

Duty of Disclosure for Insurance Contracts: A Comparative Note of the United Kingdom and Indonesia

Shanty Ika Yuniarti
Erasmus University Rotterdam, The Netherlands

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ABSTRACT

Duty of disclosure is one of the most essential aspects of an insurance contract. Its role in an insurance contract is to avoid fraud and misinterpretations. A person seeking insurance must act in good faith, and good faith requires to disclose every material fact known, related to the risk. It begins with the proposer for the insurance policy that is obliged to disclose all information to the insurer. However, there is a possibility either the insured or insurer done a breach of duty of disclosure. Breach of duty of disclosure includes Non-Disclosure and Misrepresentation. Breach of duty of disclosure also possible to happen in the Pre-Contractual and Post-Contractual Stage in an insurance contract due to either a deliberate, reckless, or innocent breach. The duty of disclosure in each country might be different depends on its jurisdiction, for example, the United Kingdom as a common law country and Indonesia as a civil law country.

ABSTRAK

Corresponding Author:

Email:

santosa.shanty@yahoo.com

Kewajiban pengungkapan adalah salah satu aspek terpenting dari kontrak asuransi. Perannya dalam kontrak asuransi adalah untuk menghindari penipuan dan salah tafsir. Seseorang yang mencari asuransi harus bertindak dengan itikad baik, dan itikad baik mensyaratkan untuk mengungkapkan setiap fakta material yang diketahui, terkait dengan risiko. Ini dimulai dengan pengusul polis asuransi yang berkewajiban untuk mengungkapkan semua informasi kepada perusahaan asuransi. Namun, ada kemungkinan tertanggung atau penanggung melakukan pelanggaran kewajiban pengungkapan. Pelanggaran kewajiban pengungkapan termasuk *Non-Disclosure* dan *Misrepresentation*. Pelanggaran kewajiban pengungkapan juga mungkin terjadi pada Tahap Pra-Kontrak dan Pasca-Kontrak dalam kontrak asuransi baik karena pelanggaran yang disengaja, gegabah, atau tidak sengaja. Kewajiban pengungkapan di setiap negara mungkin berbeda tergantung pada yurisdiksinya, misalnya, Inggris sebagai negara hukum umum dan Indonesia sebagai negara hukum perdata.

INTRODUCTION

One of the most fundamental aspects in an insurance contract is the duty of disclosure. Duty of disclosure in an insurance contract is a mutual duty imposed to both the insured and insurer. Duty of disclosure is necessary to an insurance contract in order to avoid fraud and misrepresentation, because then the parties, especially the insurer, would know more about the risks related to the insurance contract.

Duty of disclosure has been an important part of insurance law in the United Kingdom. Insurance in the United Kingdom is currently regulated in Insurance Act 2015 (“**IA 2015**”), which was enforced in 12 August 2016. IA 2015 amends the Marine Insurance Act 1906 (“**MIA 1906**”), which is considered to be the greatest change to insurance contract law in the United Kingdom over 100 years. IA 2015 is the most significant reform of the United Kingdom insurance law since MIA 1906. Duty of disclosure remains an important part of insurance law in the IA 2015. It is also to note that IA 2015 distinguishes between consumer and non-consumer insurance contract. IA 2015 only applies to non-consumer insurance contract, while consumer insurance is governed under Consumer Insurance (Disclosure and Representation) Act 2012 (“**CIDRA 2012**”).

In Indonesia, insurance law is regulated in Law No. 40 year 2014 concerning Insurance (“**Indonesian Insurance Law**”). Before law on insurance in Indonesia was enforced, regulation on insurance can be found in Article 246 of Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Indonesia*) (“**Indonesian Civil Code**”). Article 251 of Indonesian Commercial Code (*Kitab Undang-Undang Hukum Dagang Indonesia*) (“**Indonesian Commercial Code**”) also regulates about utmost good faith. This duty of utmost good faith shall also be interpreted as duty of disclosure in the conclusion of an insurance contract.

The duty to disclose is an important requirement in every insurance contract in many legal systems. However, there are no uniform principles that regulate the duty of disclosure in an insurance contract. Given the foregoing, this research aims to examines the implementation of duty of disclosure in relation to insurance contracts in the United Kingdom and Indonesia.

RESULTS AND DISCUSSION

1. Duty of Disclosure in the United Kingdom and Indonesia

This Chapter will discuss how the United Kingdom and Indonesia regulate duty of utmost good faith, which is manifested through duty of disclosure in insurance contracts, imposed to both the insured and insurer in pre-contractual and post-contractual stage. The purpose of the duty of disclosure is to enable the insurer to decide whether the insurer is able to accept the risk, determine the type of coverage, and decide the premium.

1.1. Doctrine of Utmost Good Faith in the United Kingdom and Indonesia

An insurance contract is one of the certain contracts made by law, which is based on good faith or *uberrimae fidei*.¹ In the United Kingdom, *uberrimae fidei* is clearly mentioned in Section 17 of MIA 1906, which states that a contract of marine insurance is a contract

¹ Malcoma Clarke, *The Law of Insurance Contracts* (3rd edn, Sweet and Maxwell 1997) 390.

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. Since MIA 1906 has been codified in common law, it has been generally used by the court that the application of MIA 1906 is not restricted only to marine insurance contracts, but insurance contracts in general.

A new IA 2015 has been enforced in 12 August 2016 to amend the MIA 1906. After the amendment, Section 17 of the MIA 1906 would read that insurance contract must be based upon the utmost good faith. Good faith is discussed in Article 14 of the IA 2015. It is stated in Article 14(1) that any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party, is abolished.

In Indonesia, Article 1338 of Indonesian Civil Code states that an agreement must be implemented in good faith or *uberrimae fidei*. Good faith is the fundamental basis and faith underlying each contract that each party has an obligation to disclose or inform clearly and carefully about all the essential facts relating to the subject matter insured. This is since all the information received will be used to enforce the terms or condition or a clause in the contract.

1.2. Duty of Disclosure in the United Kingdom and Indonesia

Duty of disclosure is the most important part in insurance contract and can be done in oral and written.² A person seeking insurance must act in good faith, and good faith requires him to disclose every material fact known, related with the risk. It begins with the proposer for the insurance policy that is obliged to disclose all information to the insurer. Therefore, the insurer uses the information given to make consideration before accepting the risk.³ This duty of disclosure occurs in pre-contractual stage. Such duty is also imposed on the insurer. The insurer must also assist the insured with the terms of the contract before the conclusion of the contract.

In the United Kingdom duty of disclosure can be seen in Section 18 – 20 MIA 1906. However, pursuant to Article 21(2) of the IA 2015, Sections 18-20 are omitted. Further, Section 3(4)(a) of IA 2015 replicated the duty of disclosure which was set out in Section 18(1) of MIA 1906, which states that disclosure of every material circumstance which the insured knows or ought to know.

Article 1338 of Indonesian Civil Code regulates the effects of a valid contract that fulfills the conditions regulated in Article 1320. Article 1338 stated that all valid agreements apply to the individuals who have concluded them as law. Such agreements are irrevocable other than by mutual consent, or pursuant to reasons stipulated by the law. They must be executed in good faith. It can be argued that good faith is being manifested into duty of disclosure.

1.3. Moral Hazard

² Julie- Anne Tarr and others, *Disclosure and Concealment in Consumer Insurance Contracts* (1st edn, Cavendish Published Limited 2002) 66.

³ Nael G Bunni, *Risk and Insurance Construction* (2nd edn, Spoon and Press 2003) 212.

Since an insurance contract is based on utmost good faith, which requires a duty to inform the insurer of any circumstance that is material to the judgment of insurer, moral hazard is needed. Generally, moral hazard exists when two parties deal with an agreement. Moral hazard in insurance contracts refers to the tendency of insurance protection to alter an individual's motive to prevent loss.⁴ Both the insured and insurer possess a possibility to get in acting, which is contrary to the principles stated in the agreement. However, in many legal literatures of insurance contracts, moral hazard is rather emphasized on the insured. Moral Hazard can include anything which might indicate whether the insured is a desirable person to do business.⁵ Besides, there are many legal literatures stating that there are many differences on moral hazard. Moral hazard could be opened up for any avoidance of contract conducted by the insurer according to the utmost good faith in case it influences the judgment of the insurer. Otherwise, the non-disclosure could not be proven on the balance of probabilities used by the insurer to include into the contract.

1.4. The Insured's and Insurer's Duty of Disclosure in Pre-Contractual Stage

1.4.1. The Insured's Duty of Disclosure in Pre-Contractual Stage in United Kingdom

In the United Kingdom, the principle of utmost good faith is mentioned in Section 17 of MIA 1906 where it obliges the insured to disclose all material facts and refrain in making untrue statements during the negotiation process before the parties arrive to the conclusion of contract.

The insured is only necessary to disclose all relevant facts he/she knows and upon the knowledge of the insured or depends upon the knowledge possessed by him. The duty is duty to disclose, as stated by Fletcher Moulton L.J in *Joel v Law Union and Crown Insurance*,⁶ which states that you cannot disclose what you don't know.⁷ The reason is that there was an issue pointed out that the insured was bound to disclose the fact that she had suffered from an acute depression. Then, it was being accepted that she was unaware of that fact. However, this argument was rejected by the court and the judges said that there is no duty imposed on the proposer to disclose what he/she does not know. Therefore, it may be concluded that duty of utmost good faith only concerns about what the insured knows. Furthermore, this may lead into actual knowledge from the insured.

Pursuant to *Carter v Boehm*⁸ case, it is stated that non-disclosure constitutes as a breach of duty of disclosure. If then the insured fails to disclose material circumstance, which is deemed to be known by him, he will breach the duty of disclosure, despite the reason for failure.⁹

With regard to duty of disclosure, not every material is bound to be disclosed. MIA 1906 also regulates about types of circumstances, which can be disclosed by the insured or his representative prior the conclusion of contract without violating the duty of utmost good faith. As regulated in Section 18(3) of MIA 1906, the kinds of situation which are not necessary to be disclosed are listed. This provision is then replaced by Section 3(5) of IA

⁴ Steven Shavell, *On Moral Hazard and Insurance*, (Springer Netherlands, 1992) 1.

⁵ Yvonne Baatz, *Maritime Law* (3rd edn Informa Law from Routledge, 2014) 437.

⁶ *Joel v Law Union and Crown Insurance Co.* (1908) 2 K.B 863, 884.

⁷ Mac Gillvray, *Insurance Law*, (9th edn, Sweet and Maxwell 1997), 392.

⁸ *Carter v Boehm* (1766) 3 Burr. 1905 [1910].

⁹ *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B. 863.

2016 in which exception (a) and (e) states the exactly same matter in Section 18(3)(a) and (c) of MIA 1906 and the rest exceptions are related to circumstances which insurer knows and ought to know and presumed to be known also similar as has been set out in MIA 1906.

Before CIDRA 2012 is discussed, it shall be noted that the United Kingdom distinguishes between consumer and non-consumer of insurance contracts. In Section 2 of CIDRA 2012, there is a duty imposed on the consumer to make reasonable care not to make misrepresentation to the insurer before the contract is entered into or varied. The consumer's duty of utmost good faith is altered by eliminating the requirement to disclose all material facts. The consumer only has to act honestly to respond and with reasonable care to answer the questions that have been asked and is no longer obliged to give volunteer information. The duty to disclose with reasonable care is not aimed to make a misrepresentation cease to exist when the contract is concluded. If the insured realizes that information given is considered as untrue statement, it would be constituted as further requirement to give information, which has been based on an express term in policy, such as the change of circumstances clause.

1.4.2. The Insured's Duty of Disclosure in Pre-Contractual Stage in Indonesia

The duty of disclosure entails in pre-contractual stage that the insured is required to inform everything perfectly regarding the insured object to the insurer, in order for the insurer to know exactly the risk that the insurer will bear. If the information given contains false or misleading information, insurer will bear loss, while the insured will gain benefit. Upon this situation, the principle of indemnity will be violated and may lead to the cancelation of contract.¹⁰

The duty to disclose can be seen under Article 251 of Indonesian Commercial Code which states that all wrongful or untruthful statements, or all reticence on circumstances known to the insured, however much committed in good faith on his part, which are of such nature that the agreement would not, or not on similar conditions have been undertake, if the insurer had been in the knowledge of the true state of affairs, shall make the insurance void. Indonesian Insurance Law does not regulate much on pre-contractual duty of utmost good faith imposed to the insured. What is interesting is that Article 32 of Indonesian Insurance Law the states that the insured needs to disclose enough information to insurer because the law requires that the insurer must get any information regarding the future insurance holder to determine anti-money laundering policies and combating the financing of terrorism.

1.4.3. The Insurer's Duty of Disclosure in Pre-Contractual Stage in the United Kingdom

The duty of disclosure is also imposed to the insurer prior to the conclusion of contract and it is still considered as an undefined area in insurance contract law. In the United Kingdom, pursuant to Section 17 of MIA 1906, insurance contracts are considered as contracts based on utmost good faith.

¹⁰ H M N Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia Buku 6 tentang Pertanggunggan*, (5th edn, Djembatan 2003) 59-60.

Pursuant to *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd*,¹¹ it is stated that the duty falling upon the insurer must at least extend to disclosing all material facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would like take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.¹²

The above condition can also be seen under EU Directive, where the United Kingdom has implemented EU Directives 92/49/EEC and 92/46/EEC in relation to consumer information. According to article 31 of EU Directive 92/ 96/ EEC, it is stated that the insurer in life insurance contract has to provide the following information to the insurance proposer:

- (i) Information about the insurer (name, legal form, member state, address);
- (ii) Information about the life assurance product;
- (iii) Information concerning the contractual obligation to the insurance proposer; and
- (iv) Providing an information concerning about the law.

For non-life insurance, it is regulated under Article 31 of EU Directive 92/49/EEC, where the insurer is obliged to provide some information to policy holder prior to the conclusion of the contract. Furthermore, there is also a regulatory guidance produced by FSA, which is, Insurance: Conduct of Business Rules (“**ICOBs**”), where it is stated that the insurer has duty at the pre-contractual stage to explain or assist the insured, in the consumer field.

1.4.4. The Insurer’s Duty of Disclosure in Pre-Contractual Duty Stage In Indonesia

Indonesian Commercial Code is silent about the duty of disclosure imposed to the insurer before the conclusion the contract. Nevertheless, the insurer’s duty to act in good faith is regulated in Article 19 of Government Regulation No. 73 of 1992 concerning Implementation of Business Insurance (“**Indonesian Regulation 73/92**”), where it is stated that insurance policy or any other insurance contract together with the enclosure shall not include words or sentences that can result in different interpretation regarding risks covered by the insurance, the insurer’s and insured’s obligation, and words or sentences that can cause difficulties for the insured to file a claim.¹³

Indonesian Insurance Law regulates about duty of disclosure imposed to the insurer. In Article 31(2) of Indonesian Insurance Law, it is stated that insurance agents, insurance brokers, reinsurance brokers and insurance companies must provide correct information, not false and/or misleading to the policy holder, the insured, or the participant regarding the risks, benefits, obligations and charges associated with insurance or insurance products offered. It can be concluded that the insurer owes duty to the insured to gives true information regarding insurance contract.

1.5. The Insured’s and Insurer’s Duty of Disclosure in Post Contractual Stage

¹¹ *Banque Keyser Ullman v Skandia (UK) Insurance Co. Ltd and Others* [1991] 2 AC 249, 91.

¹² *Banque Keyser Ullman v Skandia (UK) Insurance Co. Ltd and Others* [1991] 2 AC 249, 91.

¹³ Indonesian Regulation No. 73, 1992, Art. 19.

1.5.1. The Insured's Duty of Disclosure in Post-Contractual Duty of Stage in the United Kingdom

In the United Kingdom, the continuing duty of utmost good faith is supported¹⁴ by Murphy J. in *Michael Fagan v General Accident Fire and Life Assurance Corporation*,¹⁵ where he stated that the duty to exercise the utmost good faith continues throughout the relationship up to and including the making of a claim on foot of the policy. It can be concluded that the insured is obliged to disclose all of the circumstances of the loss in relation to the claim.

The duty of utmost good faith as regulated in Section 17 of MIA 1906 is not only imposed in pre-contractual stage, but also interpreted at post-contractual stage throughout the duration of the insurance contract.¹⁶ In other words, this also applies at the claims stage that the parties have opposite interests meaning that the duty is intended to refrain from any fraudulent act. This is referred to in *Star Sea and Mercandian Continent*.¹⁷

Although duty of disclosure in the post-contractual stage is not clearly regulated in IA 2015, it can be seen from Section 12 of IA 2015 that regulates about fraudulent claim in which the insured is banned to make fraudulent claim, and as a result there are consequences if fraudulent claim is found. One of the examples is that the insurer will not be liable to pay the claim. Therefore, there is duty after the conclusion of contract imposed to the insured to act honestly when making claim and disclose all material facts known by him to the insurer.

1.5.2. The Insured's Duty of Disclosure in Post-Contractual Stage in Indonesia

As insurance contracts in Indonesia are also grounded by utmost good faith therefore the insured has to perform also after the conclusion of contract. The insured owes duty not to make fraudulent or dishonest claim. The duty to not present wrongful and untrue statement must also be done at the claim stage. When damage or loss occurs, the insured has an obligation to act honestly to reveal the relevant facts to the insurer. Therefore, if the claim made by the insured contains false statement in terms of material object, or in other words, the claim which has been made is fraudulent, the insurance contract will be void meanwhile the insurer has no obligation to make any payment to the insured.

1.5.3. The Insurer's Duty of Disclosure in Post-Contractual Stage in the United Kingdom

The insurer's duty of disclosure after the conclusion of contract in the United Kingdom is also unclear. Not many legal literatures mention this duty. However, as mentioned previously, with reference to Section 17 of MIA 1906, the duty to perceive utmost good faith performs on a bilateral basis. Alternatively, it obliges a duty on both the insurer and insured.

¹⁴ Assunta Di Lorenze, *The Duty of Utmost Good Faith* (2014) 92.

¹⁵ *Michael Fagan v General Accident Fire and Life Assurance Corporation plc* [1990] 1 QB 274.

¹⁶ Assunta Di Lorenze, *The Duty of Utmost Good Faith* (2014) 92.

¹⁷ *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd and Others (The Star Sea)*, 2001, UKHL 1; [2001] 2 W.L.R. 170.

Pursuant to *Banque Financiere de la Cite SA v. Westgate Insurance Company Ltd*,¹⁸ it is stated that the obligation of utmost good faith is only be observed by the insured, not the insurer. This argument was rejected by the court as the duty to utmost good faith can also be observed by the insurer and provided damages for breach of duty in the side of the insured. Pursuant to *Star Sea and Mercandian Continent*¹⁹ case it was ruled in post-contractual stage that interests of the insured and the insurers may not be the same but they will be required to act in good faith towards each other. Moreover, in the United Kingdom, duty of utmost good faith, manifested in duty of disclosure, is a continuing duty.²⁰

1.5.4. The Insurer's Duty of Disclosure in Post-Contractual Stage in Indonesia

Indonesian law does not explicitly regulate about the insurer's duty of disclosure in post-contractual stage. Moreover, Indonesian Commercial Code is silent about the duty of disclosure from the insurer at the claim stage. Insurance contracts can also refer to Article 1320 and 1338 of Indonesian Civil Code, therefore, here the insurer is obliged to perform good faith in claim stage by accepting claim from the insured and make payment to the insured.²¹

2. Breach of Duty of Disclosure

This chapter will discuss about breach of duty of disclosure in the United Kingdom and Indonesia. Even though the principle of duty of disclosure itself is similar in both countries, in the event that a dishonest claim arises either in the pre-contractual or post-contractual stage, the implementation of the regulation in each country may result in a different outcome.

2.1. Breach of Duty of Disclosure

Breach means an action, which is to contravene with the contract. An insurance contract shall be void when either party can successfully prove that there was a breach duty of utmost good faith or *uberrimae fidae*, for instance when the dishonest insured hoped to get benefit from non-disclosure and misrepresentation. Both failures can be the grounds to the other party to rescind the contract.

Breach of duty of disclosure in an insurance contract can be found either in pre-contractual or post-contractual stage. Not all breach of contract made by the insured is constituted intentionally or deliberately. It can be committed negligently and innocently. Moreover, every breach in duty of disclosure has consequences; such as it can be the ground to the other party to avoid the contract.

2.2. Non-Disclosure

Non-disclosure refers to the situation where an insured failed to disclose all material

¹⁸ *Banque Financiere de la Cite SA v. Westgate Insurance Company Ltd* [1991] 2 A.C. 249.

¹⁹ *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd and Others (The Star Sea)*, 2001, UKHL 1; [2001] 2 W.L.R. 170.

²⁰ Assunta Di Lorenze, *The Duty of Utmost Good Faith* (2014) 92.

²¹ Sri Redjeki Hartono, *Hukum Asuransi dan Perusahaan Asuransi* (Sinar Grafika) 84.

information affecting the risk to the insurer at the time of making (or remaking) the insurance contract. Even though the insured has completed the questions that were asked, but if there is something considered as material fact and can influence to the insurer in fixing the premium and determine the risk that was not disclosed by the insured, it would constitute as a non-disclosure.

In the event of a non-disclosure, the insurer is allowed to avoid the insurance contract, which means that the insurer may treat that the insurance contract has been concluded as if it did not exist and may refuse all claims under it. This was regulated in Section 18(1) of MIA 1906, where it is stated that if the assured fails to make such disclosure, the insurer may avoid the contract. It is to note however that this article was later omitted under IA 2015. IA 2015 set a different situation where the insurer would have different remedies because the remedy would depend on the situation as has been regulated in Section 8 of IA 2015 whether the breach was either deliberate or reckless or neither deliberate nor reckless.

In Indonesia, non-disclosure is understood as a condition where the insured provides statement, which does not correspond with the real facts such as the information given is not correct and complete and tends to hide the facts.²² In the event that a non-disclosure occurs, the insurer can refer to Article 251 of Indonesian Commercial Code, which states that all wrongful or untruthful statements, or all reticence on circumstances known to the insured, however much committed in good faith on his part, which are of such nature that the agreement would not, or not on similar conditions have been undertaken, if the insurer had been in the knowledge of the true state of affairs, shall make the insurance void.

2.3. Misrepresentation

In the United Kingdom, contract law is a statement of fact made by one person to another which influences that other in making a contract, but which is not necessarily a term of that contract.²³ In an insurance contract, representation means a statement made by the insured before the contract is concluded in relation specific answer to the insurer. The insured owes to give a relevant answer to the insurer's question²⁴ since the insurer needs to receive the nature of the risk to make a decision.²⁵ In case the representation contains false statement, then it would be considered as a misrepresentation.

In the United Kingdom, misrepresentation is governed in Misrepresentation Act 1967, which permits the court discretion to refuse recession permits for non-fraudulent misrepresentation. However, the award was damaged in order to replace the recession. It seems that it can be applied to insurance case, but it has been held that it cannot be interpreted in commercial insurance as a result of an avoidance of the contract that acts as a deterrent.²⁶ Further, in insurance law of the United Kingdom, as stipulated in Section 20 of MIA 1906, rules on representation made by the insured or his agent to the insurer during

²² No 241/ PK/ Pdt/ 2011 (Supreme Court of Indonesia).

²³ Michael H Whincup, *Contract Law and Practice* (5th edn, Kluwer Law International) 308-318.

²⁴ Law Commission and Scottish Law Commission, 'Insurance Contract Law: Misrepresentation, Non – Disclosure, Breach of Warranty by the Insured' (Law Com No 182; Scot Law Com No 134, 2007) [4.91].

²⁵ Law Commission and Scottish Law Commission, 'Insurance Contract Law: Misrepresentation, Non – Disclosure, Breach of Warranty by the Insured' (Law Com No 182; Scot Law Com No 134, 2007) [1.10].

²⁶ Law Commission and Scottish Law Commission, 'Insurance Contract Law: Misrepresentation, Non – Disclosure, Breach of Warranty by the Insured' (Law Com No 182; Scot Law Com No 134, 2007) [2.14].

negotiation in pre-contractual stage must be true. This section is later replaced by Section 3(3)(c) of IA 2015, which states that in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

It seems that both MIA 1906 and IA 2015 oblige that every representation made by the insured must be correct. The same is also governed in Section 2(2) of CIDRA that every representation made by the consumer to provide an answer to the insurer they have to take reasonable care that their answer is accurate and complete, even when the consumer provides information that was not asked to the insurer.

In Indonesia, misrepresentation is an inaccurate statement made by insurance proposer to the questions asked by the insurer, which induces the insurer to agree to enter into contract.²⁷ If it is later found that there is misrepresentation and can be proved by the insurer that the insured made a misrepresentation which induce the insurer to enter the contract, then the insurer can refer to Article 251 of Indonesian Commercial code which states that as a result of incorrect information, fraud or misrepresentation, a cancellation of the insurance contract or cancellation policy occurs. Thus, the insurer would be able to avoid the contract.

2.4. Breach of Duty of Disclosure in Pre-Contractual Stage of Insurance Contract

2.4.1. Deliberate Breach of Duty of Disclosure

This condition happens when a party intentionally states in dishonest belief. This would mean that he makes a false statement though the recipient shall act on it,²⁸ even though he is perfectly aware that the information given was inaccurate. Deliberate or reckless generally belong to fraudulent behavior. In the United Kingdom, where the insured intentionally or recklessly breached the duty of disclosure, it would cause the insurer avoiding the policy and withhold the premium. The insurer has remedies for breach as stipulated in Section 8(1)(a) of IA 2015 if it has been proven that he would not have entered into the contract of insurance at all, or based on Section 8(1)(b) of IA 2015, he would have done so only on different terms.

In Indonesia, deliberate action in breach duty of disclosure means that the insured knows perfectly that he had mislead the insurer when providing information, and it could be constituted as a fraud if its proven that the information given is considered to be material. This situation can be seen in Article 269 of Indonesian Commercial Code.

2.4.2. Reckless in Duty of Disclosure

When performing duty of disclosure, it could be found that the insured had made the representation honestly, but negligently²⁹ or carelessly. Information provided by the insured is without caring whether they are true or false. For example, the insured failed to take sufficient care to understand what the insurer wanted to know or was careless when

²⁷ No 560 K/ Pdt.Sus/ 2012 (Supreme Court of Indonesia).

²⁸ Mac Gillvray, *Insurance Law*, (9th edn, Sweet and Maxwell 1997).

²⁹ Law Commission and Scottish Law Commission, 'Insurance Contract Law: Misrepresentation, Non – Disclosure, Breach of Warranty by the Insured' (Law Com No 182; Scot Law Com No 134, 2007) [4.153].

answering the questions asked by the insurer. Under the Marine Insurance Act, a breach of Section 18 or 20 only provides single remedy, which is the avoidance of the contract. Nevertheless, under the Section 8(2) of IA 2015, the insurer has different remedies depending on the situation. According to Consumer (Disclosure and Representation) Act 2012, a “qualifying breach” must be either deliberate/reckless or careless. The reason is because the consumer (insured) is obliged to avoid misrepresentation to the insurer.

In Indonesia, reckless means to make a careless statement despite whether the statement is true or false. For instance, when the insurer asks questions to the insured and the insured replies simply with a yes or no answer, without making an effort to remember what really happened. Furthermore, it could also be that the insured have no clue about the answer to the questions asked by the insurer, but the insured still gives an answer like he knows the answer to it.

2.4.3. Innocent Breach in Duty of Disclosure

Innocent breach in duty of disclosure happens when the insured believes that the statement he made with fair ground for believing that the truth of what was said,³⁰ or the insured honestly said about the fact but he does not know that the information was not relevant. The general rule which concerns all types of contract³¹ states that the innocent breach does not affect the validity of a contract or afford any defense³² to an action upon it.³³ Nevertheless, in marine insurance, even an innocent misrepresentation occurs in constituting an insurance contract, avoidance of the contract will be entitled upon if the misrepresentation is considered as material.

In Indonesia, innocent misrepresentation may also occur when there was an unclear or ambiguous question, or when the question is something that the insured does not reasonably know. However, under Indonesian Commercial Code as stipulated in Article 251, the insurer is possible to terminate the contract even though the statement given by the insured was made in good faith, but it was found later that there was an inaccurate statement, which is considered to be material.

2.5. Breach of Duty of Disclosure in Post-Contractual Stage

2.5.1. Fraudulent Claim

At the post-contractual stage, if it is later discovered that the insured has made a fraudulent claim, therefore, according to United Kingdom law under Section 12 of IA 2015, the insurer’s remedies will apply once fraud has been committed. This section however does not define what constitutes fraud or fraudulent claim. Furthermore, it can also be argued that the insurer’s remedies will apply once fraud has been committed by the insured at the claim stage. Section 12(1) of IA 2015 regulates if its proven that the insured makes a fraudulent claim, then the insurer is not liable to pay the claim where fraud is involved. However, if the insurer has already paid the insurance claim, which contains fraud, the insurer has a right to get recovery from the insured based on the monies that have been paid to the insurer.

³⁰ Mac Gillvray, *Insurance Law* (9th edn, Sweet and Maxwell 1999) 16-8.

³¹ Mac Gillvray, *Insurance Law* (9th edn, Sweet and Maxwell 1999) 16-9.

³² Mac Gillvray, *Insurance Law* (9th edn, Sweet and Maxwell 1999) 16-9.

³³ Mac Gillvray, *Insurance Law* (9th edn, Sweet and Maxwell 1999) 16-9.

In Indonesia, fraudulent claim in insurance also makes the contract void.³⁴ Fraudulent claim is also a ground for nullification of an agreement if the claim contains false statements, fraudulent, contains any hyperbolic sense or any false declarations; the policy then should be void. Apart from that, the insurer is obliged to prove whether the claim was fraudulent.

3. Judicial Duty of Disclosure

This chapter will discuss case laws regarding duty of disclosure in insurance contracts in Indonesia and the United Kingdom. Moreover, this chapter will also discuss about *onus probandi*.

3.1. Judicial Duty of Disclosure in the United Kingdom

3.1.1. Pan Atlantic Insurance Co. Ltd. and Another Appellants v Pine Top Insurance Co. Ltd. Respondents.³⁵

During 1977- 1979 Pan Atlantic the plaintiff made an insurance contract with other insurer. In 1980 and 1981, The plaintiff reinsured with the defendants (Pine Top Insurance) as the insurer. The plaintiff renewed the contract for 1981 and 1982 and the plaintiff's broker met with the defendant's underwriter to discuss the possibility to reduce the premium. Therefore, the plaintiff needs to disclose the loss record of the object that it would like to be insured. The plaintiff distracted the defendant from examining the loss record in 1977 to 1979, which the defendant was not on risk and the plaintiff disclosed the loss record in years 1980 to 1981. Nevertheless, the loss record in year 1981 that was disclosed by the plaintiff was incorrect because the plaintiff had disclosed the loss was in the amount of USD 235,768 but the true loss for year 1981 was actually USD 468,168. The Plaintiff knows perfectly about those additional losses before the slip was signed and he still did not disclose those losses. The defendant argued if he had known about the true record losses, he would not have signed the slip on 13 January 1982 on the terms, which the defendant's underwriter has accepted.

The defendant states that the losses under the reinsurance contract proved to be disastrous and the defendant refused to accept liability under the contract on the grounds of material non-disclosure. The plaintiff brought an action against the respondents claiming to hold the defendant to indemnification of losses paid by the appellant. The judge rejected the defendant's defense on non-disclosure in year 1977 to 1979 and upheld the defendant defense on non-disclosure of the additional losses for 1981 that was considered as a material non-disclosure which make the defendant as insurer entitled to avoid the contract.

The plaintiff appealed to the House of Lords. The Court of Appeal dismissed the plaintiff's appeal with following reasons:

- 1) The test of materiality disclosure under Section 18 of MIA 1906 was applicable in a non-marine insurance case, a "material circumstance" was consider has major effect on the mind of the prudent insurer to estimate the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk or on the amount of premium demanded.

³⁴ Indonesian Commercial Code, Article 251.

³⁵ Pan Atlantic Insurance Company Limited v Pine Top Insurance Company Limited [1995] 1 A.C. 501.

- 2) Further, as an insurer to be entitled to avoid a contract for non-disclosure of a material circumstance he had to show “inducement” done by the insured to enter into the policy on the relevant terms.
- 3) For the additional losses in 1981 were a material circumstance that ought to have been disclosed and the judge's conclusion that the defendants were entitled to avoid the contract should stand.

3.1.2. Wise (Underwriting Agency) LTD V Grupo Nacional Provincial S.A³⁶

The insured, Perfumeria Ultra, a retailer of Luxury goods in Cancun Mexico arranged for goods shipped from Miami and insured their cargo to Grupo Nacional Provincial (GNP) as the insurer. For the shipment, GNP made a reinsurance contract (with group of Lloyd's syndicate, led by WISE as the reinsurer. The slip was prepared by Mexican Broker to GNP. In the Spanish version about the Slip the word Rolejes which can mean either watches or clocks and there was condition on the slip which was referred specifically to Rolex watches and providing that each of the watch would come in its own case and each package would hold approximately 48 watches. However the slip which was prepared by same broker to London reinsurers which in English had been translated by someone who is not really familiar with English and the word Rolejes had been translated to clocks and the packaging description about Rolex watches was omitted. Furthermore, the slip also states about the maximum and minimum value of various items, including “clocks”, with the following amounts: least expensive was stated USD 40 and most expensive piece was stated USD 18,000, and average costs USD 1,500.

On April 2001, a quantity of goods was stolen from a container which was parked outside the insured's warehouse premises. The loss suffered was in the amount of USD 800,000 which include USD 700,000 of Rolex watches. In June 2001, the reinsurer wrote that there had been a non-disclosure because they were not told that the retailer imported Rolex and other high value branded watches. Therefore, the insurer avoid the contract on that basis. In reaction to this, GNP denied any non-disclosure. Their submissions were as follows. A reasonable underwriter ought to have known that watches, including high-value branded watches, would be a typical part of this type of trade. Even if there had been non-disclosure, reinsurers' right to rely on it had been waived. Because he did not ask any further questions, the underwriter had waived reinsurers' right to rely on the alleged non-disclosure and avoid the contract.

On the first instance, the court stated that there had been a material non-disclosure because there was a fact that the shipment contained Rolex watches. Usually, when dealing the contract between broker and the underwriter he should be able to accept the value of the goods to be insured in the beginning of contract and it was not for the underwriter to guess that the subject of the insurance was something other than what it was stated to be and there was not enough here to put the underwriter on enquiry. The fact about Rolex watches was considered as important because it is a luxurious brand and attractive target for the thieves. Based on that fact, the court stated that there was non-disclosure that had been induced to the underwriter to enter the contract, and the underwriter would not enter the contract on that terms if he had known that there was expensive watches involved. On the

³⁶ Wise (Underwriting Agency) LTD V Grupo Nacional Provincial S.A (2004) EWCA Civ 962; [2004] 2 Lloyd's Rep 483, (107) (Longmore LJ).

affirmation point, the court accepted the underwriter's evidence that he had not given notice of cancellation. Consequently, reinsurers could avoid. There was no appeal on the basis of materiality, but GNP challenged on issue of waiver, affirmation and inducement.

3.1.2.1. Judgment on Waiver

In this case, The Judges (Longmore LJ and Gibson LJ) stated that, brand watches was a material fact that was not disclosed and should be considered as unfair presentation of the risk. However, there is dissenting from Lord Justice Rix, which focused on mutual nature of duty utmost good faith. He stated that Section 18(3) of MIA 1906 regulated that fairness or otherwise of the presentation could not be judged in isolation. In his view, the question was not whether an "unfair" presentation had been waived but whether, taking both sides of the matter into consideration, the presentation was unfair or, alternatively, it would be unfair of the insurer to seek to avoid on a ground on which he was put on inquiry and should have satisfied himself rather than on inquiry.

In this case, the court concluded there had been a waiver. GNP made presentation of risk, but for an error translation of a single word, thus, an issue of non-disclosure. Accordingly, the appeal on waiver was not upheld.

3.1.2.2. Judgment on Inducement

With regard to this matter, all three Appeal Court judges were satisfied that there had been the necessary inducement. The underwriter's evidence was that, if he had been informed that watches were going to be shipped, he would not have agreed to take on the risk. The judge had accepted this, having seen the witness give evidence, and there was no reason to overturn his finding of fact. In conclusion, the appeal on inducement was rejected.

3.1.2.3. Judgment on Affirmation

Despite that the court did not allow the appeal for the waiver and inducement issue, the court of appeal allowed the appeal for the affirmation issue. In these circumstances, Rix LJ and Gibson LJ concluded that, on the balance of probabilities, a notice of cancellation had been given. Although such notice is normally given in writing, in this case it was evidenced in writing by the email and acknowledged by the underwriter because he put a copy of it on his file. Consequently, reinsurers had affirmed the contract and were not entitled to avoid.

3.2. *Onus Probandi*

As can be seen from the cases above, in Indonesia and the United Kingdom, the onus of proving on the balance of probabilities is upon the insurer who alleges it.³⁷ The insurer does the onus of proof in a case of non-disclosure that the insured is making a contract that was known by the insured³⁸ and that such information was not disclosed to the insurer. Since the onus comes from the insurer, the insured receives the benefits of any doubt. The onus of proving lies on the insurer as has been mentioned in the case of *Joel v Law*

³⁷ Mac Gillvray, *Insurance Law* (9th edn, Sweet and Maxwell 1999) 23-2.

³⁸ Mac Gillvray, *Insurance Law* (9th edn, Sweet and Maxwell 1999) 23-2.

Union.³⁹

Onus probandi in Indonesia is considered to be important because evidence is very crucial to resolve legal matters. In an insurance case, the burden of proof relies to the party who feels that his right has been irritated by other party by referring to a situation that happened. Generally, in the case of breach duty of disclosure in an insurance contract, *onus probandi* is imposed on the insurer's side since there are some facts that contradict to those contained in the insurance contract.

CONCLUSION

Duty of disclosure is one of the most fundamental aspects in insurance contracts. Duty of disclosure in an insurance contract is a mutual duty imposed to both the insured and insurer. Duty of disclosure is necessary to the insurance contract in order to avoid fraud and misrepresentation, because then the parties, especially the insurer, would know more about the risks related to the insurance contract.

Duty of disclosure is an important aspect in every insurance contract in many legal systems, including the United Kingdom and Indonesia. In the United Kingdom, duty of disclosure is specifically regulated in its prevailing law, for instance duty of fair representation is mentioned in IA 2015. On the other hand, Indonesian Insurance Law does not specifically mentions about duty of disclosure in insurance contracts. Duty of disclosure in Indonesia however exists through Article 251 of Indonesian Commercial Code.

In the event of a breach of duty of disclosure, both the United Kingdom and Indonesia provide remedies for the insurer as well as the insured. Upon such breach, several consequences may be imposed depending on the cause of the breach. Even though both the United Kingdom and Indonesia have different law system, and different regulations as well, it can be argued that both regulates that if it is proven that the insured has made a breach of duty of disclosure, the insurer will be presented with different remedies available to him. Thus, it can be concluded that both the United Kingdom and Indonesian law consider the duty of disclosure as a very important duty of the insured to be fulfilled, specifically with regard to concluding an insurance contract.

Compared to the United Kingdom, it can be concluded that provisions on duty of disclosure in Indonesian Insurance Law is still less clear and still needs improvement. Indonesian law mainly relies on the principle of utmost good faith without explicitly regulating specific provisions on duty of disclosure. Taking into account the implementation of the duty of disclosure in the United Kingdom, Indonesian Insurance Law shall add regulations to specifically regulate duty of disclosure for the benefit of both the insurer and the insured. Therefore, the insured will be acknowledged more that he is obliged to give relevant and true statements and within the actual knowledge of the insured, also by noting disclosing statements that is beyond the insured's knowledge.

Accordingly, with clear provisions and structure in Indonesian Insurance Law, the reformed Indonesian Insurance Law will reduce the possibility of a dispute as a result of a breach of duty of disclosure.

³⁹ Joel v Law Union Insurance Co [1982] 2 KB.

Acknowledgment

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