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A Study on Seeking an Alternative Approach to the Remedy for Breach of the Duty of Disclosure in English Marine Insurance Law

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Ⅰ. Introduction

The purpose of the duty of disclosure is to give the insurer the best opportunity to assess the risk he is taking over. The more information the insurer has concerning the risk, the more accurate can his evaluation be. This will, in turn, make it possible for the insurer to calculate a mathematically correct premium and to draw up an insurance contract accurately fitting the risk. As the person effecting the insurance normally is the person possessing the most information about this risk, it is natural that

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he should have a duty to pass this information on to the insurer.

From a legal point of view, the duty of disclosure may be justified as a question of fairness; it would not be fair to ask the insurer to evaluate the risk with less information than the information possessed by the person effecting the insurance. This would create a situation of contractual inequality between the parties. But the duty of disclosure may also be justified from the economic efficiency. If the person effecting the insurance were not under the duty to disclose information concerning the risk, he would be likely to keep the information to himself in order to get a lower premium. The insurer would then have to spend time and money to get the same information from other sources. The resources spent for this purpose will of course have to be reimbursed through the premium.

Under general English contract law, there is no duty on a contracting party to disclose any information to the other party in the negotiations leading up to the contract, although there is an obligation not to misrepresent. In a certain restricted contracts good faith is peculiarly necessary owing to the relationship between the parties, and in these cases -known as contracts uberrimae fidei- there is a full duty to disclose all material facts. Up to now the most important instance of such contracts is the contract of insurance.[1] The law concerning duty of disclosure is closely connected to the law concerning duty of good faith in English insurance contract law. In English law, the rules concerning duty of disclosure constitute a part of the broader duty of good faith. Although English contract law does not, in general, recognize any duty of good faith, the law of insurance contract is an exception to this, as it is the contract of utmost good faith.

Although the duty of disclosure is a part of the broader duty of utmost good faith in English insurance contract law, there is not a similar legal connection between these two issues in civil law systems. The purpose of

1) P.S. Atiyah, An Introduction to the Law of Contract, Clarendon Press, 1995, p.254.

this paper is, therefore, to analyse the scope and the remedy for breach of the duty of disclosure, separated from the duty of utmost good faith, because the duty of disclosure is more universal requirement in two legal systems. In addition to those analyses, I would like to seek an alternative remedy for breach of the duty, because the 'all or nothing' approach of English law in respect of remedy for the breach is a blunderbuss remedy that fails to distinguish between degrees of fault and seems to be of great unfairness.

As mentioned above, the purpose of the duty of disclosure is that the insurer shall obtain sufficient information to make a correct risk assessment. The insurer will need information concerning the risk in order to be able to decide whether to undertake the insurance or not, and to assess the necessary premium and contract conditions. The relevant information may be defined in two steps. The first step is to define the information that shall be disclosed as such. This is part of the question of the scope of the duty of disclose. The second step is to qualify the undisclosed information that may give the insurer a right to rescind against a failure to give the relevant information. In this paper, the second step is treated as remedies for breach of the duty, whereas the first step is discussed as part of the definition of the scope of the duty. This paper is , therefore, divided into two parts. The first part presents the scope or extent of the duty of disclosure and the second part concerns the remedy for breach of the duty of disclosure including comments on an alternative remedy.

Ⅱ. The Scope of the Duty of Disclosure

1. Objective Test

(1) The concept of a "prudent Insurer"

The seminal statement of the duty of disclosure, emphasizing an obligation voluntarily to disclose information relating to the risk presented for insurance, remains that of Lord Mansfield on 'the nature of concealment' in Carter v. Boehm[2] and the drafting of section 18[3] of the Marine Insurance Act 1906 is based to a large extent on the judgment of Lord Mansfield in that case.[4] According to section 18(2) of MIA 1906, every circumstance is material and therefore entitles the insurer to rescind the contract if not disclosed, 'which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk'. The subsection makes it clear that the test of materiality is objective and not subjective, because it is closely connected with the hypothetical prudent insurer and not with the actual insurer which is of relevance.

The term 'prudent insurer' is nowhere defined but was considered in

2) (1766) 3 Burr 1905, 1909(...Insurance is a contract upon speculation. The special facts ... lies most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void...).

3) MIA, Section 18(1) 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. 18(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

4) Robert Merkin, Marine Insurance Legislation, LLP, 2000, p.15.

Associated Oil Carriers Ltd. v. Union Insurance Society of Canton Ltd.[5] In this case, Atkin J. imposed what is in effect a limitation of reasonableness on this concept, and refused to hold that a prudent underwriter would have regarded the German nationality of the charterer of a vessel as a material fact in the absence of war, as to do so would have imposed upon the assured an unreasonably burdensome duty of disclosure. Atkin J. put the matter thus :

I think that this standard of prudence indicates an insurer much too bright and too good for human nature's daily food. There seems no good reason to impute to the insurer a higher degree of knowledge and foresight than that possessed by the more experienced and intelligent insurers carrying on business in that market at that time ... If the standard of prudence is the ideal on contended for ... there were in July 1914, no prudent insurer in London, or if there were, they were not to be found in the usual places where one would seek for them.[6]

On the other hand, Lord Mustill in Pan Atlantic Insurance Co., Ltd. v. Pine Top Insurance Co., Ltd[7] characterized the hypothetical insurer as personifying "the generality of those who know their job and perform it carefully, without exceptional timidity or boldness". Accordingly, the hypothetically prudent insurer which represent an objective standard, is the embodiment of reasonable underwriting practice, generally ascertained by expert evidence.[8]

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5) [1917] 2 K.B. 184.
6) Ibid., 192.
7) [1995] 1 AC 501, 531; D. Rhidian Thomas, The Modern Law of Marine Insurance, LLP, 1996, pp.33-34.
8) Howard Bennett, The Law of Marine Insurance, Clarendon Press·Oxford, 1996, p.47.

(2) Test of Materiality

The assured must disclose to the insurer every material circumstance before the conclusion of insurance contract. A "material circumstance" is defined as one which would "influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."[9]

The section 18 of the MIA 1906 is, however, ambiguous in providing the question of the degree to which a prudent insurer would have been influenced in his conduct, if he had been in possession of the relevant facts. There are at least three possible tests of the question:[10]

(i) the 'decisive influence' test, under which it is necessary for the insurer to satisfy the court that a prudent insurer would have acted differently, if the information undisclosed had been made available to him;

(ii) the 'increased risk' test, under which the insurer must demonstrate that the information undisclosed would have been regarded by a prudent insurer as probably increasing the risk, while not necessarily leading to a higher premium or a rejection of the assured's proposal;

(iii) the 'mere influence' test, whereby it is sufficient for the insurer to demonstrate that a prudent insurer would have wanted to know the information undisclosed, and would not necessarily have acted differently as regards the premium or the risk.

As to the question of how material the information must be the question on the degree of influence, the normal solution is that the information must be decisive for the insurer's assessment of the risk. In English insurance contract law, however, the question of materiality has been a matter of heavy struggle in the court cases and debate in the literature.

Somewhat surprisingly, the choice among these three alternatives was not seriously discussed in English court until 1982. In Container Transport

9) Section 18(2) of the Marine Insurance Act 1906.

10) Robert Merkin, Insurance Contract Law, Klewer Publishing, 2000. 3, A.5.3-02.

International Ltd. v. Oceanus Mutual Underwriting Association,[11] Lloyd J. opted firmly for the decisive influence test in determining whether the assured had made a fair presentation to the insurer[12] :

Underwriters ought only to succeed on a defence of non-disclosure if they can satisfy the court by evidence that a prudent insurer, if he had known the fact undisclosed, would have declined the risk altogether or charged a higher premium ··· It can never be enough for the prudent insurer to say 'Yes, I would have liked to know this or that fact, so that I could have made up my mind what to do about it'.

Lloyd J.'s argument was, unfortunately, rejected by the Court of Appeal on appeal in the CTI case.[13] Kerr LJ. noted that:[14]

The word 'judgment' - to quote the Oxford English Dictionary to which we were referred - is used in the sense of 'the formation of an opinion'. To prove materiality of an undisclosed circumstance, the insurer must satisfy the court on a balance of probability ··· that the judgment, in this sense, of a prudent insurer would have been influenced if the circumstance in question had been disclosed. The word 'influenced' means that the disclosure is one which would have had an impact on the formation of his opinion and on his decision-making process.

This approach, the choice of the 'mere influence' test, in the CTI case received much criticism from practitioners, arbitrators and academics due to its apparent harshness[15] and the Court of Appeal, in Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.,[16] drew back from it. In this case,

11) [1982] 2 Lloyd's Rep. 178.
12) Ibid., pp.187, 189.
13) [1984] 1 Lloyd's Rep. 476.
14) Ibid., p.500.
15) Robert Merkin, op. cit., A.5.3-04.

it is open to Steyn LJ. to choose between the 'increased risk' and 'mere influence' tests. Steyn LJ. and his Lordship opted strongly for the former on the basis that it produces a 'fair and balanced' position which would leave the difficulties raised by CTI 'considerably ameliorated'.

The Court of Appeal's decision in Pan Atlantic signalled a more generous approach to the duty and to the question whether a fair presentation had been made to the insurer. The appeal to the House of Lords in the Pan Atlantic case[17] produced a 3:2[18] majority for the 'mere influence' test, and a ruling that the phrase 'influence the judgment of a prudent insurer' meant no more than 'an effect on the mind of the insurer in weighing up the risk'.[19] The minority's view was that the insurer should not be able to deny liability unless it could be shown that a prudent underwriter would have regarded the information as increasing the risk and would have altered the premium or rejected the risk accordingly. The majority's reasons for adopting a test apparently generous to insurers (or, at least, for rejecting the 'decisive influence' test), together with the minority's counter-arguments, were as follows.[20]

(a) The majority view was that the word 'influence' in its ordinary meaning did not mean 'change the mind of', so that it could not be right to adopt the 'decisive influence' test. Equally, the decisive influence test did not appear in the legislation itself, and the reference to 'determining whether' was a plain reference to the prudent insurer's thought processes rather than his final decision. The minority view was that the use of the word 'judgment' could refer only to the insurer's ultimate decision and not to his thought processes, and that the majority approach de-emphasized the use of

16) [1993] 1 Lloyd's Rep. 496.
17) [1994] 3 All ER 581.
18) Lords Goff, Mustill and Slynn formed the majority : Lords Templeman and Lloyd formed the minority.
19) [1994] 3 All ER 581, per Lord Goff at p.587.
20) Robert Merkin, op. cit., A.5.3-04-06.

the word 'would' rather than 'might'.

(b) The majority regarded the decisive influence test as impractical for a number of reasons : (i) it is for the assured and his broker to assess what must be disclosed, and the adoption of a decisive influence test would make if difficult for this assessment to be made, whereas a wider duty would clarify the position ; (ii) the decisive influence test could operate only in the exceptional situation in which the underwriters called to give expert evidence were agreed that they would have increased the premium or rejected the risk; (iii) the decisive influence test takes as its starting point the assumption that a prudent insurer would have written the risk as disclosed on the terms accepted by the actual underwriter, whereas this is by no means a foregone conclusion; (iv) it is meaningless to ask whether any one single piece of information would have had a decisive influence on a prudent underwriter as the consideration of a risk involves balancing all factors. The minority could see little merit in these points and in particular rejected point (i) on the basis that it could not be in the assured's interest for a wide test of disclosure to be laid down ostensibly to make the assured's duty clearer to him. Lord Lloyd indeed stressed the need for certainty.

(c) The majority could find no authority for the adoption of a decisive influence test. By contrast, the minority reviewed nineteenth century decisions[21] and concluded that they pointed to 'what underwriters would have done rather than what they wanted to know'.[22]

(d) The majority took the view that the 'mere influence' test would not operate unfairly on assureds, partly because the rigors of CTI had been mitigated by the unanimous Pan Atlantic ruling that the insurer has to go on to show actual influence on him, and partly because the

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21) Most importantly, Ionides v. Pender (1874) LR 9 QB 531 and Tate v. Hyslop (1885) 15 QBD 368.

22) [1994] 3 All ER 581, per Lord Lloyd at p.630.

'mere influence' test reflected the wording of the statute and the underpinning principle of fair dealing, and that in many cases 'the core of material of which good faith demands the disclosure is relatively small and easy to identify'. The minority rejected the value judgment implicit in the majority's attitude to the mere influence test.

In this case, if the 'decisive influence' test of materiality had been accepted, it would have served to render the assured's disclosure obligation less burdensome and to a corresponding degree also limited the power of insurers to avoid policies entered into. Many would have considered it a desirable development in the law,[23] because the view is held in many quarters that the law is cast in terms too favourable to insurers.[24]

2. Subjective Test

Sections 18(2) of the MIA 1906, in defining materiality, make no mention of any requirement that the insurer must additionally prove that he was actually induced by the assured's non-disclosure to enter into the contract on the terms agreed. There is little clear authority on the matter prior to the passing of the MIA 1906, although it appears to have been accepted up to that date that actual inducement had to be proved.[25] The silence of the MIA 1906 appears to have been a gradual acceptance of the view that the insurer's satisfaction of the 'prudent insurer' test in MIA 1906 was exhaustive of his obligations. The point was made by Mackinnon LJ in Zurich General Accident and Liability Insurance Co. v. Morrison[26]:

What is material is that which would have influenced the mind of a

23) Cf. M.A. Clarke, "Failure to Disclose and Failure to Legislate: is it Material?" JBL, 1988 ; H.N. Bennett, "The Duty to Disclose in Insurance Law," 109 Law Quarterly Review, 1993.

24) D. Rhidian Thomas, The Modern Law of Marine Insurance, LLP, 1996, p.35.

25) E.g., Rivaz v. Gerussi Bros. & Co. (1880) 6 QBD 222.

26) [1942] 2 KB 53.

prudent insurer in deciding whether to accept the risk or fix the premium, and if this be proved, it is not necessary further to prove that the mind of the insurer was so affected.

The rejection of any form of subjective test can be criticised on a number of grounds: insurance law is inconsistent with ordinary contract law; it may be perceptibly unfair for a wholly innocent assured to be deprived of his contract rights simply because a hypothetical insurer would have been affected by his presentation of the risk; and it is a distortion of competition if each underwriter is permitted to assess his premiums on one basis and yet take advantages of the practices of his rivals once a dispute arises.

As a result, the matter was given detailed consideration by the House of Lords in Pan Atlantic Insurance Co. v. Pine top Insurance Co. Ltd.,[27] and their Lordships unanimously ruled, in the words of Lord Mustill, that 'there is to be implied in the MIA 1906 a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract', a proposition which applied equally to non-disclosure. Their Lordships' main reasons for reaching this conclusion were fairness and the need for insurance law to comply with the general law of misrepresentation. Lord Mustill rejected the argument that an objective test operating in isolation was necessary to impose a disciplinary element on assured, and ruled that discipline did not form part of the law, which was concerned only with whether or not there had been a distortion of the risk. The silence of the MIA 1906 was explained by Lord Mustill on the ground that MIA 1906 did not seek to deal with ordinary principles of misrepresentation but rather with the insurance aspects only, i.e., the definition of materiality. It is possible to quibble with the analysis, but the result is to be welcomed.

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27) [1994] 3 All ER 581.

3. Relationship between the Objective and Subjective Test

(1) Presumption of inducement

While it is clear from the Pan Atlantic case that an insurer must, in order to justify avoiding a policy, prove that the fact was material by the hypothetical prudent insurer and that he, an actual insurer, was induced to enter into the contract by the assured's false presentation, it is less clear how the two requirements are to operate together. One Possibility is that the test of materiality is taken as a starting point and that, once the insurer has satisfied the court that a prudent insurer would have been influenced by the fact undisclosed, it may be assumed that the insurer was in fact so induced. This was the view of Lord Mustill in Pan Atlantic, his Lordship stating that there is 'a presumption of inducement', and that 'the assured will have an uphill task in persuading the court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference'.[28]

The alternative approach is to regard the two tests as totally distinct, and to take as the starting point the actual inducement of the insurer. Only when actual inducement has been shown, the question of materiality arise. Lord Lloyd expressly supports such an analysis, and specifically states that the notion that 'inducement can be inferred from proven materiality' is a 'heresy long since exploded'.[29]

However, the presumption of inducement has a much greater drawback, in that it leaves the law more or less in the unsatisfactory state. This view of the presumption of inducement is indeed borne out by the decision of the Court of Appeal in St. Paul Fire and Marine Co.(UK) Ltd. v. McDonnell Dowell Constructors Ltd.[30] In this case, four insurers had subscribed to a

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28) Ibid., 619.
29) Ibid., 637.
30) [1995] 2 Lloyd's Rep. 116.

building risk, the policy having been obtained following an material misrepresentation as to the nature of the foundations to be used for the building. Three of the insurers gave evidence that they had been induced by the false statement, but the fourth insurer did not give evidence on this point. The Court of Appeal nevertheless held that proof of materiality gave rise to a presumption of inducement upon which the fourth insurer could rely even without adducing evidence of inducement. Given that inducement is subjective to the insurer, it is difficult to see exactly how the assured can rebut the presumption in other than exceptional circumstances.

(2) Limits on the presumption of inducement

There would appear to be two important restrictions on the operation of the presumption of inducement. First, it appears that an insurer cannot rely upon the presumption if he has failed without any reasonable excuse to give evidence as to his state of mind at the time the risk was negotiated. This, however, may be of limited use to the assured, for in many cases the time gap between the underwriting of a risk and its investigation by a court will have been considerable, and it may be that the underwriter on duty on the precise day in question may be unable for a variety of reasons to give reliable evidence, or indeed any evidence at all, as to what transpired.

Secondly, it is implicit in the presumption of inducement that it rests upon the assumption that a prudent insurer will necessarily have been influenced by material failures to disclose on the assured's part. If, by contrast, the insurer can be shown to have been imprudent when underwriting the risk, it becomes much more difficult for that insurer to claim that he was actually influenced by the assured's misleading presentation of the risk. Indeed, if the subjective test has any real significance if the light of the presumption of inducement, it must be that of permitting the assured to demonstrate that, while a prudent insurer would

probably have been influenced, this particular insurer was not influenced. The point was raised in Marc Rich & Co. AG v. Portman[31] and the outstanding issue was that of inducement in this case. Evidence presented to Longmore J demonstrated that the underwriter who had accepted the risk was a junior who had little or no knowledge of the market, and indeed that underwriter's own evidence confirmed that fact. The question in this case was the relevance of such evidence. Longmore J. held that the underwriter had not been in a complete 'intellectual stupor', and that he had been induced-albeit only to a limited extent-by the presentation of the risk to enter into the contract. The policy was, therefore, voidable.

It follows from this decision that evidence of past imprudence is immaterial, and that evidence of actual underwriting imprudence at the time of the assured's presentation is capable of rebutting the presumption of inducement and putting the insurer on proof of actual inducement, although actual inducement itself has a fairly low-level threshold, as it is only where the underwriter has a complete lack of understanding that it can be said that he has not been induced.

4. Connection between Event Causing Loss and Breach of Duty

The materiality of a fact is to determined at the date at which the insurance contract becomes binding. This rule has two consequences. First, if a fact appears to be immaterial prior to the conclusion of a contract, and only proves to be material thereafter, the assured is not in breach of duty for failing to disclose it. Second, if the fact appears to be material prior to the making of the contract, and subsequently proves to be immaterial, it follows that the assured is in breach of duty for failing to disclose if. Thus, in the old case of Seaman v. Fonnereau,[32] the assured failed, before the

31) [1996] 1 Lloyd's Rep. 430.
32) (1734) 2 Str. 1183. Cf. Lynch v. Hamilton (1810) 3 Taunt. 37.

contract had been completed, to disclose to the insurer rumours that the vessel for which insurance was sought had suffered severe damage in a gale. Those rumours proved to be unfounded once the insurer was on risk, but the insurer was nevertheless held to be entitled to avoid the policy. This case demonstrate clearly that no causal link is required between the breach of the duty of disclosure and any ensuing loss.

Ⅲ. Remedies for Breach of the Duty of Disclosure

1. Rescission and its consequences

Where the assured has failed to disclose a material fact, the insurer's remedy is avoidance of the contract.[33] It is no defence that the assured is unaware of the materiality of a circumstance within his knowledge, even though the test for materiality is extremely broad and judged by reference to the hypothetical, prudent insurer and not by reference to the reasonable assured. An assured who is acting perfectly reasonably and not seeking to conceal anything may breach the duty of disclosure through inadvertent and innocent mistake. Nor is the culpability of the breach or its relative seriousness or triviality of any relevance to the insurer's remedy. The insurer may avoid the contract regardless of both how the duty came to be broken and the consequence of the breach. The law of non-disclosure admits no principle of proportionality of remedy.[34]

The effect of rescission is to avoid the contract ab initio at the insurer's option. Avoidance of the contract, otherwise known as rescission, asserts a defect in the formation of the contract with the result that it is in principle

33) Cf. MIA 1906, Sections 17, 18(1).
34) H.N. Bennett, "Mapping the doctrine of utmost good faith in insurance contract law," LMCLQ, 1999, p.172.

a retrospective remedy returning the parties to the position they were in before the contract was concluded.[35] The assured is, therefore, entitled to a return of his premium. The assured's right of restitution is, however, subject to two qualification. First, the policy might provide that the premium is not to be recoverable if the policy is avoided. Secondly, MIA 1906, s.84(1) provides that the assured cannot recover the premium when he has been guilty of fraud.[36]

It is also the case that the insurer has the right to recover sums paid by him. Where a policy has been obtained following a breach of duty, and has been renewed, it would seem that the insurer is entitled to avoid the initial contract as well as all subsequent renewals.

The effect of a breach of the duty of disclosure by the assured is to render the contract voidable at the insurer's option. Rescission of the contract is, therefore, not automatic and the insurer may decide to waive the breach and affirm the contract.[37] Under some circumstances, the right to rescind for breach of the duty of disclosure may be lost. The insurer, the innocent party, may make a positive decision not to rescind but to affirm the contract, thereby waiving the remedy of rescission. Such a decision must be fully informed. This requires that the innocent party have knowledge of the facts which give rise, in law, to the right to elect between rescission and affirmation.[38] In addition, the insurer have knowledge of the existence, in law, of the right of election,[39] but a court will readily infer that an insurer has that knowledge.[40]

The decision to affirm has no effect until communicated, but once

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35) H.N. Bennett, op. cit., 1996, p.139.

36) Robert Merkin, Insurance Contract Law, 2000. 3, Klewer Publishing, A.5.6-01.

37) Yvonne Baatz, "Utmost Good Faith in Marine Insurance Contracts," Marine Insurance at the turn of the Millennium(ed. by Marc Huybrechts), Vol.1, Intersentia : Antwerp, 1999, p.24.

38) Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp. of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391, 398.

39) Peyman v. Lanjani [1985] Ch. 457.

40) Simner v. New India Assurance Co., Ltd. [1995] L.R.L.R. 240, 258.

communicated to the party in breach, it is final and irrevocable and does not require perfection by any consideration, reliance or change of position.[41] Such communication must be unequivocal but may be by words or conduct. Therefore, the representee may expressly inform the representor of his decision to rescind or affirm the contract or may communicate this decision by conduct consistent only with the representee's choice. Such conduct is assessed objectively. If, with the knowledge of the breach and the resulting right of election, the representee conducts himself in a manner consistent only with affirmation of the contract, he will be held to have elected not to rescind even if unaware of this legal consequence of his actions or subjectively intending not to affirm the contract. Conduct by a fully informed representee amounting to an election to affirm the contract, for example, includes acceptance of premium, issue of a policy, approval of measures taken to rectify a misrepresentation, co-operation without reservation in attempting to repair demage to the insured ship, requesting further information regarding a casualty and acquiescing in and inviting the assured to proceed with a lengthy investigation of the loss, and cancelling the policy in accordance with the terms of a cancellation clause therein.

The right of election conferred upon a innocent party imposes no compulsory obligation to elect. The law recognizes an entitlement to a reasonable time to decide upon the preferred option.[42] Once such period of time has expired, however, there remains no obligation to elect but the right election may be lost by the law either depriving him thereof or deeming him to have made his choice. Thus, failure to excercise a right of rescission within a reasonable time may be viewed as a representation by conduct of a decision to affirm the contract.

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41) Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp. of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391, 398-399.

42) McCormick v. National Motor & Accident Insurance Union Ltd. [1943] 49 Ll.L.Rep. 362.

2. Alternative Remedies

Three arguments can be made that rescission is too harsh a penalty. First, it is an all-or-nothing remedy; thus, the penalty exacted may be way out ot proportion to the breach. Second, it is particularly draconian approach that the duty of disclosure can find a violation although there is not a causal relation between the loss and the fact disclosed. Third, rescission is a blunderbuss remedy that fails to distinguish between degrees of fault: The non-disclosure may be wilful or it may be totally innocent, yet the consequence is the same.[43]

The 'all or nothing' approach with respect to remedy of English law is also capable of working great injustice: in particular an insurer may avoid the policy totally in respect of an undisclosed matter which may have had at best a marginal effect on the premium or in respect of a matter totally unconnected with the loss. From the point of view of the assured, the remedy of rescission is draconian.[44] He is deprived of all cover regardless of either the culpability or gravity of his breach of the duty. An inadvertent breach resulting from an innocent mistake is as fatal as a calculated concealment. In the Court of Appeal in Pan Atlantic v. Pine Top,[45] Nicholls LJ stated as follows:

Justice and fairness would suggest that when the inadvertent non-disclosure came to light what was required was an adjustment in the premium or, perhaps, in the amount of the cover. Those are not options available under English law. The remedy is all or nothing. The contract of insurance is avoided altogether, or it stands in its entirety. This is not the only field in which English law still seems to adopt a fairly crude,

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43) Thomas Schoenbaum, "The Duty of Utmost Good Faith in Marine Insurance Law : A Comparative Analysis of American and English Law," Journal of Maritime Law and commerce, Vol.29, No.1, 1998. 1, p.35.

44) H.N. Bennett, op. cit., 1996, p.140; Susan Hodges, Cases and Materials on Marine Insurance Law, Cavendish Publishing Limited, 1999, pp.213-214.

45) [1993] 1 Lloyd's Rep. 496, 506.

all-or-nothing approach, when what is needed is a more sophisticated remedy more appropriate, and in that sense more proportionate, to the wrong suffered.

In this respect, the Insurance Ombudsman's 1989 Report[46] is worthy of comment. The Report considered three alternative approaches to this problem: first, that the insurer is not permitted to avoid the policy for minor breaches of duty; secondly, that the insurer is required to make full payment but is entitled to set off from that payment the amount of additional premium which would have been payable by the assured had full disclosure been made at the outset; and thirdly, that the insurer is obliged to pay only that proportion of the loss represented by the proportion of the premium actually paid.[47]

In French law[48] by comparison, the remedies for non-disclosure are qualified. As non-disclosure can have been committed at different times or with different intentions, the legislature has had to adapt the remedy to the circumstance of the case. Thus there are several types of remedy outlined in the legislation: nullity of the contract in the case of bad faith by the assured; cancellation of the contract; rewriting of the contract with an additional premium or proportional reduction in the indemnity in the case of good faith being shown by the assured.

Art. L.172-2(1) of Code des Assurances provides for the avoidance of the contract when that non-disclosure has diminished the insurer's opinion of the risk, whether or not the non-disclosure is causative of the risk. Thus, the most severe remedy, the avoidance of contract, is limited to the case where the assured acts in bad faith. Where the assured demonstrates good

46) IOB Annual Report for 1989, at paras. 2.16-2.17; Robert Merkin, op. cit., A.5.6-02.

47) Thus, if the premium paid was £100, but the premium payable with full disclosure would have been £125, the insurer is liable only for 80 per cent of the claim.

48) Cf. Code des Assurances, Art. L. 172-2.

faith or innocence, Art. 172-2(2) provides that the insurer remains liable but his liability is reduced in proportion to the ratio which the premium actually paid bears to that which would have been charged had the disclosure had been made. The insurer is, therefore, only relieved of liability in French law where he can establish he would never have covered the risk if he had known of the undisclosed fact. Otherwise he is liable for the loss in proportion to the ration which the actual premium bears to the premium which would have been charged had the non-disclosure not occurred.[49]

Ⅳ. Conclusion

Where the assured has failed to disclose a material fact, the insurer's remedy is avoidance of the contract. It is no defence that the assured is unaware of the materiality of a circumstance within his knowledge, even though the test for materiality is extremely broad and judged by reference to the hypothetical, prudent insurer and not by reference to the reasonable assured. An assured who is acting perfectly reasonably and not seeking to conceal anything may breach the duty of disclosure through inadvertent and innocent mistake. Nor is the culpability of the breach or its relative seriousness or triviality of any relevance to the insurer's remedy. The insurer may avoid the contract regardless of both how the duty came to be broken and the consequence of the breach. The law of non-disclosure admits no principle of proportionality of remedy.

The English Law Commission observed[50] in 1980 that the application of proportionality to remedy for breach of the duty of disclosure has the strong advantage that it eliminates severe "all or nothing" result of marine

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49) Sarah C. Derrington, "Non-disclosure and misrepresentation in contracts of marine insurance: a caoparative overview and some proposals for unification", LMCLQ, 2001. 2.

50) Law Commission Report, Insurance Law : Non-Disclosure and Breach of Warranty, Law Com. No.104(1980), para. 4.4.

insurance law. It also seems to provide a basis of arithmetical certainty for the calculation of the amount due to the assured. Nevertheless, the Law Commission was not convinced that the adoption of the proportionality principle was an appropriate response to the problem. The Law Commission Report noted[51] that, in France, the application of the proportionality principle has raised problems in various types of cases. Most of all, the principle does not and cannot operate with the arithmetical certainty which appears to be its underlying principle and justification. For this reason various French jurisdictions have either refused to apply it or have made only a nominal deduction. The Law Commission was of the opinion that this difficulty could be mitigated in cased where there are fixed tariffs corresponding to the circumstances but this is seldom the reality, at least in the marine insurance context.

The harshness of the duty of disclosure in English marine insurance law is due to the extent of the obligation to disclose on the assured and the inflexibility of the remedy available for breach of the duty. The insurer may avoid the contract. It is 'all or nothing'. The draconian nature of the remedy has meant that the development of the scope of the duty has been curtailed. The draconian remedy is widely believed to be appropriate where the breach of the duty is fraudulent. However, it is, in my view, time to adapt flexible remedies in proportion to the degree of fault of the assured in English insurance contract law. What is really needed in English insurance law is to introduce a more sophisticated remedy ascertaining degrees of fault.

51) Ibid., para. 4.7.

References

Adams, John and Roger Brownsword, Key Issues in Contract, Butterworths, 1995.

Baatz, Yvonne, "Utmost Good Faith in Marine Insurance Contracts," Marine Insurance at the turn of the Millennium(ed. by Marc Huybrechts), Vol.1, Intersentia : Antwerp, 1999.

Atiyah, P.S., An Introduction to the Law of Contract, 5th ed., Clarendon Press · Oxford, 1995.

Beale, H.G.(ed.), Chitty on Contracts, 28th ed., Sweet & Maxwell, 1999.

Beatson, J.(ed.), Anson's Law of Contract, 27th ed., Oxford University Press, 1998.

Bennett, H.N., "Mapping the doctrine of utmost good faith in insurance contract law," LMCLQ, 1999.

Bennett, H.N., The Law of Marine Insurance, Clarendon Press · Oxford, 1996.

Bennett, H.N., "Utmost Good Faith in the House of Lords," Law Quarterly Review, Vol. 111, 1995.

Bennett, H.N., "The Duty to Disclose in Insurance Law," Law Quarterly Review, Vol. 109, 1993.

Bird, John & Hird, Norma J., "Misrepresentation and Non-disclosure in Insurance Law - Identical Twins or Separate Issues?", Modern Law Review, Vol.59, 1996.

Clarke, M.A., The Law of Insurance Contracts, 3rd ed., LLP, 1997.

Clarke, M.A., "Insurers-influenced but yet not induced," LMCLQ, 1994.

Clarke, M.A., "Insurance Contract and Non-Disclosure," LMCLQ, 1993.

Derrington, Sarah C., "Non-disclosure and misrepresentation in contracts of marine insurance: a comparative overview and some proposals for unification," LMCLQ, 2001.

Hasson, R.A., "The Doctrine of Uberrima Fides in Insurance Law-A Critical Evaluation," Modern Law Review, Vol. 32, 1969.

Hodges, Susan, Cases and Materials on Marine Insurance Law, Cavendish Publishing Limited, 1999.

Hodges, Susan, Law of Marine Insurance, Cavendish Publishing Limited, 1996.

Hudson, N. Geoffrey and J.C. Allen, The Institute Clauses, 3rd ed., LLP, 1999.

Ivamy, E.R. Hardy(ed.), Chalmers' Marine Insurance Act 1906, 10th ed., Butterworths, 1993.

Lowry, John and Philip Rawlings, Insurance Law, Hart Publishing, 1999.

Merkin, R.M., Marine Insurance Legislation, LLP, 2000.

Merkin, R.M., Insurance Contract Law, Klewer Publishing, 1999.

Mustill, M.J. and J.C.B. Gilman, Arnould's Law of Marine Insurance and Average, Vol. II, 16th ed., Stevens & Sons, 1981.

Schoenbaum, T.M., "The Duty of Utmost Good Faith in Marine Insurance Law : A Comparative Analysis of American and English Law," JMCL, Vol. 29, No. 1, 1998.

Tarr, Anthony A. & Tarr, Julie-Anne, "The Insured's Non-disclosure in the Formation of Insurance Contracts: A Comparative Perspective," International and Comparative Law Quarterly, 2001. 7.

Thomas, D.R., The Modern Law of Marine Insurance, LLP, 1996.

Treitel, G.H., The Law of Contract, 10th ed., Sweet & Maxwell, 1999.

Wilhelmsen, Trine-Lise, "Issues of marine insurance : Duty of disclosure, duty of good faith, alteration of risk and warranties", CMI Spain Colloquium, 2000. 9. 18-20.

ABSTRACT

A Study on Seeking an Alternative Approach to the Remedy for Breach of the Duty of Disclosure in English Marine Insurance Law

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English contract law has traditionally taken the view that it is not the duty of the parties to a contract to give information voluntarily to each other. In English law, one of the principal distinctions between insurance contract law and general contract law is the existence of the duty of disclosure in insurance law. This article is, therefore, designed to analyse the scope or extent of the duty of disclosure and the remedy for breach of the duty in English marine insurance law. The main purpose of this article is also to seek the alternative remedy for the breach. The results of analysis are as following :

First, the scope of the duty of disclosure is closely related to the test of materiality and the concept of a hypothetical prudent insurer. The assured is required to disclose only material circumstances subject to MIA 1906, s. 18(1). The test of materiality, which had caused a great deal of debate in English courts over 30 years, was finally settled by the House of Lords in Pan Atlantic and the House of Lords rejected the 'decisive influence' test and the 'increased risk' test, and the decision of the House of Lords is thought to accept the 'mere influence' test in subsequent case by the Court of Appeal.

Secondly, an actual insurer is, in order to avoid contract, required to provide proof that he is induced to enter into the contract by reason of the non-disclosure of the assured. But this subjective test of actual inducement is somewhat meaningless in sense that English court takes the test of materiality as a starting point and assumes the presumption of inducement

even in case of no clear proof on the inducement.

Finally, MIA 1906, s. 18 provides expressly for the remedy of avoidance of the contract for breach of the duty of disclosure. This means rescission or retrospective avoidance of the entire contract, and the remedy is based upon a fairly crude 'all-or-nothing' approach. The remedy of rescission is too draconian from the point of view of the assured, because he can be deprived of all cover despite he is innocent perfectly. An inadvertent breach from an innocent mistake is as fatal as wilful concealment. What is, therefore, needed in English marine insurance law with respect to remedy for the breach is to introduce a more sophisticated or proportionate remedy ascertaining degrees of fault.

Key Words : duty of disclosure, test of materiality, rescission