regulations. These includes requirements for appointment of Board of Directors, CEO/Key persons to be fit and proper, Auditors, Appointed Actuary and other issues guided by Laws or general regulations in the insurance Industry.<sup>120</sup>

At this juncture, it is important to put on record that the guideline categorized *Takaful* operation into two (2) classes: Family Takaful Insurance and General Takaful Insurance.<sup>121</sup>

Family Takaful Insurance is described as typically a long term arrangement between the takaful operators and takaful - insurance Participant providing the policyholder with financial relief, for instance, bereavement, critical illness or disabling injury to fund contributor. On the other hand, General Takaful-insurance is described as typically a short term arrangement between the takaful

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<sup>118</sup>Z.S.Darazo, Op.Cit.

<sup>119</sup> Section 3 of the Guideline extensively captured the governance standards required from Takaful operators while section 4 provided for structures, managements and distributions of the Takaful operators' funds.

<sup>120</sup> Z. S. Darazo, Op.cit.

<sup>121</sup> Section 2.1 of the Guideline provided for this.

## Juxtaposition of Motor Vehicle Insurance Scheme and Motor Takaaful as Islamic Law Alternative

operators and takaful - insurance Participant providing financial compensation for specific losses such as theft or damage etc but will exclude Family Takaful-Insurance.<sup>122</sup>

It is also provided that in carrying out the business, takaful operator must adopt any of the following models:

- i. Takaful-insurance based on Mudarabah (Profit sharing) contract.
- ii. Takaful Insurance based on Wakalah (Agency) contract.
- iii. Takaful-insurance based on hybrid Wakalah-Mudarabah (Agency-profit sharing) contract.<sup>123</sup>

The above summarized the operation model for shari'ah compliance insurance product in Nigeria as per regulation released by NAICOM.

The purpose here is to juxtapose the operation of the scheme under the two systems under consideration. This is to identify differences between the operations of the scheme. *Takaaful* (as Islamic Alternative to Insurance) differed from insurance in connection with motor vehicle insurance in the following areas and issues:

1. Insurance on motor vehicle under Nigeria Statutes is Commercial (with exception of co-operative insurance)<sup>124</sup> while Takaful is essentially based on principle of tabarru' (donation), mutual assistance and doctrine of helping one another (ta'aawun), but the aspect of commercial is developed to invest the funds in the pool in order not to tide down the money.
2. Common law insurance is one codified in the statutes while *takaful* is developed from Principles of Islamic Commercial law through the exercise of doctrine of *Ijtihad*.
3. Minimum amount to be deposited with the Central Bank of Nigeria. while Takaful-Insurance Operators are required to deposit N100,000,000:00 (One Hundred Million Naira) each for Family *Takaaful* and General *Takaaful* separately<sup>125</sup>, Conventional insurance companies must deposit 50% of the minimum required Capital, depending on the

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<sup>122</sup> Section 2.1 of the Guideline.

<sup>123</sup> Section 2.2 (a-c) of the Guideline.

<sup>124</sup> Section 1(a) of Insurance Act, Cap I17, L.F.N. 2004.

<sup>125</sup> Appendix to the Takaful-insurance Guideline.

Categories of insurance to be offered as stipulated under Section 9<sup>126</sup> of the Insurance Act.<sup>127</sup>

4. Under Conventional Insurance on motor vehicle, insurance companies owns the premium and as such control ownership of the funds, invest the funds and make profits out of the business without declaring any profit to the policy-holders. The only benefit for the policy holder is when the loss or risks occurred to the vehicle insured under the policy. *Takaaful* company, on other hand, is not owner of the fund but only a manager and administrator of the funds. It is on the managerial services rendered that qualifies the company to entitle to commission or profit depending on the modes/method adopted.
5. Under Conventional insurance, there is essentially risk transfer mechanism. However, under *Takaful* the policy does not entail risk transfer, but a kind of social function of mutual risk-bearing/sharing. Thus, *takaful* is not a sale or an exchange rather is a membership contract to a common pool; of which every member is entitled to certain benefits.<sup>128</sup>
6. The essential motivational factor for the conventional insurance is search for the profit. Contrastingly, motivation for *Takaful* operation/policies is directed by ethical means for the overall benefits of society and environment and fulfilment of Islamic objective of social welfare.<sup>129</sup>
7. Conventional insurance as practiced under our statutes is interest based, while *takaful* is shariah compliant and as such free from interest (*riba*) and other forbidden (*haraam*) elements.<sup>130</sup>
8. On the dissolution of conventional insurance company, reserved and surplus funds belong to the shareholders, while reserve/surplus capital is distributed to the participants or donated to charity, when *takaful* operator is dissolved.<sup>131</sup>

It is of great importance to state here that the list of the above differences is not exhaustive as there may be other differences not known to the researcher. It is therefore opened to improvement. The Centre message here is that there exist vast differences between *Takaful* and conventional modes of insurance.

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<sup>126</sup> Provided that an insurance Company must have a paid up Share Capital of the following amount before carrying out business:

- (a) in case of life insurance, not less than N150,000,000.00;
- (b) in case of general insurance, not less than N200,000,000.00;
- (c) in case of composite insurance business, not less than N350,000,000.00;
- (d) in case of Re-insurance Business, not less than N350,000,000.00.

However, by regulation issued by NAICOM in 2005, the amount has been review-up to N2,000,000,000:00, N3,000,000,000:00, N5,000,000,000:00 and N10,000,000,000:00 respectively: see Agomo, C.K., Op.cit, P. 247.

<sup>127</sup> Section 10 of the insurance Act.

<sup>128</sup> <http://www.financialislam.com/takaful...islamic> insurance. access on 14<sup>th</sup> Nov. 2014 at 12.00p.m.

<sup>129</sup> Ibid.

<sup>130</sup> [www.islamqa.info/en/ref/islamqa/13076](http://www.islamqa.info/en/ref/islamqa/13076).

<sup>131</sup> <http://www.financialislam.com>, ibid.

### **Conclusion**

This paper has discussed the essential elements of contract as it relates to insurance as well as specific rules guiding insurance under Nigeria statutes. It also reflects the policy of insurance to motor vehicle with its various modes and the extents of loss/damages to which each category covers as well as in line with the Takaful Guideline 2013.

### **Recommendation**

It is recommended that the public should be sensitized on the advantages of insurance on vehicle generally and dangers of brandishing fake insurance covers. Furthermore, it is further recommended that participant in the industry should take the opportunity of guideline on Takaful to diversify to Shari'ah compliant products with a view to expanding the populace with insurance covers.