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Application of the Terms and Conditions of English Law Related to the Duty of Utmost Good Faith under Marine Insurance Contract: Korean Supreme Court Decision 2018.10.25, Docket No.2017Da272103

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Abstract

Purpose – This paper analyzes how to interpret the legal view of the precedents to the UK Insurance Act 2015, comparing it to the UK Marine Insurance Act (MIA) 1906 with a focus on the relationship between the duty of uberrimae fidei and the duty of disclosure. Furthermore, this study focuses on the judgment of the Korean Supreme Court in a case, that examined whether the legal nature of the duty of disclosure or duty of uberrimae fidei in insurance law can be considered as a matter related to the insurer's liability when the applicable terms of English law are incorporated under the insurance contract.

Design/methodology – This paper belongs to the field of explanatory legal study, which aims to explain and test whether the choice of law is linked to the conditions that occur in the reality of judicial practice. The approach that is used toward this problem is the legal analytical normative approach. The juridical approach involves studying and examining theories, concepts, legal doctrines and legislation that are related to the problem.

Findings – Regarding the requirements and effects of breach of the duty of disclosure, if English law and the Korean Commercial Act are handled differently from each other and Korean law is recognized as the applicable law outside of the insurer's liability, it may be whether the insurer's immunity under English law is contrary to s.633 of the Korean Commercial Act. In considering the breach of the duty of disclosure as a matter of the insurer's liability, even if English law is applied as a governing law, the question of how to interpret the agreement of the governing law in this case may also be raised in the interpretation of Korean International Private Law in relation to the applicable law that applies to the rest of the matter, excluding the matters of liability.

Originality/value – According to the Korean Supreme Court judgement under the governing law of the MIA 1906, the basis for recognizing the assured's pre-and post-contractual duty of disclosure is separate, and the only important matters to be notified by the assured after the conclusion of the insurance contract are those that are "relevant" and "material circumstances" that are "relevant" to the matter in question after the conclusion of the insurance contract.

Keywords: Choice of Law, English Law, Governing Law, Korean Commercial Act, Marine Insurance Act, Utmost Good Faith
JEL Classifications: F10, G22, K12, L90

1. Introduction

The very foundation of a contract of marine insurance rests on the principle of uberrimae fidei (utmost good faith). Insurance is a contract of uberrimae fidei as declared in s.17 of the

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UK Marine Insurance Act 1906 (hereinafter, MIA 1906); this section partially codified the common law. According to this principle, both parties to the insurance contract must voluntarily disclose to each other all facts material to the risk. Any breach of this duty shall render the contract voidable at the option of the aggrieved party, in other words, the party who has suffered as a result of this breach. Although an insurance contract is a simple commercial contract, it differs from other commercial contracts with regard to the application of this principle (iEduNote, n.d.). The codification was intended to reproduce as exactly as possible the existing law relating to marine insurance (Gilman et al., 2018). The origin of the duty of good faith was relevant to the issue of remedies for breach and to how the duty was given effect in practice. This is the principal reason why it was important to understand where the duty comes from. Section 17 attracted very little attention in cases following the MIA 1906. A passing reference was made to it in *Cantiere Mercanico Brindisino v. Janson* (1912) in which Vaughan-Williams LJ suggested that avoidance on the ground of non-disclosure of a vessel's unseaworthiness, under a policy containing a "seaworthiness admitted" clause, might be based on s.17 of the MIA 1906, rather than s.18 (Hodges, 1996).

In common law, only insurance contracts provide an example of "utmost good faith." The person taking up the insurance shall have the duty to disclose to the insurance company all facts of which s/he is aware or that may affect the premium or acceptance of the risk. The failure to do so makes the contract voidable at the option of the insurance company, which means the contract is rescinded (LawTeacher, 2018).

The first case in which much significance was attached to s.17 was *Container Transport International Inc. v. Oceanus Mutual Indemnity Association [Bermuda] Ltd* (1984) (hereinafter, *CTI case*). Although this decision attracted a great deal of criticism in other respects and was subsequently overruled on the main issue of whether a breach of good faith, non-disclosure, or misrepresentation that did not induce the contract can afford grounds for avoidance, this did not affect the importance of the dicta contained in the judgments. Sections 18 and 20 of the MIA 1906 have been described as "illustrations or consequences" of the rule set out in s.17 that insurance was a contract of utmost good faith, as articulated by Lord Lloyd in *Pan Atlantic Ins Co. Ltd v. Pine Top Ins Co. Ltd (1995)* (hereinafter, *Pan Atlantic* case), but it was clear that in cases involving a question of pre-contractual non-disclosure or misrepresentation by the insured, the requirements of materiality and inducement and other requirements of ss.18 and 20 generally had to be met. Although the "fair presentation" test suggested by Kerr L. J. in the *CTI case* was accepted in subsequent cases, this was not a substitute for the requirements in the ensuing sections. Indeed, in *Banque Financiere de la Cie v. Westgate Insurance Co*., (1998)(hereinafter, *Banque Financiere* case) the Court of Appeal rejected a formulation of the test for materiality seemingly derived from the *CTI case* and the use of "broad concepts of good faith and fair dealing" as a guide to the scope of the reciprocal duty owed by insurers.

However, in a subsequent Court of Appeal case, a rather different approach was taken. In *Drake Insurance Plc v. Provident Insurance Plc* (2004)(hereinafter, *Drake Insurance* case), the Court of Appeal was prepared to find that the exercise by an insurer of its right to avoid a policy had to be carried out in good faith, such that bad faith would prevent its exercise. A differently constituted Court of Appeal, which delivered its judgment only a short time before the judgment in the *Drake Insurance* case, came to the opposite conclusion (*Brotherton v. Aseguradora Colseguros SA*, 2003).

These cases were related to the exercise of the right of avoidance and were technically examples of the post-contractual duty of uberrimae fidei. However, what these cases serve to illustrate for present purposes is that some members of the Court of Appeal at least were willing to give s.17 teeth so far as insured parties are concerned by using it as a mechanism to curtail an otherwise unrestricted right on the part of the insurer to avoid the policy in which there had been a breach by the insured of the pre-contractual duty of utmost good faith (Gilman et al., 2018).

In other words, the Law Commissions explicitly recommended preserving the role of utmost good faith, ostensibly as an "interpretative principle" but apparently with one eye to allowing future developments on the basis of it. Moreover, as if this was not clear enough, the treatment in the English Insurance Act 2015 (hereinafter, 2015 Act) of s.17 of the MIA 1906 confirms the point. This provision was long accepted as reproducing the common law and hence as applying *de facto* to all insurance (Soyer and Tettenborn, 2016). Sections 18 to 20 of the MIA 1906 have been repealed, and any rule of law of the same effect as those provisions is abolished in relation to contracts of insurance and variations entered into after the regime came into force (August 12, 2016). Part II of the 2015 Act revises the whole topic of the pre-contractual duty of utmost good faith in sections that are part restatement, part codification or attempted codification, and part new law under the label the "duty of fair presentation." The new statutory regime applies to contracts of insurance entered into after August 12, 2016, and to variations of contracts of insurance entered into at any time after August 12, 2016.

In *Korean Supreme Court Decision* (2018), it was determined that provisions related to the utmost good faith and duty of disclosure provided in ss.17–20 of the MIA 1906 apply to marine insurance including the governing law. In the case of sea transportation and marine insurance, it is very important because English law and precedents have long played a leading role. This case fully reflects the intent of English precedents regarding the interpretation of ss.17–18 of the MIA 1906, for example, *Banque Financiere (1996)*, *The Good Luck (1992)*, *New Hampshire Insurance Co. v. MGN Ltd (1995)*, *Societe Anonyme d'Intermediaries Luxembourgeois v. Farex Gie (1995)*, *Fraser Shipping Ltd. v. Colton and Others (1996),* and *The Star Sea (2001)*, etc.

The purpose of this study is to analyze how the English Insurance Act 2015 changed the duty of utmost good faith. The insurance law meaning of the MIA's duty of utmost good faith system will be thereby clarified. Furthermore, while the Korean Supreme Court judgment is related to the duty of uberrimae fidei and duty of disclosure under the MIA 1906, the consideration of the duty of utmost good faith under the MIA 1906 is related to the duty of uberrimae fidei and duty of disclosure under the Korean Commercial Act. In addition, through the review of the Korean Supreme Court judgment, the study is intended to examine the legal implications of the duty of uberrimae fidei and duty of disclosure under insurance contract law.

2. Outline of Utmost Good Faith

2.1. Meaning of Utmost Good Faith

The old theory of uberrimae fidei originated in the early stages of marine insurance and roughly translates from Latin into English as of "utmost good faith": all parties to marine insurance contracts have mutual responsibilities and insist on their duties in accordance with the highest standards of good faith based on ethics and efficiency. In addition to being essential to insurance contracts, the obligation of utmost good faith also stems from the nature of the insurance relationship: the insured is regarded as morally obliged to disclose all the information materials that the insurer is required to provide. The harsh penalty under uberrimae fidei for voiding the policy should also deter insured parties from withholding information from an insurance carrier or carelessly completing an insurance application

(Gibbs, 2015).

In addition, uberrimae fidei is economically inevitable because the insurer had no reasonable means to effectively acquire information without modern transportation or ubiquitous digital transmission (Zhu, 2020).

In English insurance law, the duty of utmost good faith separates insurance law principles from contract law principles because, whilst the former require volunteering material facts before the contract was concluded, the latter do not impose such an obligation on the contracting parties (Gurses, 2016). The duty of disclosure is admittedly closely related to the doctrine of uberrimae fidei. The truth, however, as can be seen from the judgment of Lord Mansfield in *Carter v. Boehm* (1766) is that the duty of disclosure stems from the principle of uberrimae fidei and not *vice versa* (Hodges, 1996). However, this 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 representation originate, it has to be the wider and more potent of the two concepts (Hodges, 1996). A breach of the duty of uberrimae fidei is generally established by proof of non-disclosure or misrepresentation. This has somehow, over the years, caused the line between the defenses of non-disclosure and of utmost good faith to blur. The realization that they are distinct principles came recently with the cases of *CTI* and, in particular, The Litsion Pride *(Black King Shipping Corpn v. Massie*, 1985).

In the 19th century, the cases referred to "the duty of utmost good faith" to express the "pre-contractual duty of disclosure" and the "duty not to misrepresent material facts" (Gilman et al., 2018). Avoidance was the only recognized remedy under English law for breach of pre-contractual duties. Demands for alternative remedies, such as claiming damages for the breach instead of avoiding the contract *ab initio*, were rejected by the courts (Gurses, 2016).

Under the MIA, it was discussed whether s.17, in other words, the duty of utmost good faith, was illustrated exhaustively (Merkin, 2010) by ss.18–20 of the MIA 1906. The duty of fair presentation of the risk derives from the duty of uberrimae fidei. As the case law illustrated, the scope of the duty of uberrimae fidei is broader than the pre-contractual duties. Its implications have been discussed by English courts in various different contexts in which the definition of good faith, the scope of the duty of good faith, and remedy for its breach have been referred to but determined authoritatively (Gurses, 2016).

The fact that the only remedy afforded by this section is "avoidance" of the contract creates enormous difficulties (Soyer, 2015). At the pre-contractual stage, in most instances, "avoidance" would be an impractical remedy for the assured, especially if a breach is detected after the insured property suffers a loss (Shin Gun-Hoon, 2011a). The duty at the post-contractual stage is also not free from controversy. The remedy of "avoidance" is often deemed to be too harsh, and courts have been forced to resort to innovative construction techniques in order to impose restrictions on the scope of the post-contractual duty of good faith (Shin Gun-Hoon, 2011b). Initially, on the premise that there is no justification for requiring the same high degree of openness post-contractually as is expected from parties at the pre-contractual stage, it was held in *The Star Sea* that only fraudulent failure to act in good faith, post-contract, gives rise to the right to avoid (Soyer, 2014).

After the making of the insurance contract, however, the content of the duty of utmost good faith is not clear. The House of Lords dealt with *The Star Sea* case, which was closely related to the duty of utmost good faith and judged that in litigation, the duty of utmost good faith did not apply to the acts of the assured (Chung Dae, 2005).

Building upon that principle, in *K/S Merc-Skandia XXXXII v. Certain Lloyds Underwriter's (The Mercandian Continent)*(2001), Longmore LJ held that it would be appropriate to invoke the remedy of avoidance in a post-contractual context if the innocent party would otherwise be justified in accepting the conduct of the party in breach of the duty as a repudiatory breach of the policy. This approach presupposes that the need to observe good faith in the post-contractual context would normally be associated with a contractual obligation, and it attempts to align "avoidance" with contractual remedies that would be applicable when the clause in question is breached in a fraudulent fashion. Naturally, these authorities, originally designed to ameliorate the harshness of the remedy of avoidance, impose a serious constraint on the scope of the insurer's post-contractual duty of good faith, if they do not trivialize it (Soyer, 2017).

2.2. The Traditional Regime of Utmost Good Faith

2.2.1. The Test of Materiality

As regards the duty of full disclosure prior to the time of making the contract, the assured is bound to disclose "material" circumstances. Whether the circumstance or representation is material is a question of fact. Under ss. 18(2) and 20(2) of the MIA 1906, a circumstance or representation is material if it "would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk" (Koh Jae-Jong, 2008). This test is often referred to as "the prudent insurer test" or "the prudent underwriter test"(Eggers, 2017).

The approach toward determining a "material" circumstance under the wording of the MIA has been a highly complex and contentious affair, making it quite central to calls for reform. The above-stated "prudent insurer" requirement under s.18 of the MIA 1906 for determining whether a circumstance was material was developed from the perspective of the insurer and imposes an onerous burden of disclosure on the insured without providing any guidance (Choi Mi-Soo, 2017). Despite the maritime roots of the MIA 1906, the Court of Appeal drew no distinction between marine and non-marine insurance contracts and adopted this "test of materiality" as a general principle in *Lambert v. Cooperative Society Ltd.* (1975) Nevertheless, McKenna J, in empathizing with the insured, made it clear that this case showed the unsatisfactory state of the law (LawTeacher, 2019).

The test of materiality was further developed in the *Pan Atlantic* (1975) case, in which the House of Lords affirmed the previously held view that the phrase "influenced the judgement" referred merely to factual circumstances that the insurer would have liked to know of, but not necessarily acted on, when assessing risks. This objective test meant that insured parties were required to disclose every piece of information that would have an effect on the mind of the insurer. This caused two main problems. First, it meant that insured parties were held to an impossibly high standard of disclosure and were expected to effectively read into the mind of a prudent insurer. Second, it meant that insurers could avoid policy disputes (LawTeacher, 2019).

To mitigate the harshness of the law, the House of Lords introduced a second, independent limb of "inducement" to the test of materiality. This was a subjective test that required insurers to provide evidence showing that a material circumstance had induced them to enter into the contract. *In St Paul's Fire & Marine Insurance Co. v. McConnell Dowell Contractors Ltd* (1995), this was achieved using evidence from other insurers as well as expert witnesses. Although it did impose an appropriately higher burden of proof on the insurer in cases of non-disclosure, such an approach also added a degree of complexity and artificiality to the materiality test (Blackwood, 2013). For example, in *Marc Rich & Co. A.G. and another v. Portman and Others* (1996), Longmore J found the insurer in question to be "a most unsatisfactory witness... [who] revealed a surprising ignorance or indifference to prudent underwriting practice." Nevertheless, the inducement requirement did allow the court to limit insurers' recourse to the drastic remedy of avoidance, as illustrated in the *Drake*

Insurance case (2004). However, Merkin has criticized this approach as coming perilously close to allowing the court to underwrite the policy itself (Merkin, 2007). The subjective test of materiality, still very much insurer-centric, does little to improve the clarity and scope of an insured's disclosure obligations.

2.2.2. Representation

The insurer will be able to rely on a material misrepresentation giving rise to a right of avoidability if he or she can establish that the representation was false (Eggers, 2017). If the representation is one of fact, the representation will be true if it is "substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer." That is, if there has been a representation of expectation or belief, in order to establish that there has been a misrepresentation, the insurer will have to prove that the assured represented the expectation or belief dishonestly (Eggers, 2017).

The term "representation" under the MIA connotes principles of uberrimae fidei as laid out under s.17. If the assured turns out to have had the intention of deceiving the insurer, though it may not be about a material fact, and this act by the assured would lead him to a breach of duty of utmost good faith, the effect of which would render the contract voidable at the option of the insurer under s.17 (LawTeacher, 2018).

The other important feature of representation is that s. 20(3) of the MIA 1906 tells us that "representation may be either a representation as to a matter of fact or as to a matter of expectation or belief."

Accordingly to Templeman and Lambeth (1986), there are three types of representations: a representation simply of fact, a representation of expectation, and a representation of belief. Section 20(3) gives the impression that there are two types of representations, namely, as to a matter of fact and as to a matter of expectation or belief.

2.2.3. Avoidance

The party who has been guilty of a non-disclosure or misrepresentation could not, of course, avail itself of its wrongful act to treat the contract as void. The other party to the insurance could, however, elect either to treat the contract as valid or to repudiate it, although, strictly speaking, the insurer had no positive obligation to do either (Gilman et al., 2018).

If the assured failed to disclose a material circumstance to one insurer but not another, only the former would be one policy might contain a separate and distinct contract, relating to each separate item of insured property, even if there is only one assured, so that in the case of a fleet policy, there may be a separate insurance contract for each vessel that is a member of the fleet (depending on the terms of the policy) (Eggers, 2017).

In Carter v. Boehm, Lord Mansfield refers to a contract being void for non-disclosure, and indeed case law on the doctrine of uberrimae fidei in the 18th and early 19th centuries refers, for example, to a policy being rendered void or avoided for non-disclosure or misrepresentation, seemingly without the intervention of an election to avoid on the part of the insurer (Pak Jee-Moon, 2019). Nothing, however, turned in these cases on the distinction between a void and voidable contract (Bennett, 2006). The latter part of the 19th century, however, witnessed the start of a change in favor of the policy being analyzed as voidable (*Morrison v. Pacific Fire & Universal Marine Insurance Co.*, 1872), but the cases were not unanimous (*Anderson v. Pacific Fire & Marine Insurance Co.*, 1872), and, in 1887, Arnould still stated that the contract was void, ipso facto, whenever misrepresentation or concealment had entered into its making (Bennett, 2006). The matter was placed beyond doubt by ss.17, 18, and 20 of the MIA 1906, all of which provide unambiguously that the policy may be avoided or that the insurer may avoid the contract.

A contract can be avoided from the time that a breach of duty is to be found in the contract. Rescission is not compulsory, but only occurs if the party discovers that there is a breach of duty of good faith. In such a case, the party may choose to avoid the policy or not. The party is under no obligation to avoid the policy, and it depends on his decision. It is also not necessary that avoidance of a policy should be exercised for serious breaches of duty, and the court shall not have the power to intervene in the policy to do so (LawTeacher, 2018).

The effect of avoidance for non-disclosure or misrepresentation was that the policy was set aside *ab initio*. The avoidance was certainly retroactive in the sense that the parties were entitled to a return of the premium and repayment of losses paid prior to the time of avoidance.

2.2.4. Pre-Contractual Duties

The first notable feature of s.17 of the MIA 1906 is that it expressly applies to both insured and insurer. The principle that reciprocal duties of disclosure are owed by both parties was recognized by Lord Mansfield in *Carter v. Boehm* (1766) and has never since been questioned. The subject was discussed in the pre-contractual stage in *Carter v. Boehm* (1766) in which Lord Mansfield gives as an example the position of an underwriter who insured a ship for a voyage, which he privately knew to have arrived (Soyer, 2017).

Despite this very early recognition of mutual duties, there appear to have been no cases in the English courts in which it was necessary to examine the scope of the duty owing by an insurer or in which breach of the duty of uberrimae fidei by insurers was invoked by an assured until the 1980s, when breach of good faith was put forward as one of the grounds for claiming damages in the Banque Financiere case (Gilman et al., 2018). A number of observations as to the nature and scope of the insurer's duty of good faith in the light of Banque Financiere litigation are in order. First, it is indisputable that such a duty exists, and s.17 of the MIA 1906 has been viewed as the statutory basis for codifying the principles of equity law developed over the centuries prior to the enactment of the MIA 1906. Second, the first-instance judge and the Court of Appeal, by drawing an analogy with the assured's pre-contractual duty of good faith, needed to engage in judicial lawmaking in order to define the degree of materiality, given that s.17 is silent on the point. Last but not least, avoidance not only provides an impractical remedy for the assured but also has proved something of a stumbling block in allowing alternative remedies, as its existence led the judges in the Court of Appeal to conclude that the judicial basis of the statutory duty stems from the jurisdiction exercised by the Court of Equity.

In other words, whilst there may have been instances in which an insured could have breached its pre-contractual duty of uberrimae fidei other than by breach of the duty to make disclosure and only to make representations that are true (as expressed by ss.18–20 of the MIA 1906), in practical terms non-disclosure and misrepresentation were the most important aspects of the pre-contractual duty of uberrimae fidei as it applies to insured parties.

In almost every instance in which a policy of marine insurance is affected, the underwriter must rely solely on the good faith of the assured for supplying him with full and true information of many of those facts on which the character and nature of the risk, and consequently the rate of premium and policy terms, depend. It is to the assured that all communications respecting the actual state of the property proposed for insurance, such as the time and place at which the goods are to be loaded, or the ship is to sail – the force and equipment of the vessel, her current situation, and progress in her voyage, etc. – are in the first instance addressed: it is thus the natural and sole depositary of much of that information, a full and true communication of which is absolutely essential to the underwriter in order that it may correctly judge the nature of the risk and the proper rate of premium (Gilman et al., 2018).

That summary is consistent with the principles laid down in the *Pan Atlantic* case, which is now the leading authority on the requirement of materiality and inducement in this branch.

The *Pan Atlantic* case was appealed to the House of Lords in proceedings that involved a challenge to the holdings in the *CTI case* on both materiality and inducement grounds. By a bare majority, the House of Lords upheld the *CTI case* on materiality, confirming the rejection of the deceive influence test, while unanimously reversing it with respect to inducement (Bennett, 2006). The House of Lords approved the *CTI case*, but that decision was interpreted by the Court of Appeal in the *Pan Atlantic* case as doing no more than rejecting the different decision test. Nevertheless, three factors indicate that the House of Lords went further and positively espoused the relatively lenient test of objective relevance to the assessment of the risk. First, the question posed by Lord Mustill militates against interpreting the statements of Lord Mustill and Lord Goff as merely rejecting the decisive influence test. Second, Lord Mustill stated that, while not decisive, they furnished substantial support for the view that the duty of disclosure extended to all matters that would have been taken into account by the insurer when assessing the risk that he was consenting to assume. Third, commenting on the decision of the Court of Appeal in the *Pan Atlantic* case, Lord Mustill observed that, had it not been bound by the rejection in the *CTI case* of any requirement of inducement of the actual insurer, the court might have felt freer in its ruling on materiality. The House of Lords held that an actionable breach of the duty of uberrimae fidei must induce the actual underwriter into the contract. Consequently, the House of Lords was able to enjoy this greater freedom with respect to the test for materiality, reject the incorporation therein of any element of inducement, and espouse the lower threshold.

In *St Paul Fire & Marine Insurance Co. (UK) Ltd v. McDonnell Dowell Constructors Ltd* (1995), the Court of Appeal confirmed that the House of Lords in the *Pan Atlantic* case had, indeed, answered in full the question posed by Lord Mustill. The Court also considered the impact of the ruling of the House of Lords on the different risk test of the Court of Appeal. As Evans LJ said in the Court of Appeal in *St Paul Fire & Marine Insurance Co. (UK) Ltd v. McDonnell Dowell Constructors Ltd* (1995), the "prudent insurer" is "no more than anthropomorphic conception of the standards of professional underwriting which the Court finds it appropriate to uphold". The Court of Appeal's focus upon the prudent insurer's appreciation of a difference between the true risk and that presented was expressly approved by the House of Lords, quoting Lord Mustill's statement that the whole object of the rules as to representation, misrepresentation, and concealment was to enable the insurers to judge accurately the risk that they undertake. With respect, this interpretation seems incorrect. Subsequent cases vary in the formula they espouse. The Court of Appeal in the above case did, however, reject an argument that materiality required the circumstance to increase, and not merely alter, the perceived risk. Many factors may increase the risk in some respects but decrease it in others. To this extent, the test adopted by the Court of Appeal in the *Pan Atlantic* case is clearly no longer good law.

2.2.5. Other Weakness

The MIA made no distinction between innocent non-disclosure, negligent non-disclosure, and fraudulent concealment (Birds, 2019). This meant that an insured could have acted well within the meaning of "good faith" but still fail to meet the standard of utmost good faith. Moreover, an insurance proposal form does not remove overarching disclosure obligations. In *Schoolman v. Hall* (1951), the insured's claim was rejected after it was found that he had previous convictions that were not disclosed despite there being no prompt for such information on the proposal form. In this regard, there is also no obligation for the insurance to ask any questions (LawTeacher, 2019).

Perhaps the most glaring drawback with the MIA would be that it only provided a single remedy of policy avoidance *ab initio*. Given that courts did not entertain the idea of damages in insurance law, a breach of disclosure obligations would allow the insurer to pay all premiums back to the insured and act as if the policy had never existed. For obvious reasons, this draconian approach was "critical[ly] flaw[ed]... [in] that [it] provided insurers with remedies which in many circumstances [were]disproportionate."

It is also important to note that the law did not distinguish between consumer and commercial insured parties. Despite some protections being offered to consumers, the state of the law was quite aptly described by Tyldesley as being "archaic, unclear, and unfair" (Tyldesley, 2009).

3. Development of the Duty of Utmost Good Faith

3.1. Outline

Under the old law, the underwriter was precluded from avoiding the policy (1) if in the meantime he had done something to affirm it; or (2) if an estoppel had arisen, for example, if the rights of third parties had intervened or if the assured party had altered his position in the belief that the contract was a subsisting one. It does not appear that the 2015 Act has altered the application of those principles, and the discussion here remains relevant. Questions of affirmation and waiver are separate and distinct concepts, despite overlap between the two. The relevant principles are of general application. The right to avoid may be lost either by an election to affirm the contract or by reason of an estoppel. It is clear that before there can be an affirmation, the underwriter must have full knowledge of the facts entitling him to avoid the policy. He then has a reasonable time in which to decide what course of action to take, and he cannot be said to have affirmed the policy until such time has elapsed (Gilman et al., 2018).

In other words, the duty owed by the assured during negotiations and before the contract is made, and duties of agents effecting the insurance, were set out in some detail in ss.18–20 of the MIA (now repealed by the 2015 Act) (Lee Jung-Won, 2016). By contrast, s.17 was expressed in broad general terms (and remains in force, albeit amended by the 2015 Act). The most obvious differences between s.17 and the sections that followed were that s.17 referred to mutual duties; that it contained no express reference to the concept of materiality; and that it was not confined, in terms, to the pre-contract stage (Gilman et al., 2018). The 2015 Act is said to have abolished the doctrine of utmost good faith. It may take just as long before the effects of the new statute begin to be seen in the courtrooms or filter through the adquate transparency of the insurance industry (Costabel, 2017).

Under the 2015 Act, the pre-contractual duty of utmost good faith is renamed the "duty of fair presentation of the risk." Moreover, the 2015 Act codified some of the common law principles developed since the MIA came into force and also brought clarifications to some issues such as the "knowledge of insurer" and "knowledge of insured" in relation to the fair presentation of the risk (Gurses, 2016).

The concept of utmost good faith as a creator of substantive rights and duties, rather than as a subsidiary principle of interpretation, would effectively disappear as a result of the legislation that became the 2015 Act. The question is whether this is correct, or whether there remains more scope than appears for utmost good faith concepts to affect insurance contracts and their performance (Soyer and Tettenborn, 2016).

At first sight, it might be thought that a combination of the 2015 Act and establishment case law provided an open-and-shut case for the Law Commission's position. It is not only that the Act supplanted the old common law duty in the two most high-profile aspects of utmost good faith, pre-contract information and fraudulent claims. More important is the combination of *Banque Keyser Ullmann SA v. Skandia (UK) Insurance Co. Ltd* (1990) (hereinafter, *Banque Keyser Ullmann* case) and s.14 of the 2015 Act. In the *Banque Keyser Ullmann* case, the Court of Appeal rebuffed an attempt to invoke a breach of the duty of uberrimae fidei (in that case, a deliberate failure by underwriters to inform) as a breach of contract sounding in damages, implying that the only remedy for infringement was avoidance of the contract, but since s. 14 now bars avoidance for any breach of that duty, it must follow that the duty itself is now devoid of substantive content.

It is submitted, with respect, that this argument will not do, for a number of reasons. First, *Banque Keyser Ullmann* case and the cases following it are authority for the claim that damages are not available for breach of the duty of uberrimae fidei where the breach lies in non-disclosure. They do not, it is suggested, rule out damages for breaches of other aspects of the good faith duty. Second, it is worth remembering that there are possible remedies other than damages and avoidance. These include not only other monetary remedies such as those based on unjust enrichment but also, more importantly, the response of ineffectiveness (in the case in which restrictions are put on the exercise of rights). Third, there are a number of documented cases in which the courts have intervened on the basis of a lack of utmost good faith, and which are not caught by the 2015 Act. These subdivide into a number of categories. However, this is a large subject and deserves a section unto itself.

First, some decisions suggest that considerations of utmost good faith may on occasion control (and, where necessary, invalidate) the exercise of rights arising under an insurance contract. One instance is the liability insurer's invariable right to take over and control legal proceedings against the insured. In *Groom v. Crocker* (1939), the Court of Appeal was in no doubt that, because of the obvious potential conflict of interest involved, insurers could only do this "in what they bona fide consider to be the common interest of themselves and their assured." Hence, in that case, the court took the view that an insurer could not legitimately admit fault by the assured for reasons not of forensic tactics but to safeguard the insurer's own private knock-for-knock arrangement, and subsequent cases have made it clear that for the same reason, where liability cover is limited, the insurer also owes at least some duty not to compromise the assured's position as regards uninsured liabilities. Again, where an insured has been guilty of non-disclosure but the insurer has "blind-eye" knowledge of other facts that might make that non-disclosure innocuous, the Court of Appeal suggests that it may be contrary to good faith for the latter to avoid, at least without consulting the insured. This may or may not be academic in connection with avoidance, but it may well be relevant elsewhere, for example, when in a given case an insurer has the right to cancel the contract for the future or demand extra precautions be taken.

The precise ambit of the application of the good faith principle in this connection is uncertain. For example, it has been said not to apply in cases in which liability insurers stipulate that settlements of third-party claims will not honored unless previously approved; these have been held subject simply to the general contractual rule that discretions of this kind must not be exercised capriciously or arbitrarily and not to any further demand that they be exercised with regard to the assured's own interests. Nevertheless, that it applies to at least some specific rights seems clear.

The duty of good faith may affect (1) the duty to exercise at least some particular rights with a view to the other's interests; (2) a duty to correct mistakes; (3) some aspects of the duty to provide information during the policy; and, possibly, (4) a duty to minimize loss. It seems, however, that there is no reason to regard these as closed categories. In a later stage, it is worth asking how, if at all, the duty of utmost faith might be generalized – a matter of some interest, raising issues not only of possible analogies from other contracts classified, with insurance, as contracts of the utmost good faith but also of recent development in the field of good faith generally within English law.

With the implementation of the 2015 Act, s.17 of the duty of utmost good faith under the MIA 1906 has been a rule of the past, and retroactively void as a consequence of the breach having been abolished (Jin Hong-Ki, 2016). In other words, the 2015 Act retained s.17 of the MIA 1906 that "marine insurance contract is a contract based on utmost good faith," but due to the breach, the rule for recognizing the right to cancel the contract was deleted. Furthermore, the 2015 Act abolished all case law related to disclosure and representation of the MIA (ss. 18 to 20) (Chung Dae, 2019).

3.2. Exercise of Rights

A number of authorities have indicated that the insurer might be precluded from exercising an apparent right (e.g., the right to avoid the policy) if it is evident that the insurer has not acted in good faith whilst exercising the remedy. In *Strive Shipping Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Grecia Express)* (2002), Colman J said that, having regard to what he said was the equitable origin of the duty of uberrimae fidei, an insurer should not be entitled to avoid a policy for non-disclosure if to do so would be unconscionable. Colman J was considering the example of a case in which there had been non-disclosure of suggested material facts, which, it transpired at trial, did not in fact exist. He considered that it would be unconscionable and in breach of the insurer's duty of uberrimae fidei to avoid in those circumstances.

That reasoning was unfavorably commented on by the Court of Appeal in *Brotherton v. Aseguradora (No.2)*(2003) (albeit not expressly overruled). In that case, Mance LJ said that (1) whether or not of equitable origin, the right to avoid was not subject to any requirement that it be exercised in good faith or conscionably, and (2), in any event, recent authority had been concerned to limit the post-contractual duty of utmost good faith to cases of repudiation or fraud. He concluded that, even if there was room for developing a principle that the right of avoidance was subject to a requirement that it be exercised in good faith, a matter on which he said he was expressing no view at all, *Brotherton v. Aseguradora (No.2)*(2003) was not a case in which it would be of relevance.

There is no doubt that the duty of uberrimae fidei continues even after the insurer has committed itself. It is true that (apparently because of the reduced need for co-operation at this stage) the duty is less exacting after that time (and, in some respects, amounts to little more than a prohibition on actual fraud). Nevertheless, the argument that one party needs extended protection from self-interest and, where necessary, the fulfilment of positive duties and the demonstration of something more than a simple absence of bad faith, may still convincingly apply in a number of specific instances. Take, for example, the case in which a liability insurer has the right to conduct litigation for the defense. There may be a need for at least some control here to protect the interests of the insured: as the Court of Appeal has put it, the insurer's discretion will protect it only "provided that they do so in what they bona fide consider to be the common interest of themselves and their assured." Thus where cover is limited, the insurer must be under some duty, in conducting the defense, not to compromise the assured's position as regards uninsured liabilities, and, indeed in *Groom v. Crocker* (1939), the Court of Appeal took the view that it was unacceptable for an insurer to admit fault by the assured when the object was not tactical litigation but instead the desire not to imperil the insurer's own knock-for-knock arrangements with another provider. Conversely, where a liability insurer agrees to meet the costs of a settlement by the insured, the latter cannot claim indemnity if he was not acting in good faith toward the insurer or knowingly sacrificed the insurer's interests to his own. Again, where an insured has been guilty of non-disclosure but the insurer has "blind-eye" knowledge of other facts that might make that non-disclosure innocuous, the Court of Appeal has said that it may be contrary to utmost good faith for the insurer to avoid, at least without consulting the insured. This latter instance is possibly academic today insofar as it applies to avoidance, but it may well be relevant elsewhere, for example, when in a given case, an insurer has the right to demand that extra precautions be taken and if they are not to cancel cover for the future. The precise ambit of the application of the good faith principle in this connection is uncertain. For example, it has been said not to apply in cases in which liability insurers stipulate that settlements of third-party claims will not be honored unless previously approved; these have been held subject simply to the general contractual rule that discretions of this kind must not be exercised capriciously or arbitrarily and not to any further demand that they be exercised with regard to the assured's own interests. Nevertheless, the fact that the principle of good faith applies to at least some specific rights seems clear.

The major content of the 2015 Act on the duty of disclosure and duty of utmost good faith is as follows. First, s. 14 of the 2015 Act removes avoidance from the scope of s. 17 of the MIA 1906. Second, the insurer's duty of fair presentation under the 2015 Act pertains to volunteering of relevant information, because of the inherent imbalance of knowledge between the parties.

3.3. Provision of Information

The duty of fair presentation requires the assured to disclose information that the assured "know[s] or ought to know." This duty entails a considerable burden on the assured, greater than that under the MIA 1906.

The most obvious case of provision of information after conclusion of the contract, the possibility of being bound up with the duty of utmost good faith, is the rules on subsequent modifications and fraudulent claims. However, these are not relevant to this article, since (a) as regards subsequent modifications, it seems clear that Part 2 of the 2015 Act applies to the whole field; (b) there is some doubt whether the rule as to fraudulent claims is in fact an outgrowth of utmost good faith; the Insurance Act 2015 applies to the exclusion of any common law remedy (Kim Jae-Woo, 2019). Nevertheless, (c) that this latter area is also now pre-empted by Part 3 of the 2015 Act is authority that utmost good faith may go further than this. First, where the terms or circumstances of the insurance contract require information to be provided during the contract in order to inform a decision by the insurer, the knowing provision of false information or fraudulent non-disclosure of relevant facts may amount to a breach of the duty of uberrimae fidei. Second, while the courts will not infer as a matter of course a duty by an insured to keep his insurer informed, good faith may in special circumstances give rise to one. Thus, in the Court of Appeal decision in *Alfred McAlphine Plc v. BAI (Run-Off) Ltd* (2000), concerning failure to keep a liability insurer properly informed, Waller LJ seemingly accepted that deliberate concealment or misinformation might be a breach of the duty of uberrimae fidei.

In *Phoenix General Insurance Co. v. Halvanon Insurance Co. Ltd* (1985), Hobhouse J took the view that where the circumstances demanded it – particularly in the case of liability insurance and reinsurance –an obligation would arise out of good faith to keep adequate records and make them available to the insurer (or reinsurer) in order to allow the latter to keep track of his liabilities. It was not made clear what the remedy would be in such a case, but it seems from later authority that there is no reason why remedies other than avoidance should not be available.

4. Case Analysis

4.1. Main Issues and Holdings

In *Korean Supreme Court Decision (2018)*, the plaintiff (the insured), as an exporter, entered into an export contract for crane materials with a buyer in Brazil. On the other hand, plaintiffs entered into a contract for carriage of goods by sea to transport the above cargo from Masan port, Korea, to Brazil with the company that became the carrier (hereinafter, freight forwarder) by exercising the right to intervene as a freight forwarder.

The freight forwarder started shipment of the cargo on May 12, 2013, and the surveyor issued a first report stating that the wooden crates packing some of the cargo were damaged. Cargoes that were marked for damage to the wooden crates were returned before shipping and shipped on board after repackaging.

On May 16, 2013, the freight forwarder became the policy-holder, and the cargo insurance contract was signed with the plaintiff as the insured. On May 17, the first mate (officer) issued the Mate's Receipt (M/R) containing the cargo's foul statement. On May 22, the freight forwarder informed the defendant that the clean bill of lading was issued without a letter of guarantee (L/G). The actual carrier requested an L/G issued by the plaintiff, but the plaintiff refused it.

Subsequently, the agent of the actual carrier requested the issuance of a clean bill of lading to the actual carrier and issued an L/G and, on behalf of the captain, a clean master bill of lading to the freight forwarder. On May 24, at the request of the freight forwarder, a special contract was added to the insurance contract in this case to waive subrogation rights to the policy-holder.

At the time of arrival at the landing port, it was found that a significant proportion of the cargo was damaged, and the plaintiff replaced and repaired the damaged goods according to the export contract.

When the plaintiff made a claim against the insurer (defendant) for the substantial amount of damages caused by the damage to the cargo, the defendant cancelled the insurance contract on the grounds that the plaintiff had breached the duty of utmost good faith under the MIA. The problem was that the plaintiff did not notify the insurer of the poor packing before the pre-contract shipment and did not notify the post-contract issuing of the L/G.

4.2. Summary of Decision

When the transfer of a claim is made for the main purpose of launching a lawsuit, even if the transfer of the claim does not fall under trust law, it is invalid because s.6 of the Trust Act is applied by analogy. The main purpose of making a lawsuit should be judged in light of the circumstances and manner in which the claim transfer contract was concluded, the time interval from the conclusion of the transfer contract to the lawsuit, and the relationship between the transferor and the transferee.

Section 17 of the MIA 1906 states, "A marine insurance contract is a contract based on utmost good faith, and if either party does not comply with the utmost good faith, the other party may cancel the contract." Under the MIA 1906, the duty of the utmost good faith applies at all claim stages, of post-contract, execution, and accident of a marine insurance contract. What are significant here all matters that influence the judgment in determining whether or not the insurer will calculate premiums or undertake risks (Kim In-Hyun, 2019).

Thus, the duty of utmost good faith under the MIA is a principle of fair dealing that continues even post-contract and must be observed throughout the contract. However, even in the implementation stages of the insurance contract, if the duty of the utmost good faith is recognized as a broad and general duty, there is a concern that the equity of the contractual relationship may be injured by causing an excessive burden on the insured. Therefore, once the contract is concluded, it should be considered that it is not reached to the extent that it demands aggressive action to increase the convenience of the other party, and it is considered to be relaxed with the duty not to damage the other or damage the contract relationship. In particular, when adding or changing the content of an existing contract during the continuation of the insurance contract under the MIA, the duty of disclosure is burdened only for material circumstances, such as the duty of disclosure provided for in s.18 of the MIA 1906.

4.3. Review

4.3.1. The Legal Nature and Context of the Governing Clauses of English Law

Legally speaking, the duty of utmost good faith is a bilateral obligation in the sense that it is borne not only by the insured, but also by the insurer, and is a continuing obligation in that it is borne not only before, but after the establishment of an insurance contract. Section 17 of the MIA 1906 stipulates that both parties to the insurance contract bear the duty of utmost good faith. The duty of utmost good faith is only recognized between insurer and insured, so the insurer is not liable for the assignee of the claim paid (Kim Hyun, 2020). The duty of disclosure provided for in ss.18–20 of the MIA 1906 is derived from the duties of utmost good faith, but the duties of utmost good faith are independent of this duty of disclosure and cover it. Since the insurance contract is a bona fide contract, the insured's duty of utmost good faith does not end with the establishment of the insurance contract, but it is an ongoing obligation during the insurance period (Yoon Seong-Geun, 2018). Therefore, the insured is obliged to inform the insurer of material facts obtained after the initial provision of the information, especially if the information originally provided has changed materiality. The duty of utmost good faith is recognized for mutuality, so the insured's duty of disclosure is governed by s.18 of the MIA 1906 before the contract is established, and s.17 after its establishment, but the insurer's duty of disclosure relies on only s.17 of the MIA 1906 stipulating the obligation to comply with the utmost good faith (Lee Pil-Bok, 2019).

The issue was whether insurer was obliged to inform the insured bank of the employee's embezzlement of the insurance broker as to whether the insurer is liable for the duty of disclosure prior to the conclusion of the insurance contract. The duty of disclosure was first considered in the *Banque Financiere* case, and after the contract was concluded, the duty of disclosure was recognized in *The Good Luck*.

However, in Korea, there is a strong opinion that the statute of repose for the termination (or cancellation) of the contract due to the breach of the duty of disclosure determines the nature of the insurance contract as a matter of establishment and effectiveness. In particular, regarding the judgment in 1991, "the governing clauses of the foreign law are not immediately invalidated pursuant to s.663 of the Korean Commercial Act, because the result of the application of foreign law in accordance with these clauses will be disadvantageous to the policy-holder rather than the provisions of the Korean Commercial Acts" (Lee Jung-Won 2019a). It is encouraging that the all-designated theory was adopted, based on the instruction. This is interpreted *prima facie* as a contradiction between the *Korean Supreme Court Decision* (2016) *and Korean Supreme Court Decision* (2018). *Korean Supreme Court Decision* (2018) *follows the partial designation as Korean Supreme Court Decision* (2016), but it decides the nature of the duty of disclosure as a problem that is covered by the "insurance liability."

4.3.2. Application to Post-contract in Duty of Utmost Good Faith

In *Korean Supreme Court Decision* (2018), the scope of protection of duty of the utmost good faith is changed as of the date of the insurance contract, May 16, 2013. After concluding the insurance contract in this case, a nonparty (company) issued a clean B/L to the defendant without issuing an L/G for the cargo. With regard to the change of the insurance contract with the addition of the special provision for the waiver of subrogation right in this case, the judgment of this case makes it difficult to conclude that the series of circumstances under which the L/G was issued is a material situation with respect to changes in the insurance contract of this case. It was decided that plaintiffs or the nonparty (company) could not be regarded as breaching the duty of utmost good faith consistently required after concluding the insurance contract in this case.

The duty of utmost good faith in s.17 of the MIA 1906 is broader than the duties in ss.18 and 20 of the MIA 1906 and applies even after an insurance contract is concluded or after an accident occurs. In this case, the judgment goes further and determines that the duty of utmost good faith must be followed even after the conclusion of the insurance contract (Yoo Jung-Won 2019). However, even in the implementation stage of insurance contracts, if the duties of utmost good faith are recognized as broad and general duties, there is a risk of overburdening the insured and damaging the equity of the contract relationship (Lee Jung-Won, 2019b). Therefore, once the contract has been concluded, it should be considered that it does not reach the extent that it demands to act in order to increase the convenience of the other party of the contract. It should be regarded as being relieved by duty of not causing damage to the other party or harming the contractual relationship.

5. Conclusions

English law adopts an adversarial model of contractual negotiations, requiring each party to accept responsibility for its own interests. The law will assist a party that has been induced into a contract by an inaccurate or misleading statement, termed a misrepresentation. A contract so induced is voidable, meaning that it is liable to be set aside retrospectively through the remedy of rescission. However, there is no general duty to volunteer information, even though it may be evident that such information would be regarded as highly relevant by the other party in deciding whether to contract and, if so, upon what terms. Insurance contracts, however, constitute an exception to the rule: they are contracts of the utmost good faith (uberrimae fidei), and the doctrine of utmost good faith not only reaffirms a passive duty to refrain from misrepresentation but also imposes a pro-active duty to volunteer certain information. Breach of such duties affords the innocent party the option of retrospective avoidance of the contract. The fact that the remedy is absolute and uncompromising has led to detailed scrutiny of all aspects of the doctrine.

In other words, the new statutory regime applies to contracts of insurance entered into after August 12, 2016, and to variations of contracts of insurance, entered into at any time after August 12, 2016. Many of the relevant principles are common to both regimes, but where that is so, the principles will be directed to the MIA 1906 regime; the new Ch. 18B will then deal with the specific features of the 2015 Act, avoiding repetition so far as possible.

The duties owed by the insured during negotiations and before the contract is made, and duties of agents affecting the insurance, were set out in some detail in ss.18–20 (now repealed by the 2015 Act). By contrast, s.17 of the MIA 1906 was expressed in broad general terms (and remains in force, albeit amended by the 2015 Act). The most obvious differences between s.17 and the sections that followed were that s.17 referred to mutual duties; that it contained no express reference to the concept of materiality; and that it was not confined, in terms, to the pre-contract stage.

In *Korean Supreme Court Decision* (2018), the Court considered whether not to notify the matters to be notified before and after the conclusion of the contract is against the principle of utmost good faith. (1) Before the conclusion of the insurance contract, it was a question whether the failure to notify the first survey that the cargo was damaged was a breach of the principle of utmost good faith. The Korean Supreme Court considered that the first survey was not important, and in actual transportation, there was no problem as the damaged wood packaging was replaced with a normal one before shipment. (2) After the insurance contract is concluded, shippers issue a L/G to the carrier in order to issue a clean bill of lading. However, in this case, it was issued by a ship agent for the issuance of a master bill of lading, and it is difficult to see it as an L/G in the ordinary sense. When summarizing the circumstances in which an insurance contract with the same content as the series of reasons for issuing an L/G was additionally concluded, the court decided that the plaintiff, the insured, was not important to notify the issuance of the L/G. Even if the final survey report before the conclusion of the insurance contract was found to have been loaded in a damaged state, if this was not disclosed, it would be evaluated as breaching the principle of utmost good faith, as it is an important factor in calculating the premium.

In *Korean Supreme Court Decision* (2018), the Supreme Court said, "When adding or changing the contents of an existing contract during insurance contract under the MIA 1906, the duty of disclosure is borne only for the material circumstances in relation to the change, and for all material circumstances such as the duty of disclosure specified in s.18 of the MIA 1906, it is not necessary to notify." In this case, the Korean Supreme Court has a separate basis for recognition of insureds' pre- and post-contractual duty of disclosure under MIA 1906. In addition, it is meaningful to reaffirm the position of the English precedent, in that the important matters to be disclosed by the insured after the establishment of an insurance contract include only matters in question and material circumstances after the conclusion of the insurance contract.

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