

# The Duty of Good Faith in the Pre-Contractual Stage in Marine Insurance, A radical change of approach by the new Insurance Act 2015 or evolutionary logic?

Since 2006 the British Law Commission has prepared a revision of English Insurance and marine insurance law which resulted in a new statute on the subject. This new UK statute will enter into force in August 2016.<sup>1</sup>

The new statute will have an impact on insurance contracts in general and on the Third Parties (Rights against Insurers Act) 2010.

The new statute is the result of very thorough study and examination by the Law Commission which started its work in 2006.

The Law Commission published 9 issues papers, 3 discussion papers and 2 reports which resulted also in the enactment of the Consumer Insurance (disclosure and representations) Act (CIDRA) 2012.

Let there be no misunderstanding, the new statute is not easy reading; indeed the Insurance Act 2015 is a rather complicated and lengthy document composed by 7 parts and 2 schedules.

The Act starts with definitions (part I), continues with the duty of fair representation (part II), part III deals with warranties and other terms, part IV with fraudulent claims, part V with good faith and contracting out, part VI deals with amendments to the Third Parties (Rights against Insurers Act 2010), Part VII contains general provision and all this is followed by schedule I on the insurers remedies for qualifying breaches and schedule II on the rights of third parties against insurers: relevant insured persons.

These modifications are good for 23 long and detailed statutory articles.

## I. THE ABANDONMENT OF THE AVOIDANCE SANCTION ATTACHED TO THE GOOD FAITH REQUIREMENT OF ARTICLE 17 OF THE M.I.A. 1906

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<sup>1</sup> See [www.parliament.uk/billsandlegislation/insuranceact2015](http://www.parliament.uk/billsandlegislation/insuranceact2015).

What immediately strikes is article 14 in part V of the new statute in which the English legislator seems to abandon or dump the avoidance sanction attached to the good faith requirement mentioned in article 17 of the M. I.A. 1906.

At least for a continental civilian lawyer, this is – if not shocking – at least very surprising to read.

Article 14 of the Insurance Act 2015 holds 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”.

Indeed, a very surprising message!

Although the concept of good faith was never a general overriding principle in traditional contract law based on the Common Law, the requirement good faith was nonetheless for ages a fundamental principle in English Marine Insurance Law.

A lot has been written on the content of the duty of good faith, but it can be claimed that the duty of the utmost good faith has been held an overriding principle from which the duty of full disclosure and fair representation are derived and not vice versa, as was said by Suzan Hodges <sup>2</sup> .

But this however does not mean that the two notions are synonymous, covering the same ground.

They may well overlap, but as the duty of utmost good faith is the source from which the duty of disclosure and the law of correct representation originates, it has to be the wider and more potent of the two concepts.

As a consequence it is very surprising that English law has abandoned the avoidance sanction coupled to the concept of good faith in insurance contracts all together because this was a basic principle on which other rules were vested. It is true that in the comments on the new statute the Law Commission says that the principle of good faith remains as an “interpretative principle”, but after the radical dumping the avoidance sanction of article 17, this is rather cold comfort and could result in “paying lip service” to good faith principle rather than a real strong statement of position.<sup>3</sup>

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<sup>2</sup> Suzan Hodges, *The law of marine insurance 1996*, Cavendish Publishing Ltd. p.84: “the duty of disclosure admittedly is closely related to the doctrine of utmost good faith. The truth however is, as can be seen from the judgment of Lord Ellen Borrov in *Carter v. Boehm*, that the duty of disclosure stems from the principle of utmost good faith and not vice versa. 1766, 96 er 1162

<sup>3</sup> Law Commission, *Insurance Contract Law, Business Disclosure, warranties, insurer’s remedies , fraudulent clauses and late payment*, ref.LC N° 353, scot law ,N°235 , 17 July 2014, executive summary at number 6.8

In this article we will consider the consequences of this new statute in relation to non-consumer contracts for which the law allows a certain contracting out.

## II. GOOD FAITH IN THE MARINE INSURANCE ACT 1906

The good faith concept.

From the very early beginnings of English law or since the formation of English Common Law there has been very little room for the acceptance of the good faith principle in contract law.

There were some modest signs of the acceptance of the principle of good faith in early English law as petitioners for the Equity Court (Chancery Court) would rely on this principle in their petitions to the King and his Chancellor, but a general concept of good faith in relation to contracts had not yet been received into the medieval Common Law.<sup>4</sup>

The concept of good faith was introduced via the vehicle of marine insurance as part of the law merchant or the “lex mercatoria” dealing with maritime law.<sup>5</sup>

The principle of good faith was solidly affirmed by Lord Mansfield’s leading decision of *Carter v. Boehm*<sup>6</sup>.

Lord Mansfield was inspired by continental / civil law on which the “Lex Mercatoria” was based out of which marine insurance law emerged.

Lord Mansfield is credited with incorporating the law merchant or the “lex mercatoria” into the Common Law of England.

He introduced into the Common Law a scientific body of commercial law modelled along the lines of Roman /French law.

Lord Mansfield was a scholar of the civilian law and was familiar with the writings of foreign civilians and thus Lord Mansfield at the time attempted to introduce into English Commercial Law a general principle of good faith<sup>7</sup>.

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<sup>4</sup> Johan Hendrik Botes, *From good faith to utmost good faith in Marine Insurance*, Pieter Lang GmbH, Hamburg, 2006 at p. 91.

<sup>5</sup> Johan Hendrik Botes, *ibidem*, p. 91.

<sup>6</sup> *Carter v Boehm* (1766) 3 burr. 1905.

<sup>7</sup> See Botes, *ibidem* p. 99.

However his attempts to introduce the principle of good faith into English Contract Law in general did not succeed and the high standard of good faith to be observed by parties into a contract only survived in certain contracts, such as insurance and partnerships<sup>8</sup>

Good faith was never very popular in England as one can learn from Rhidian Thomas<sup>9</sup> .

Professor Rhidian Thomas asserts that the fundamental elements of the concept of good faith stand in opposition to the philosophical outlook underpinning the main stream of the Common Law tradition ....<sup>10</sup>

In this leading case *Carter v. Boehm*, Lord Mansfield held that the duty of good faith was reciprocal.

Even though Lord Mansfield was not successful in having this principle of good faith been accepted in the general Common Law, nonetheless the principle was solidly established as a principle of law in article 17 of the Marine Insurance Act 1906.

The further articles 18 on full disclosure, 19 on the disclosure by the agent, 21 on the presentations to be made during the contract negotiation are in fact based on that general principle of the utmost good faith and not vice versa.

### III. THE MARINE INSURANCE ACT 1906

It may be fairly said that the general principle of good faith (a civil law principle) was never popular as principle because general principles alone are seemingly never very popular in the Common Law.

The Common Law prefers detailed expression of the law, which can be found in the decided cases.

The British Law Commission under the leadership of Sir McKenzie Chambers drafted the Marine Insurance Act 1906. This Act is a codification of the then

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<sup>8</sup> Botes, *ibidem* p. 99

<sup>9</sup> Rhidian Thomas *The Modern Law of Marine Insurance*, volume I, p. 39.

<sup>10</sup> Botes, *ibidem* p. 13

existing Marine Insurance Law but is a codification only in the Common Law meaning of the word.

It is a limited (not a large or comprehensive) piece of legislation, consolidating the law on Marine Insurance as it was established by- and found in the various court cases.

The Marine Insurance Act 1906 is not to be seen as a fundamental departure of the existing (case-)law, but only as a systematisation and a codification of that what was; the existing law as it was found in the various English court decisions, although some new features have also been introduced.

We may consider the Marine Insurance Act 1906 as a masterpiece.

This systematic synthesis of the existing law remained unchanged on the statute book for more than 106 years!

The most important articles for our present study are of course article 17, spelling out the duty of utmost good faith to be followed by the articles 18 through 21 on the duty of disclosure (article 18), the duty of disclosure by agents (article 19) and the representations during and pending the contract negotiations, leading up to the insurance contract (article 20).

It is said that article 18, spelling out the duty of disclosure by the assured is engulfed by a “blanket of simplicity”:

“Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance, which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.”

In considering and in interpreting these statutory rules, the British Courts nonetheless went back to the earlier decided cases prior to the 1906 Act in order to explain and ascertain the full meaning of the statutory rules contained in the Act.

This is a typical common law approach. A statutory rule, or a statute is always seen as an exception or even a deviation of the existing Common Law and ought to be strictly or narrowly construed.

A statutory rule never carries the same weight and authority as an earlier court decision.<sup>11</sup>

The articles 17 through 20 of the Marine Insurance Act 1906 have resulted in a voluminous amount of cases and when the Courts had to apply the articles on full disclosure by the agent, on representation during the negotiations, they continued to rely on decisions prior to 1906 enactment to ascertain their true meaning.<sup>12</sup>

Article 18.2 of the Marine Insurance Act states that every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or in determining whether he will take the risk.

This test of materiality is said to be engulfed with a “blanket of simplicity” but the materiality test has nonetheless resulted in many cases, explaining and expanding the concept so that over the years things got rather complicated.<sup>13</sup>

Pretty soon the distinction was made whether a circumstance has to be material to the risk or material to the prudent insurer and whether more must be made known to the insurer by the proposer than circumstances that are strictly related to the risk itself (physical hazard), the so called “moral hazard” aspects of the risk.

And there were two opposing views: the assured must disclose those circumstances which are objectively relevant to the risk, versus the view that the assured is obliged to disclose the circumstances which would affect the prudent insurer in deciding whether or not to agree to the terms of the proposed insurance.

And soon the view prevailed that something more must be revealed than purely circumstances relating to the risk itself, as Justice Colman, QC, put it in the *Moonacre*, 1992<sup>14</sup>

*“Given the width of the general principle of the utmost good faith, there can be no justification for confining material circumstances to those which are directly relevant to the assessment of the risk”.*

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<sup>11</sup> See René David and John EC Brierly, *Major Legal Systems in the World Today*, second edition, 1978, Stevens p. 353

<sup>12</sup> Guy Blackwood, *The pre-contractual duty of (utmost) good faith: the past and the future*, LMCLQ,2013 p.312

<sup>13</sup> Peter McDonald Eggers, *The Pre Contractual duty of utmost good faith – materiality and remedies*, p. 51, in *Marine Insurance, The Law in Transition*, edited by Professor Rhidian Thomas, London, Informa 2006. Ozlem Gürses & Eozlem Geurses, *Marine Insurance Law*, Southampton 2015, chapter 4 The Duty of Utmost Good Faith, material facts, Physical Hazard and Moral Hazard.

<sup>14</sup> *The Moonacre*, [1992]2 Lloyd’s Rep 501,520

This issue of what is material and ought to be made known to the insurer has resulted in a massive number of cases, one of which is *Ionides and another v. Pender*<sup>15</sup>, in which the Court said it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter as business could hardly be carried on if this was required.

However, this case was one of many leading up to schools of thought relating to the issue of materiality to the risk( physical materiality) or materiality to the prudent insurer which includes also circumstances, qualified as the “moral hazard”.

For a period of time it was thought that the issues relating to “materiality” and the avoidance of the contract on the ground of non-disclosure, had been put to rest by the Court of Appeal in the CTI case.<sup>16, 17</sup>

That case on its turn was overturned later on by *Pan Atlantic Insurance Company Ltd. and another v. Pine Top Insurance Company Ltd.*<sup>18</sup> , hereinafter referred to as the “Pine Top” decision.

In a detailed historical discussion and analysis of previous cases, Lord Mustill came to the conclusion that a circumstance can be “material”, without being decisive which means that even though a circumstance in itself may not have the decisive influence on the judgement of a prudent insurer, it must nonetheless be communicated by the proposer to the insurer.

There is solid authority that the tests stated in articles 18, 2 and 20, 2 is much more than the simple wording which these articles would suggest; something more has to be submitted to the insurer rather than that what is strictly relevant to the risk itself, for instance circumstances that are related to the insured himself, his past criminal record, possible pending charges, rumours in the market, earlier refusals, earlier financial transactions, etc.....<sup>19</sup>

#### IV. THE NEED FOR REFORM, THE LAW COMMISSION AT WORK SINCE 2006

Needless to say that it became very difficult for a proposer to know what exactly he ought to submit to the insurer which could be considered material. That was

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<sup>15</sup> *Ionides and another v. Pender* (1873-1874) LR 9 QB 531

<sup>16</sup> Suzan Hodges, *The law of marine insurance 1996*, Cavendish Publishing Ltd. p. 89.

<sup>17</sup> CTI case (1984), 1, Lloyd’s rep. 476.

<sup>18</sup> *Pan Atlantic Insurance Company Ltd. and another v. Pine Top Insurance Company Ltd.* (1994), 2 Lloyd’s Rep. 427, House of Lords.

<sup>19</sup> Peter McDonald Eggers, *ibidem* p. 57, conclusion.

very important nonetheless because if he failed to submit, the sanction for not submitting such a circumstance was the avoidance of contract with the consequence that he found himself without insurance.

It was noticed in the market that the duty to full disclosure based on this “duty to the utmost good faith” was generally poorly understood by the proposers, whereas the existing law was not adequately equipped for the commercial realities of the 21<sup>st</sup> Century business life which is a life of massive insurance business, with many contracts to be made on a daily basis.

The Maine Insurance Act 1906 does not require the insurer to ask questions or to indicate what he wishes to know but instead the policy holder must work out what a hypothetical prudent underwriter would consider to be relevant.<sup>20</sup>

Moreover it was also thought that the present law in fact encourages the insurers or the underwriters to do the real underwriting on the moment that they are confronted with the claim.

During the negotiations under the present law, the insurers could take a very passive role and wait for all the information to be submitted by the proposer and they could accept the risk under the information provided and, on the moment that the claim arises , they can start questioning.

It was also felt that the sanction on non-compliance with the duty of the utmost good faith or the duty to full disclosure was too harsh and too inflexible because it is an all or nothing remedy, allowing no room to take special circumstances into account.

If indeed the proposer failed to submit a circumstance which later on was labelled as “*material*”, the consequence was the avoidance of the contract all together.

On a number of occasions insurers have taken advantage of this which gave the impression that article 17 had become a tool of oppression against the insured.<sup>21</sup>

All these reasons (together with serious criticism on the system of warranties as they are dealt with in the Marine Insurance Act 1906) called for a reform and so the Law Commission started its preparatory revision work in 2006.

## V. THE NEW INSURANCE ACT 2015 IN PREPARATION

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<sup>20</sup> David Hertzell, Law Commissioner and Laura Burgoyne, *The Law Commission and Insurance Contract Law Reform: an update*, *Journal of International Maritime Law*, issue 2, volume 19, 2013 at p. 106.

<sup>21</sup> Peter McDonald Eggers, *Pre-Contractual duty of utmost good faith-materiality and remedies*, in *Marine Insurance : The law in Transition*, London 2006, Informa at page 64



Since 2006 the Law Commission released 9 issue papers and 3 consultation papers on the various issues considered open to reform.

The suggestions of the commission were broadly supported by the market and on account of a broad consensus reached, the Parliamentary procedure for uncontroversial commission bills was introduced.

A first bill was released on the consumer's pre-contractual duty of disclosure and representation which led to the enactment of the Consumer Insurance (disclosure and representation) Act (CIDRA) 2012, which came into force on April 6<sup>th</sup>, 2013.

This Act introduces the duty on the consumer to answer the insurer's questions honestly and reasonably.

The present Insurance Act 2015 covers 3 main areas,

- a) Disclosure and misrepresentation in business and other non-consumer insurance contracts,
- b) Insurance warranties,
- c) The insurer's remedies for fraudulent claims.

The present review only deals with the disclosure and misrepresentation aspects in business and other non-consumer insurance contracts.

The 2015 Insurance Act takes a formidable turn by altering and strongly limiting article 17 of the Marine Insurance Act 1906 and by replacing the sections 18 through 20 of the same Act 1906.

The insured's pre-contractual duty of good faith is replaced by the requirement that the insured must make to the insurer a fair presentation of the risk and that implies that he either discloses every material circumstances that he knows or ought to know which would influence the judgement of the insurer in deciding to underwrite the risk or provides information sufficient to put a prudent insurer on notice to enquire further into the cover proposed.

The new rules are supposed to be a default regime for commercial parties.

Parties are able to contract out of the reforms and substitute their own agreed regimes but for consumer insurance contracts the reforms are mandatory.

It is believed that the new rules establish a fairer balance between the interest of insurers and the insured.

A contractual term which tends to depart from the default regime to the detriment of the insured must be clear, unambiguous and brought sufficiently to the attention of the other party.

The statute insists on transparency and the policy holders must be given reasonable opportunity to understand the alternative terms put forward by the insurers.

The contracting out has been dealt with in the articles 16 through 18 of the new Act.

But perhaps the most sweeping reform proposal put forward, relates to the remedy of avoidance, which is currently available for a breach of the duty of the utmost good faith at a pre-contractual stage.

The main criticism directed at this remedy was that it adopted an all or nothing approach, which might extract a penalty way out of proportion to the breach, disregarding the state of mind of the assured (i.e. whether he acted innocently, negligently or deliberately at the time the breach occurred<sup>22</sup>

## VI. THE NEW MARINE INSURANCE ACT 2015

This new Marine Insurance Act 2015 will become effective in August 2016.

For a civilian lawyer, the most striking article in the new statute is article 14 by which the avoidance sanction attached to a violation of the requirement good faith by either party is abolished.

*“(1) 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 part is abolished.*

*(2) Any rule of law to the effect that the contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this act and the Consumer Insurance (disclosure and representations) Act 2012”.*

In doing so, the United Kingdom has to a large extent disposed of the heritage of Lord Mansfield and cut lose from the civilian law tradition and inspiration of marine insurance in general.

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<sup>22</sup> Baris Soyer, *Marine Insurance Fraud*, Informa , 2015 at p 176

The efforts of Lord Mansfield to introduce the concept of good faith into English Contract Law were not successful and were only accepted in the field of Marine Insurance Law, a section of the law which originated from the International Lex Mercatoria. That has now been given up to a large extent in unequivocal language; at best the principle remains as an “interpretative principle” only because it lacks any potent sanction.<sup>23</sup>

The law Commission is however of the opinion that the good faith principle remains as an interpretative principle but that optimistic message may not be realistic.<sup>24</sup>

“While we have proposed specific provisions covering the principal examples of good faith in the form of fair presentation and remedies for fraud, a general statement is still useful.

We envisage three roles for such a principle:

(1) To interpret the duty of fair presentation. Both parties are expected to act in good faith in exchanging information. For example, if a court were to find that an insured had intentionally disclosed only the bare minimum of information, hoping that the insurer would fail to make further enquiries to reveal the full picture, the insured would not have acted in good faith and would therefore be in breach of the duty of fair presentation.

(2) To inform the need to imply contractual terms into the policy under the traditional “business efficacy” test. Good faith provides a background when considering whether it is necessary to imply a particular term.

(3) To leave some room for judicial flexibility. It is possible that the principle of a mutual duty of good faith could provide a solution to an especially hard case or emergent difficulty.

Although we think such cases would be extremely rare, it is possible that the courts could develop the concept to prevent an insurer from relying on a right to deny a claim where it would be manifestly unfair to do so.”

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<sup>23</sup> Law Commission, *Insurance Contract Law, Business Disclosure, Warranties, Insurer’s remedies, Fraudulent Claims and late payment*, N° 353, Scot Law N° 238 (summary) July 17, 2014, at 6.8  
ref.LC 353, 17 July 2014, executive summary at number 6.8

<sup>24</sup> Guy Blackwood, *The pre-contractual duty of (utmost) good faith: the past and the future*, LMCLQ,2013 p.322  
“I am not certain how the principle would assist in the process of construction of policy terms, or in defining of parties’ obligations, if the breach of the duty does not give rise to a cause of action”

At the same time, the decision to abandon , or at least cripple and weaken, the potent principle of the utmost good faith coupled with a strong sanction, English Insurance Law is departing from the European Contract Law,( soft law) as spelled out by section article 4 : 110, number 1 : a party may avoid the term which has not been individually negotiated if contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, etc....

The good faith requirement (a civil law principle) was never popular as a principle, because general principles alone have apparently never been popular in the Common Law because their lawyers prefer a detailed expression of the law rather than vague general terms.

It seems to us that the Insurance Act 2015 has somewhat decapitated the very principle on which the duty for the insured to submit a fair presentation is based.

Professor William Tetley drew the attention on the differences between the Common Law style of drafting and the continental law style of drafting.<sup>25</sup>

He stated that the basic tenet of the civil law style of drafting (le style Français) is concision.

“The aim of the style is to be concise; to present the principle of law in a single, general, harmonious phrase that by its broad terms and composes all particular details.

A celebrated example are the articles 1382 and 1383 of the French Civil Code which in two sentences contains the all law of personal delict (equivalent to personal tort in the Common Law....).

The Common Law style of drafting (le style anglais) emphasizes precision rather than concision.

The aim of the style is to include every possible detail in order to fully inform the citizen of the law and of its rights.

The practice in Common Law drafting is to list all the particulars proceeded by a catch all phrase which is followed by a demurrer such as “notwithstanding the generality of the foregoing”.

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<sup>25</sup> William Tetley, Marine Cargo Claims, 3<sup>rd</sup> edition, at pg. 47.

What happened in the Insurance Act 2015 is remindful of this typical Common Law approach.

The general very broad principle of the requirement of the duty of the utmost good faith coupled with the sanction of avoidance is jettisoned in favour of a much more detailed regulation replacing the articles 18 to 20 of the Marine Insurance Act 1906.

The Law Commission felt that there was the need to decapitate art 17 of the marine insurance Act 1906 as can be seen from the report 353:<sup>26</sup>

“The law allows unmeritorious refusals .The 1906 Act is insurer-friendly. The principles were developed at a time when the insured knew their business while the insurer did not, and were designed to protect the fledgling insurance industry against exploitation by the insured. Where a policyholder is in breach of an obligation, the law gives wide-ranging opportunities for the insurer to avoid the contract and refuse all claims, or to treat its liability as discharged, even where the remedy seems out of proportion to the wrong done by the policyholder.”

The matter is now dealt with by a rather detailed and complicated description of how the proposer / insured must act when he wants to obtain and negotiate a new insurance contract.

Under the language of the new statute, an insured will have to make a fair presentation of the risk to the insurer at the time of the placement.

In order to make such a fair presentation, the insured must disclose to the insurer every material circumstance which is known to him or which ought to be known to him and failing that, the insured must give the insurer sufficient information to put a prudent insurer on notice that he needs to make further inquiries to reveal the material circumstances.

It is clear that a greater emphasis is now placed on the insurer himself to raise the essential questions and as such the new statute is an important departure from the actual statute which placed the burden to provide the relevant information solely on the insured.

The purpose of the new Act is to stimulate a greater dialogue between insured and insurer and encourage insurers to identify in advance the information which they require to cover the risk.

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<sup>26</sup> Law Commission, *Insurance Contract Law ,Business Disclosure, Warranties, Insurer’s remedies, Fraudulent Claims and late payment*, N° 353, Scot Law N° 238 ( summary) July 17, 2014, at number 1,12

So gone are the days that the insurer could sit back and relax and wait for all the information to come from the side of the insured.

There is no departure from the existing case law of what is to be understood by a material circumstance as it is still a circumstance, which would influence the judgement of a prudent insurer in determining whether to take the risk and on what terms.

But some examples of what are to be considered as material circumstances are now summed up in the new Act.

See in that respect article 7, supplementary, number 4: examples of things which may be material circumstances are-: a – b –c.

For the purpose of the present article, part II of the new Act is important for our understanding as it describes the duty of a fair presentation.

Article 3 on the duty of fair presentation states as follows:

- 1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.
- 2) The duty imposed by subsection 1 is referred to in this Act as “the duty of fair presentation”.
- 3) A fair presentation of the risk is :
  - a. which makes the disclosure requirement by subsection (4),
  - b. which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer and
  - c. 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.
- 4) The disclosure required is as follows, except as provided in subsection (5)
  - a. disclosure of every material circumstance which the insured knows or ought to know or
  - b. failing that disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further inquiries for the purpose of revealing those material circumstances.
- 5) In the absence of inquiry, subsection (4) does not require the insured to disclose a circumstance if :
  - a. It diminishes the risk,
  - b. The insurer knows it,
  - c. The insurer ought to know it,
  - d. The insurer is presumed to know it,

e. It is something as to which the insurer waives information.

The statute is fairly complicated reading but continues with article 4 on the knowledge of the insured, article 5 on the knowledge of the insurer, article 6 on knowledge in general and article 7 mentions supplementary terms.

One of the main criticisms against the existing Marine Insurance Act 1906 was the harshness of the sanction of a violation of article 17 of the Act as the insurer could avoid the contract all together and this was seen as a sanction that in many cases was out of proportion.

Article 8 of the new statute will bring a more equitable and balanced approach to this problem.

According to article 8 the insurer has a remedy against the insured for a breach of the duty of fair presentation only if he can show that, but for the breach, he would not have entered into the contract of insurance at all or would have done so only on different terms.

The remedies are set out in schedule 1 of the Insurance Act 2015.

A breach for which the insurer has a remedy against the insured is referred to in the act as "*qualifying breach*".

A qualifying breach is either a) deliberate or reckless or b) neither deliberate nor reckless.

According to the statute, article 5, a qualifying breach is deliberate or reckless if the insured

- a) Knew that it was in breach of the duty of fair presentation or
- b) Did not care whether or not it was in breach of that duty.

It is for the insurer to show that the qualifying breach was deliberate or reckless.

In schedule 1 of the Act, the proportionality of the remedies are being dealt with.

This part of the schedule 1 applies to qualifying breaches of the duty of fair presentation in relation to non-consumer insurance contracts.

If a qualifying breach was deliberate or reckless, the insurer

- a) May avoid the contract and refuse all claims
- b) Need not to return any of the premiums.

As to qualifying breaches that were neither deliberate nor reckless, the solution is as follows:

If in the absence of a qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but he must in that event return the premium paid.

If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium) the contract is to be treated as it had been entered into on those different terms if the insurer so requires.

A special solution with reference to premium:

In addition if the insurer would have entered into the contract (whether the terms relating to the matters other than the premium would have been the same or different) but would have charged a higher premium, the insurer may reduce proportionally the amount to be paid on a claim and the statute presents us in section 2 of that subparagraph with the arithmetic formula.

## **CONCLUSIONS**

We are faced with a surprising Insurance Act 2015.

We are confronted with a statute which alters the existing Marine Insurance Act 1906 on some technical aspects in a significant way, but also the Act is a fairly radical departure of the existing Marine Insurance Law in general in that it has weakened, if not dropped, the solid sacred and healthy principle of the duty of the utmost good faith coupled with the sanction of avoidance for both parties.

The legislator has probably done so in order to avoid an abusive reliance on this article providing an easy escape from liabilities by the parties.

A breach of the good faith requirement only can no longer serve as an easy excuse to avoid liabilities under the marine insurance contract.



Other than that it is certainly a rather complicated new piece of legislation, rather detailed with many references spread over 7 parts, and 2 schedules.

It strikes that many issues are still open-ended. What do we have the understand by “fair” and it can be assumed that the new statute will probably result in a number of cases being introduced before the Courts as test cases to ascertain the meaning of some of the novel concepts.

In general of course the new regulation on disclosure at the inception of the contract constitutes a more balanced approach between insured and insurer whereas from now on also the insurer has a pro-active role to play, contrary to what his passive position was under the Marine Insurance Act 1906.

In general it is thought that his new statute will offer better protection to the assured on 3 levels, the issue of the duty of full disclosure, ( which we discussed in this paper) the issue of warranties and the questions in relation to introduction of fraudulent claims.

The new statute is the first major modification of the Marine Insurance Act of 1906 which stood out for more than 106 year as an exemplary statute for the rest of the commercial world.

It is to be hoped that the new statute will indeed result in a better, more balanced relation between insured and insurer to the benefit of the entire global insurance market.

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