

Singapore Academy of Law
Law Reform Committee

Report on Reforming Insurance Law in Singapore

February 2020



Singapore Academy of Law
Law Reform Committee

Report on Reforming Insurance Law in Singapore

February 2020

COPYRIGHT NOTICE

Copyright © 2020, the authors and the Singapore Academy of Law. The report was completed on 3 December 2019.

All rights reserved. No part of this publication may be reproduced in any material form without the written permission of the copyright owners except in accordance with the provisions of the Copyright Act or under the express terms of a licence granted by the copyright owners.

Members of the Subcommittee on Insurance Law Reform

1. Simon Goh Keng Yeow (chair)
2. Associate Professor Yeo Hwee Ying
3. Puspasari Dewi Rajamoney
4. The Honourable Judicial Commissioner Mr Mohan s/o Ramamirtha Subbaraman
5. Winston Kwek Choon Lin
6. Jason Chan Tai-Hui SC
7. Alvin Ee Chin Liang

The report was edited by Dr Jack Tsen-Ta Lee, Deputy Research Director, Singapore Academy of Law.

An electronic copy of this report may be accessed from the Singapore Academy of Law website at <https://www.sal.org.sg/Resources-Tools/Law-Reform/Law-Reform-e-Archive-By-Date>.

National Library Board, Singapore Cataloguing in Publication Data

Name(s): Singapore Academy of Law. Law Reform Committee. | Lee, Jack Tsen-Ta, editor.

Title: Report on reforming insurance law in Singapore.

Description: Singapore: Singapore Academy of Law, 2020

Identifier(s): OCN 1131708780 | ISBN 978-981-14-4502-6 (softcover) | ISBN 978-981-14-4503-3 (ebook)

Subject(s): LCSH: Insurance law—Singapore.

Classification: DDC 346.5957086—dc23

ISBN 978-981-14-4502-6 (softcover)
978-981-14-4503-3 (e-book)

About the Law Reform Committee

The Law Reform Committee (“LRC”) of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

Comments and feedback on this report should be addressed to:

Law Reform Committee
Attn: Law Reform Co-ordinator
Singapore Academy of Law
1 Coleman Street
#08-06 The Adelphi
Singapore 179803
Tel: +65 6332 4070
Fax: +65 6333 9747
Email: lawreform@sal.org.sg

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
Overview	1
Recommendations.....	1
CHAPTER 1 INTRODUCTION	3
CHAPTER 2 THE DUTY OF UTMOST GOOD FAITH AND RELATED DUTIES	5
A. The duty of utmost good faith.....	5
B. The duty of disclosure and misrepresentation	6
C. Warranties	7
D. Remedies for fraudulent claims	7
E. Other jurisdictions.....	8
1. United Kingdom	8
2. Australia.....	12
3. Germany.....	15
F. Consultation on the proposed reforms for the law on warranties	17
G. Recommendations	19
CHAPTER 3 INSURABLE INTEREST	21
A. Insurable interest in life policies	21
1. Nature of interest.....	21
(a) Singapore.....	21
(b) England and Wales	22
(c) Australia	24
(d) Germany	26
(e) Discussion	27
2. Timing of assessment.....	27
(a) Singapore.....	27
(b) United Kingdom.....	28
(c) Germany	28
(d) Discussion	29
3. Extent of interest	29
(a) Singapore.....	29
(b) Other jurisdictions	30
(c) Discussion	30
4. Requirement of consent.....	30
(a) Singapore and the United Kingdom	30
(b) Australia	30
(c) Germany	31

(d) Discussion	32
B. Insurable interest in indemnity policies.....	33
1. Nature of interest.....	33
(a) Singapore.....	33
(b) United Kingdom.....	34
(c) Australia	34
(d) Germany	35
(e) Discussion	35
2. Timing of assessment.....	36
(a) Singapore.....	36
(b) United Kingdom.....	36
(c) Australia	37
(d) Germany	37
(e) Discussion	38
3. Extent of Interest	38
4. Consultation on the proposed reforms for the law on insurable interest.....	38
C. Recommendations	40
CHAPTER 4 BROKERS' RESPONSIBILITY FOR UNPAID PREMIUMS.....	42
A. Other jurisdictions.....	43
1. United Kingdom	43
2. Germany.....	44
3. Norway.....	45
B. Issues.....	46
1. Impracticalities	46
2. Anomalies with common law	46
3. Redundancy.....	47
C. Recommendations	47
CHAPTER 5 LATE PAYMENT OF CLAIMS	49
A. United Kingdom	50
B. Other jurisdictions.....	51
C. Recommendations	51
CHAPTER 6 CONCLUSION.....	53

EXECUTIVE SUMMARY

OVERVIEW

1 The Insurance Law Subcommittee (the '**Subcommittee**') of the Law Reform Committee studied the deficiencies of the current state of insurance law in Singapore and selected the following areas for possible reform:

- (1) The duty of utmost good faith;
- (2) the duty of disclosure and misrepresentation;
- (3) warranties;
- (4) remedies for fraudulent claims;
- (5) insurable interest;
- (6) brokers' responsibility for unpaid premiums; and
- (7) late payment of claims.

2 The Subcommittee reviewed the insurance law of leading foreign insurance jurisdictions to identify the areas that could be adapted as recommendations for the reform of Singapore's insurance law. The insurance contract law as enshrined in the statutes of the United Kingdom ('**UK**'), Australia and Germany were most commonly reviewed in addition to certain provisions of Norway and certain states of the United States of America, to determine which jurisdiction's law was best suited as a model for the purposes of Singapore's insurance contract law reform.

RECOMMENDATIONS

3 The Subcommittee recommends that for the duty of utmost good faith and its related areas of the duty of disclosure, misrepresentation, warranties and remedies of fraudulent claims, the framework and provisions of the bifurcated insurance contract law regime enshrined in the UK's Insurance Act 2015 (c 4; '**UK Act**') and the Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) should be adopted, albeit in a single Insurance Contract Act in Singapore. Desirable features of the Australian Insurance Contracts Act 1984 (No 80, 1984, Compilation No 24 in force on 1 July 2016 (C'wealth, Aust), as amended in 2013; '**ICA**') may be adopted to supplement the provisions under the UK statutes.

4 For the requirement of insurable interest in life-related policies, the Subcommittee's recommendations are to:

- (1) Repeal section 62 of Singapore's Insurance Act (Cap 142, 2002 Rev Ed; '**IA**'); and

- (2) Retain section 57 of the IA, save that section 57(1)(b)(iv) of the IA be substituted with clause 2(2) of the UK Insurable Interest Bill 2018 (see note 51 below) and enacted as a standalone provision. Clause 2(2) of the UK Insurable Interest Bill 2018 states that “an insured has an insurable interest [in the life of another person] if there is a reasonable prospect that the insured will suffer economic loss if the insured event occurs”.

5 For the requirement of insurable interest in non-life-related or indemnity policies, the Subcommittee’s recommendation is to adopt sections 16 and 17 of the Australian ICA, which is basically to remove the requirement for insurable interest.

6 On brokers’ responsibility for unpaid premiums under section 53 of Singapore’s Marine Insurance Act (Cap 387, 1994 Rev Ed), the Subcommittee recommends:

- (1) repealing section 53(1) and replacing it with a provision stating that unless agreed otherwise, a broker is not personally liable to pay the premium to the insurer; and
- (2) re-enacting section 53(2) with an amendment that makes clear that the lien provided therein should be extended to non-marine insurance as well.

7 Finally, with regard to late payment of claims, the Subcommittee recommends enacting a specific provision to require insurers to make payment within a “reasonable time”. For the meaning of *reasonable time*, reference may be made to sections 13A(2) and (3) of the UK Act and the explanatory notes to the UK Enterprise Bill (see note 111 below). Relevant factors to be considered by the court as well as illustrations should be included under the provision enacted.

CHAPTER 1

INTRODUCTION

1.1 The Insurance Law Subcommittee (the '**Subcommittee**') studied the deficiencies of the current state of insurance law in Singapore and selected the following areas for possible reform:

- (1) The duty of utmost good faith;
- (2) the duty of disclosure and misrepresentation;
- (3) warranties;
- (4) remedies for fraudulent claims;
- (5) insurable interest;
- (6) brokers' responsibility for unpaid premiums; and
- (7) late payment of claims.

(each a '**topic**')

1.2 Topics (1) to (4) stated above were reviewed together as they all are related to the duties of utmost good faith owed by parties to an insurance contract, particularly by the insured. Topics (5) to (7) were reviewed individually.

1.3 The Subcommittee reviewed the insurance law of leading foreign insurance jurisdictions to identify the areas that could be adapted as recommendations for the reform of Singapore's insurance law. The insurance contract law as enshrined in the statutes of the United Kingdom ('**UK**'), Australia and Germany were most commonly reviewed in addition to certain provisions of Norway and certain states of the United States of America ('**USA**'), to determine which jurisdiction's law was best suited as a model for the purposes of Singapore's insurance contract law reform. The statutes are as follows:

- (1) **UK** – the UK Insurance Act 2015 (the '**UK Act**')¹ and the Consumer Insurance (Disclosure and Representations) Act 2012 ('**CIDRA**');²
- (2) **Australia** – the Insurance Contracts Act 1984, as amended in 2013 ('**ICA**');³ and

1 2015 c 4 (UK).

2 2012 c 6 (UK).

3 No 80, 1984, Compilation No 24 in force on 1 July 2016 (C'wealth, Aust).

- (3) **Germany** – the German Civil Code (*Bürgerliches Gesetzbuch*; ‘**BGB**’)⁴ and the German Insurance Contract Act 2008 (*Versicherungsvertragsgesetz*; ‘**VVG 2008**’).⁵

1.4 In July 2019, the Subcommittee published a consultation paper setting out its proposals for reforming the law on warranties in insurance contracts and the requirement of insurable interest (the ‘**Consultation Paper**’) and forwarded the same to the relevant insurance industry trade associations in Singapore such as the Life Insurance Association, the General Insurance Association and the Singapore Insurance Brokers’ Association. Interested parties were invited to submit their responses by end August 2019. The responses on each of the two topics are discussed under the relevant sections below.

4 Federal Law Gazette (*Bundesgesetzblatt*) I, page 42, 2909, promulgated on 2 January 2002; 2003 I, page 738, last amended by Art 4, para 5, of the Act of 1 October 2013 (Federal Law Gazette I, page 3719) <https://www.gesetze-im-internet.de/englisch_bgb/>.

5 Federal Law Gazette I, page 2631, promulgated on 23 November 2007, last amended by Art 15 of the Act of 17 August 2017 (Federal Law Gazette I, page 3214) <https://www.gesetze-im-internet.de/englisch_vvg/>.

CHAPTER 2

THE DUTY OF UTMOST GOOD FAITH AND RELATED DUTIES

2.1 For topics (1) to (4), which consist of the duty of utmost good faith and its related duties, it is recommended that the provisions in the UK Act are preferred for consideration for Singapore's insurance contract law reform and, where desirable, supplemented by provisions from the ICA. We first go into each area of insurance law selected for reform before discussing the various provisions of foreign legislation considered for reform.

A. THE DUTY OF UTMOST GOOD FAITH

2.2 At the core of Singapore's insurance contract law is the principle of utmost good faith. This principle originated from the English common law position stated in the 1766 case of *Carter v Boehm*⁶ and was codified in England as section 17 of the Marine Insurance Act 1906 ('MIA 1906').⁷ Under the Application of English Law Act,⁸ Singapore adopted the MIA 1906 wholesale in 1994⁹ and enacted the Marine Insurance Act ('MIA').¹⁰

2.3 Section 17 of the MIA imposes a duty of good faith on both the insured and the insurer. It provides:

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

2.4 While the provision refers to a "contract of marine insurance", the position under common law is that it applies to all types of insurance and not just marine insurance.¹¹

2.5 The problem with section 17 of the MIA is that it provides for only one remedy for a breach of the duty of utmost good faith: the avoidance of the insurance policy. This all-or-nothing approach is too harsh and a draconian remedy. Where the insurer is the party in breach of the duty, this remedy would not benefit or address the prejudice caused to the insured who wants his claim to be met and paid.

6 (1766) 3 Burr 1905, 97 ER 1162, Ct of King's Bench (Eng & Wales).

7 6 Edw VII, c 41 (UK).

8 Cap 7A, 1994 Rev Ed.

9 *Id.*, s 4(2) read with the 1st Schedule, Pt II, item 5.

10 Cap 387, 1994 Rev Ed.

11 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 at 518 and 554, HL (UK); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] 2 WLR 170, HL (UK); *Synergy Health (UK) Ltd v CGU Insurance Plc* [2011] Lloyd's Rep IR 500 at [180]–[182], HC (Eng & Wales).

B. THE DUTY OF DISCLOSURE AND MISREPRESENTATION

2.6 Under section 18(1) of the MIA, the insured is under a duty to disclose to the insurer every material circumstance known to the insured, or which ought to be known to him in the ordinary course of business, before the insurance contract is concluded. If the insured fails to make such disclosure, the insurer may avoid the contract. Section 18(2) of the MIA further provides that a circumstance is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

2.7 The justification for section 18 of the MIA was that the insured knows more about the risk to the insured than the insurer; as such, the insured must be obliged to disclose all material circumstance before the insurance contract was made.¹² However, while this might have been the case a hundred years ago, with the advancement in technology and the information revolution, insurers are no longer as helpless as they used to be during risk assessment. In some cases, with the aid of data analytics, the insurer may actually possess superior knowledge of the nature of the risks than the insured.

2.8 Further, the current duty of disclosure under section 18 of the MIA is poorly understood by insured persons. These persons do not know how to comply; and for companies, it is uncertain whose knowledge within the company is relevant to satisfy what is known or ought to be known.

2.9 The section 18 of the MIA duty of disclosure is also onerous on the insured while at the same time allowing the insurer to play a passive role without a requirement to ask questions on what they view as relevant material facts. This has been said to encourage ‘underwriting at the claims stage’, where questions are asked only when a claim is made, during which insurers would use the answers to decline a claim.

2.10 Lastly, as stated above, the sole remedy of avoidance in the event of a breach of the duty of disclosure is harsh and allows the insurers to reject the whole claim even if they would have accepted the risk if they were given full disclosure, albeit at a higher premium.

2.11 Section 19 of the MIA extends the insured’s duty beyond section 18 to encompass the disclosures made by an agent on their behalf. Taken at face value, it captures an agent’s knowledge acquired beyond his or her

12 As Lord Mansfield stated in *Carter v Boehm*, above, n 6, 3 Burr at 1909, 97 ER at 1164: “Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist.”

role as the agent for that insured, such that knowledge acquired in another capacity – for example, while acting for another client – will be included. In situations where there is more than one intermediary (such as cases where placing brokers and producing brokers are involved), the scope of the duty can be uncertain and potentially very wide.

2.12 Section 20 of the MIA provides that every material representation made by an insured or his or her agent to the insurer during the negotiations for the contract and before the contract is concluded must be true. If untrue, the insurer can avoid the contract.

2.13 The definition of a material representation under section 20(2) is the same as that in section 18(2) of the MIA – that it will influence the judgment of a prudent insurer in fixing the premium or determining whether he or she will take the risk. As such, problems that plague the duty of disclosure in section 18 of the MIA also apply to section 20.

C. WARRANTIES

2.14 Section 33(3) of the MIA states that a warranty must be exactly complied with, whether it be material to the risk or not. Otherwise, the insurer will be discharged from liability from the date of the breach of warranty. Section 34(2) confirms that once a warranty is breached, the insured cannot avail itself of the defence that the breach has been remedied and that the warranty has been complied with before the loss.

2.15 The effect of these provisions is very harsh. It allows an insurer to refuse to pay a claim and discharge itself from all liability (and not merely liability for the loss at hand) for the most trivial of breaches which have no bearing on the risk and even if the breaches were remedied before the loss occurs. This issue is exacerbated by the use of ‘basis of contract’ clauses to convert any and all statements made by the insured at the proposal stage (such as the insured’s answers in proposal forms submitted to the insurer for the purposes of procuring insurance) into warranties.

D. REMEDIES FOR FRAUDULENT CLAIMS

2.16 The remedies for an insurer when faced with a fraudulent claim are convoluted and in a state of confusion. The common law rule is that the fraudster forfeits the fraudulent claim; however, section 17 of the MIA allows the insurer to avoid the whole insurance contract ab initio, as the insured will be deemed to have breached the duty of utmost good faith.

E. OTHER JURISDICTIONS

1. United Kingdom

2.17 Up until 2012, the insurance contract law in the UK was based on principles derived from cases in the 18th and 19th centuries and codified in the MIA 1906. Although the MIA 1906 appears to apply to marine insurance only, case law has made clear over the years since that most of the principles apply to non-marine policies as well, and that the MIA 1906 embodies the common law.

2.18 However, much has changed and the way the insurance market conducts business in modern times is very different from the 18th and 19th centuries, where face-to-face meetings at Lloyd's coffeehouse would have been the norm. Back then, underwriters were almost wholly dependent on the insureds or their brokers for relevant material information of the risk they were asked to insure. Today, underwriting is very much a technology, systems and data-driven process where information asymmetry is not the norm anymore. Calls for insurance law reform started as early as the 1957 in the UK, but it was not until 2006 that the Law Commission of England and Wales and Scottish Law Commission (collectively the '**UK Law Commissions**' or '**Law Commissions**') started the review in earnest. This resulted in the enactment of the CIDRA and the UK Act.

2.19 The CIDRA, which replaces consumers' duty to volunteer information with a duty to answer the insurers' questions honestly and reasonably, took effect in March 2012. The UK Act took effect in August 2016 and the provisions have not been tested in the UK courts yet.¹³ Therefore, in relation to the law on disclosure and misrepresentation, two separate regimes apply in the UK now, in place of the MIA 1906, as it was felt that reform in the area of disclosure and representations for consumer insurance through CIDRA was more urgent.

2.20 The duty of utmost good faith in section 17 of the MIA 1906 is preserved under the UK Act¹⁴ but its effect is modified by provisions in the CIDRA and the UK Act to limit it as an interpretative principle, and avoidance is no longer the sole remedy for a breach of the duty in the UK.

2.21 For the duty of disclosure and misrepresentation, separate regimes apply, depending on whether it is a consumer insurance product or not. For consumer insurance, the CIDRA replaces the provisions in the MIA 1906

13 There is one case that mentioned the UK Act in *dicta* and that if the UK Act was applicable (which it was not) to the case at hand, it would have made no difference to the outcome for the insured's breach of the duty of disclosure and the insurer would still be entitled to avoid the policy: *Dalecroft Properties Limited v Underwriters Subscribing to Certificate Number 755/BA004/2008/OIS/00000282/2008/005* [2017] EWHC 1263 (Comm), HC (Eng & Wales).

14 See the UK Act, above, n 1, s 14.

with a duty to take reasonable care not to make a misrepresentation to the insurer.¹⁵ Whether or not a consumer is seen to have taken reasonable care depends on all relevant circumstances, including the type of consumer insurance contract, any relevant explanatory materials given to the consumer, how clear and how specific were the insurer's questions and whether the insurer highlighted the importance of answering its questions. Dishonesty by the consumer is always to be taken as showing a lack of reasonable care.¹⁶ This effectively places an inquiry-based duty on the insurer to ask questions relevant to its underwriting decision-making process and strips away from the consumer insured the old and commonly poorly understood duty of disclosure under the MIA.

2.22 The CIDRA also introduces a concept of qualifying misrepresentations, being misrepresentations for which the insurer has a remedy against the consumer.¹⁷ The CIDRA has also codified the inducement requirement of the actual underwriter (that is, a subjective test in the common law test of materiality) before a misrepresentation is actionable,¹⁸ as first pronounced by Lord Mustill in *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd*¹⁹ to mitigate the harsh disclosure test in the MIA 1906. The remedy depends on the insured's state of mind and the nature of the misrepresentation. Proportionate remedies range from avoidance and non-return of premium for a deliberate or reckless misrepresentation on one end of the spectrum, to charging of a higher premium or reduction of the amount to be paid for the claim on the other end.²⁰

2.23 For life insurance policies, the CIDRA prohibits an insurer from terminating a life policy by reason of careless misrepresentation and limits the insurer's remedies to serving notice of an offer to contract on different terms (except terms relating to premiums) or reduce the amount to be paid for a claim proportionately.²¹ It would then be up to the consumer to decide whether to terminate by giving reasonable notice to the insurer, and if so, the insurer has to refund any premiums paid for the balance of the policy term.

2.24 As for warranties, section 6 of the CIDRA abolishes the use of 'basis of contract' clauses which convert representations by the consumer insured into warranties, the breach of which leads to avoidance of the policy regardless of the materiality or lack of causal connection with the risk giving rise to the claim.

15 CIDRA, above, n 2, s 2.

16 *Id*, s 3.

17 *Id*, s 4.

18 *Id*, s 4(1)(b).

19 Above, n 11.

20 CIDRA, Schedule 1.

21 *Id*, Schedule 1, para 9(5).

2.25 Provisions to contract out of the CIDRA or provisions to put the consumer in a position worse than what the consumer would have been in under the CIDRA would have no effect.²²

2.26 For non-consumer (or business) insurance contracts, the law set out in sections 18 to 20 of the MIA 1906 is replaced with a duty of fair presentation. Now, section 3(3) of the UK Act provides that a fair presentation of the risk is one:

- (1) which obliges the insured to disclose every material circumstance which the insured knows or ought to know or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances;
- (2) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and
- (3) in which every material representation as to a matter of fact is substantially correct, and as to a matter of expectation or belief is made in good faith.

2.27 In the absence of inquiry, the insured is not required to disclose a circumstance if it diminishes the risk, the insurer knows or ought to know it or is presumed to know it or it is something as to which the insurer waives information.²³

2.28 Sections 4 to 6 of CIDRA clarify the knowledge of the insured (whether as an individual or as a corporation) and of the insurer. With regard to the knowledge of a corporation insured, the knowledge will be that of the individuals who are part of the corporation's senior management or responsible for the corporation's insurance.²⁴

2.29 In addition to defining a material circumstance or representation as one which would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms, section 7 of the UK Act also gives the following three non-exhaustive examples of material circumstances:

- (1) special or unusual facts relating to the risk;
- (2) any particular concerns which led the insured to seek insurance cover for the risk; and
- (3) anything which those concerned with the class of insurance and field of activity in question would generally understand as

22 *Id*, s 10.

23 *Id*, s 3(5).

24 *Id*, s 4(3).

being something that should be dealt with in a fair presentation of risks of the type in question.

2.30 An insurer will only have a remedy against an insured for a breach of the duty of fair presentation if the insurer shows that, but for the breach, the insurer would not have entered into the contract of insurance at all or would have only done so on different terms.²⁵ Such a breach (which is for the insurer to prove) to which a remedy is available is known as a ‘qualifying breach’ and is either:

- (1) deliberate or reckless (when the insured knew it was in breach of the duty of fair presentation or did not care whether or not it was in breach), or
- (2) neither deliberate or reckless.

2.31 For a qualifying breach that is deliberate or reckless, the insurer may avoid the policy and keep the premiums paid. All other breaches will entail proportionate remedies, which are:²⁶

- (1) avoidance of the policy and returning the premiums if the policy is one the insurer would not have entered;
- (2) to treat the policy as if it had different terms (other than the premium), if indeed the insurer would have accepted the risk on those different terms; and
- (3) reduce proportionately the amount to be paid for a claim if the policy is one the insurer would have entered but would have charged a higher premium.

2.32 The purpose of the above remedies is to put the insurer, as far as practicable, in the position it would have been in had the insured fulfilled its duty to make a fair presentation.

2.33 As for warranties, the ‘basis of contract’ type clauses no longer have the effect of converting any provisions into warranties.

2.34 Automatic avoidance is no longer the remedy for a breach of warranty.²⁷ A breach of warranty can be remedied if the insured cures the breach in time and the insurer’s liability can reattach if and when a breach of warranty is cured.

2.35 Part 4 of the UK Act also moves away from the remedy of avoidance for a fraudulent claim and embraces the common law remedy of forfeiture of the claim. Section 12 of the UK Act not just makes clear the insurer is not liable for the (fraudulent) claim, but also empowers the insurer to recover

25 UK Act, above, n 1, s 8.

26 *Id*, Schedule 1.

27 *Id*, s 10(1).

from the insured all sums paid in respect of this claim and also to terminate the policy from the time of the fraudulent act. However, the insurer remains liable for legitimate losses before the fraudulent act. As to what constitutes a fraudulent claim, the UK Act does not define this and the position remains for the common law to develop.²⁸

2. Australia

2.36 Australian insurance law was largely based on English law until 1984. In particular, the MIA 1906 was adopted by Australia for its Marine Insurance Act 1909.²⁹ With the law reform in 1984, most classes of insurance contracts in Australia are not regulated under the ICA. The exceptions are:³⁰

- (1) Marine insurance;
- (2) insurance required under state legislation (such as workers' compensation and compulsory third-party liability motor vehicle insurance);
- (3) private health insurance; and
- (4) reinsurance.

2.37 Several changes were introduced to the ICA by the Insurance Contracts Amendment Act 2013 ('ICAA').³¹ The ICAA was passed into law on 28 June 2013 and applies to insurance contracts issued after 28 December 2015. It addresses both consumer and business insurance.

2.38 The provisions on utmost good faith can be found in sections 12 to 15 of the ICA. However, as mentioned above, certain contracts of insurance fall outside the ambit of the ICA and are subject to the duty of utmost good faith under common law only.

2.39 Sections 12 to 15 of the ICA made a number of significant departures from the principles of utmost good faith under common law. The ICAA caused further departures with the new sections 13(2) to (4) and 14A of the ICA.

2.40 The duties of utmost good faith in the ICA and under common law are different in four main aspects, in that the ICA:

28 For example, in *Versloot Dredging BV v HDI Gerling Industrie Verischerung AG* [2016] 3 WLR 543, SC (UK), the majority decided that there is a distinction between the case in which an assured claims for loss that has not been suffered, and the case in which the assured claims for a loss that has been suffered but has told lies in order to substantiate the claim: Subsequent "collateral lies" do not defeat an objectively genuine claim, such that a fraudulent claim is confined to situations where the assured dishonestly claims for a loss that has not actually been suffered at all or to the extent asserted, or that he knows does not fall within the policy.

29 Act No 11 of 1909 (C'wealth, Aust).

30 ICA, above, n 3, s 9.

31 No 75, 2013 (C'wealth, Aust).

- (1) makes the duty of utmost good faith an implied term of the contract of insurance, subject to the provisions of the ICA;³²
- (2) creates an inherent remedy for breach of the duty of utmost good faith to third party beneficiaries of the contract of insurance;³³
- (3) expands the duty of utmost good faith post formation of contract to third-party beneficiaries of the contract of insurance;³⁴ and
- (4) empowers oversight by the Australian Securities and Investments Commission ('ASIC') to address breaches of the duty of utmost good faith and gives ASIC the ability to enforce measures to ensure compliance with the duty.³⁵

2.41 The ICA restricts the remedy of avoidance for breach of the duty of utmost good faith.³⁶ However, the sole remedy of avoidance under common law remains the legal position in Australia for marine insurance and reinsurance as the two categories of insurance are outside the purview of the ICA.

2.42 The insured's duty of disclosure is provided for in sections 21 and 22 of the ICA. Provisions on misrepresentation are at sections 23 to 27 of the ICA. The remedies available for a breach of the duty of disclosure and for misrepresentation are set out in sections 27A to 33 of the ICA.

2.43 Like Singapore, Australia also adopted its Marine Insurance Act 1909 from England. As such, its disclosure obligations are *in pari materia* with section 18 of the MIA. However, Australia changed these obligations to a new regime that requires an insured to disclose matters that:

- (1) were known to him that are relevant to a decision of the insurer on whether to accept the risk and if so, on what terms; or
- (2) a reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including (a) the nature and extent of the insurance cover to be provided; and (b) the class of person who would ordinarily be expected to apply for insurance cover of that kind.³⁷ These two conjunctive limbs at (a) and (b) are newly inserted requirements of the ICAA and take effect on policies issued after 28 December 2015.

32 ICA, above, n 3, s 13(1).

33 *Id*, s 13(30).

34 *Id*, s 13(4).

35 *Id*, s 14A.

36 *Id*, s 54.

37 *Id*, s 21.

2.44 Sections 21(2)(a) to (d) of the ICA contain similar exceptions to the duty of disclosure in sections 18(3)(a) to (d) of the MIA.

2.45 For ‘standard cover’ consumer forms of insurance (such as motor vehicle, home building, home contents, sickness and accident, travel insurance and consumer credit), the ICA introduces a disclosure regime separate from that of general insurance (section 28) and life insurance (section 29) in what is defined under the ICA as an “eligible contract of insurance” in sections 21A and 21B. These provisions on eligible contracts of insurance requires the insurer to ask specific questions (and not ‘catch-all’ type questions such as: ‘Are there any other circumstances known to you which might be relevant to our decision to accept the risk?’) and if the insurer does not, the insurer will be taken to have waived the disclosure requirement. In contrast, section 21 of the ICA, which applies to all other forms of insurance, does not restrict the insurer’s ability to ask open-ended questions.

2.46 For general insurance contracts, where the insured’s failure to disclose or a misrepresentation of relevant information is made fraudulently, section 28(2) of the ICA allows the insurer to avoid the contract. If there is no fraud, the insurer is unable to avoid the contract but may reduce its liability to the amount that would place the insurer in a position it would have been in had the non-disclosure or misrepresentation not occurred.³⁸ Section 60 of the ICA sets out the only situations in which an insurer may cancel a contract of general insurance, which includes cases where the insured fails to comply with the duty of utmost good faith or duty of disclosure.

2.47 For cases of non-disclosure or misrepresentation of relevant information in life insurance contracts, section 29 of the ICA provides similar remedies to the insurer with a few key differences. For non-fraudulent non-disclosure or misrepresentation, there is a three-year time limit for an insurer to avoid a contract,³⁹ given that life insurance contracts have a longer timeframe than that of general insurance (which are typically taken out or renewed annually). A new section 29(4) was introduced by the ICAA to allow insurers to vary the sum insured (with a prescribed formula) under life policies (issued after 28 December 2015) to more accurately reflect the premiums that would have been payable had the insured complied with the duty of disclosure or not made a misrepresentation. Lastly, section 33 of the ICA gives the court the power to disregard an insured’s non-disclosure or misrepresentation of relevant information in cases where such non-disclosure or misrepresentation was insignificant.

2.48 Unlike the MIA, the ICA prescribes an insurer’s pre-contractual disclosure obligations to notify the insured of its obligations and the scope

38 *Id.*, s 28(3).

39 *Id.*, s 29(3).

of cover before accepting a proposal for insurance. First, under section 22 of the ICA, the insurer must clearly inform the insured in writing of the general nature and effect of the duty of disclosure in section 21 and section 21A (for eligible contracts of insurance). If the insurer fails to do so, the insurer cannot avail itself of any of the remedies for non-disclosure unless there was fraud by the insured.

2.49 Second, section 37 of the ICA requires insurers to notify the insured of “unusual terms” for policies that are not within the category of “eligible contracts of insurance”. A failure to do so would bar an insurer from relying on such unusual terms.

2.50 Third, for “eligible contracts of insurance”, section 35 of the ICA requires insurers to clearly inform the insured in writing of any deviation from the standard cover set out in the Insurance Contracts Regulations. These are commendable provisions for consideration.

2.51 As for warranties, section 24 of the ICA makes any statement made by the insured about any existing fact a representation and not a warranty.

2.52 Fraudulent claims are dealt with under section 56 of the ICA and it endorses forfeiture of the claim as the remedy and not avoidance of the policy. In addition, if the fraud is only a minimal or insignificant part of the claim and non-payment of the remainder of the claim is harsh, subject to the consideration of the aim to deter fraud, the court can order the insurer to pay such amount as is fair and equitable under the circumstances.

2.53 On a practical note, given the challenges of proving fraud under section 56 (which requires the insurer to establish the insured’s intent), there have been a far greater number of reported Australian cases on section 54 of the ICA. Section 54 deals with situations where the insured has failed to comply with a policy requirement after the inception of the policy (contrast pre-contractual non-disclosure and misrepresentation discussed above).

2.54 Where the insured’s act or omission can reasonably be regarded as causing or contributing to the relevant loss, section 54(2) enables the insurer to avoid the claim. In cases where such acts or omissions cannot reasonably be regarded as causing or contributing to the relevant loss, section 54(1) enables the insurer to reduce its liability in respect of the claim by the amount which fairly represents the extent to which its interests were prejudiced by the insured’s act or omission.

3. Germany

2.55 The BGB expressly provides for a general principle of good faith in section 242 under the conceptual components of allegiance and faith (*Treu und Glauben*). It attaches to every contractual relationship, including insurance and reinsurance contracts. Translated, it states that “an obligor

has a duty to perform according to the requirements of good faith, taking customary practice into consideration”.

2.56 Utmost good faith, on the other hand, is seen as a more onerous version of good faith and has developed from case law in Germany. However, it would appear that the duty of utmost good faith has not been extended to apply to reinsurance under German law; the duty of good faith under section 242 of the BGB applies instead.

2.57 The German Insurance Contract Act 1908 (*Versicherungsvertragsgesetz*; ‘VVG 1908’) had several rules that were unduly burdensome to the insured, such as a pre-contractual duty to disclose to the insurer all risk-relevant facts even though the insurer did not ask any questions on this.⁴⁰ The VVG was amended in 2008 and section 19(1) of the VVG 2008 now expressly requires the insurer to ask questions of the insured during the pre-contractual disclosure stage, further to which the insured will be under a duty to answer and disclose all circumstances which are material to the insurer’s decision whether to conclude the contract. There is both an insurer’s subjective view as well as an insurer’s objective view, in order to protect the insured, for this element of inducement to enter into the contract of insurance.

2.58 Section 6(1) of the VVG 2008 casts a pre-contractual duty to advise the insured and a breach will sound in damages against the insurer under section 6(5).

2.59 Section 19 of the VVG 2008 provides for a scaled set of remedies, with a right to avoid the contract being the basic remedy. However, the insurer’s right to avoid is subject to several conditions – it will be allowed to avoid the contract only if, for example, the insured breached its duty of disclosure intentionally or by acting with gross negligence; the insurer would not have concluded the contract but for the non-disclosure; and the insurer had instructed the insured in writing of the consequences of any breach of the duty of disclosure.⁴¹

2.60 The VVG 2008 is similar to the CIDRA with regard to consumer insurance contracts and is applicable to both consumer and non-consumer insurance contracts. The only exception is that parties to an insurance contract on large industrial risks are freed from the restrictions of semi-mandatory provisions in order to allow parties the freedom to contract on their own terms.⁴²

2.61 With regard to warranties, there is a German equivalent called *Obliegenheiten*. They set out duties that must be performed and a breach will lead to cancellation of the insurance contract or relief of the insurer of

40 VVG 1908, s 16.

41 See the VVG 2008, above, n 5, ss 19(4) to (6).

42 *Id*, s 210.

its obligations.⁴³ There must be a causal relation between the breach of the obligation by the insured and the occurrence of the insured event unless there is fraud.⁴⁴

2.62 In conclusion, the insurance contract statutory framework under German law is largely set out in the VVG 2008 and supplemented by other German codes, in particularly the overarching BGB. It is a complex framework. Furthermore, reinsurance is excluded from the VVG 2008.⁴⁵ We therefore do not recommend the adoption of the German model in Singapore.

F. CONSULTATION ON THE PROPOSED REFORMS FOR THE LAW ON WARRANTIES

2.63 In the Consultation Paper, the Subcommittee set out the following recommendations based on the reforms to the UK insurance law regime on warranties:

- (1) Abolish basis of the contract clauses;
- (2) provide that a breach of warranty suspends rather than discharges the insurer's liability, which may be revived when the breach is remedied; and
- (3) where terms (or warranties) are designed to reduce the risk of loss of a particular type or at a particular time or place, they should not affect losses of a different kind or at a different time or place.

2.64 The Subcommittee also proposed a compulsory regime in which an insurer is barred from using a contract term to put the consumer in a position worse than what he or she would otherwise have been under the new insurance legislation. In non-consumer insurance, the parties would generally be free to make alternative arrangements in their contracts, provided that the consequences of the contract terms are clear and that the insurer takes sufficient steps to bring it to the insured's attention. This is the regime adopted in the UK.

2.65 The majority of the insurers who responded agreed with the abolishment of basis of the contract clauses. Nevertheless, several issues and comments were raised. We discuss the more pertinent ones below.

2.66 First, the Subcommittee received a comment that warranties are meant to simplify and exclude all controversy by dispensing with the need on the part of the insurer to establish the materiality of the breach before

43 *Id*, s 28.

44 *Id*, s 28(3).

45 *Id*, s 209.

being allowed to render the policy void. However, the downside of this benefit of convenience to insurers is that the insured persons could be deprived of their benefits under the policies when their breach did not even affect the risk insured or was already remedied before the insured loss occurred. Such potential injustice to the insured is precisely what the Subcommittee seeks to address via these reforms.

2.67 Another issue raised by a life insurer is that the life insurance industry has already been regulating itself through Members' Undertaking No 53 issued by the Life Insurance Association of Singapore ('MU 53'). Under MU 53, life insurance companies in Singapore undertake to include an 'incontestability clause' in the life insurance policies they issue. This clause provides that claims will not be rejected for fraud, non-payment of premium, or exclusions stated in a policy after it has been in force during the lifetime of the life assured for one or two years (to be determined by the insurer) from the commencement date or reinstatement of the policy, whichever is later.

2.68 While such incontestability clauses do mitigate the draconian effect of a breach of warranty, the Subcommittee is of the view that they do not go far enough: the life insurers are still able to avoid the life policies for immaterial breaches of warranties during the first or second year of the policy. Furthermore, MU 53 applies only to life insurers. The Subcommittee recommends proceeding with a more thorough reform of the whole insurance law regime.

2.69 Third, two common concerns of the insurers are: (1) what happens if the breach of warranty affects the risk insured and whether they could re-underwrite the risk; and (2) what happens if the insured had fraudulently provided the insurer with false information during the underwriting stage. These concerns are understandable, but are already addressed in the proposed reforms:

- (1) If a breach of warranty affects the risk insured and such impact on the risk insured cannot be remedied, the policy will effectively be deemed void. This is because where the impact on the risk insured cannot be remedied, coverage will remain suspended until the policy term expires. This approach under the proposed reform would give insureds the chance to remedy the breach without prejudicing the insurer's interest.
- (2) If an insured intentionally provides the insurer with false information during the underwriting stage, he would have committed fraudulent misrepresentation. Under the UK regime (which the Subcommittee proposes to be adopted), if the insured commits misrepresentation deliberately or recklessly, the insurer may avoid the insurance contract and refuse all claims. The insurer will also be allowed to keep all the

premiums already paid.⁴⁶ It is therefore not necessary to automatically convert all statements made by the insured at the proposal stage into warranties (through basis of contract clauses) to protect the insurers from fraudulent misrepresentations.

2.70 Lastly, a common point raised by the insurers is that while the legal remedies offered under the current regime are draconian, insurers usually do not strictly enforce their rights to avoid a policy where the breaches are non-material. In this regard, the Subcommittee appreciates that the proposed reforms would merely codify these well-founded industry practices into law.

G. RECOMMENDATIONS

2.71 Singapore insurance contract law and the MIA are based on the English common law and the MIA 1906, like the position in Australia before 1984. Germany, being a leading civil law jurisdiction, developed its insurance contract law on a different path from the English common law and the overarching BGB must be read and kept in mind even as the VVG deals with insurance contract law, excluding reinsurance.

2.72 It may be too much of a leap, coupled with the language challenge, to model our Singapore insurance contract law reform on the German codes. In any event, laudable aspects of German law, such as proportionate remedies, are now available in the UK Act, so turning to the UK position for a new Singapore Insurance Contract Act would be preferable, given the common language and the continued respect for English case precedent as case law develops on the ambit and interpretation of the CIDRA and the UK Act in what remains as a leading insurance hub globally.

2.73 The findings of the industry consultation also show that the reforms in the UK generally achieve an appropriate balance between the protection of insureds' interests and the insurers' need for the insureds to not increase the risk insured. The Subcommittee therefore recommends the adoption of the reforms adopted in the UK. However, the bifurcated approach to consumer and business insurance as seen in the UK need not be followed in Singapore as a single Singapore Insurance Contract Act can be considered.

2.74 That said, there are features in the Australian insurance contract law (discussed above) that Singapore should consider for our own Singapore Insurance Contract Act. It is therefore recommended that whilst the provisions in the CIDRA and the UK Act are preferred for consideration as a

⁴⁶ UK Act, above, n 1, Schedule 1, Pt 1, para 2.

base for Singapore's insurance contract law reform, where desirable, we should supplement with provisions from Australia's recently amended ICA.

CHAPTER 3

INSURABLE INTEREST

3.1 This Chapter on insurable interest is divided into two major portions, with Part A dealing with life policies and Part B dealing with property indemnity policies. Each portion is further divided into their sub-issues and suggested discussion issues for Singapore would be included at the end of each sub-issue.

3.2 Liability policies are left out of this report. Insurable interest is not usually a problem for the specific category of liability policies as the insured will always have a legally recognised interest in the insured event in the form of his legal liability.

A. INSURABLE INTEREST IN LIFE POLICIES

3.3 The comparative analysis of the requirement of insurable interest in life policies will be divided into four sub-issues:

- (1) The nature of interest;
- (2) the timing of assessment;
- (3) the extent of the interest; and
- (4) the requirement of consent from the person whose life is insured.

1. Nature of interest

(a) Singapore

3.4 In Singapore, the requirement of insurable interest for life policies is governed by section 57 and section 62 of the Insurance Act ('IA').⁴⁷ This simple statement belies various complications caused by the interaction between these two sections.

3.5 Section 57(1)(a) provides that life policies are void unless "the person effecting the insurance has an insurable interest in the life which is insured at the time the insurance is effected". Under section 57(1)(b), A is deemed to have insurable interest in B's life if (i) B is A himself; (ii) B is A's spouse at the time the insurance is effected; (iii) B is A's child or ward under the age of 18 years at the time the insurance is effected; or (iv) B is

47 Cap 142, 2002 Rev Ed.

any other person on whom A is wholly or partly dependent at the time the insurance is effected.

3.6 Section 62 of the IA (which co-exists with section 57) is a local re-enactment of the UK's Life Assurance Act 1774 ('LAA 1774').⁴⁸ Section 62(1) states that no insurance shall be made by any person on any event wherein the policyholder does not have any interest, or it will be void.

3.7 The primary problem is that the IA only recognises limited types of insurable interest. This is no longer consonant with market practice. Apart from the presumed categories enumerated in section 57(1)(b), the term *insurable interest* is undefined in both section 57 and section 62. In the absence of any definition, the common law definition of insurable interest in life policies, as stated in *Halford v Kymer*,⁴⁹ must therefore apply to section 57(1)(a) and section 62(1). However, the common law requires a legally recognised pecuniary right or detriment to be present but this is wholly inadequate to capture the variety of reasons and interests why one would insure the life of another. The facts of *Halford v Kymer* themselves displayed this prominently: a son who expressly insured his mother's life to cover her funeral costs had his claim denied because he was not legally obliged to incur such costs. To a person with rudimentary knowledge of legal rights and obligations, this would seem completely arbitrary; after all, the son already expressly informed the insurer of the purpose of the life policy taken out on his mother. As for the presumed categories, apart from being limited in scope, they are not clear in themselves. In particular, the terms *ward* in paragraph (iii) and *dependant* in paragraph (iv) allow a variety of definitions and do not allow a policyholder to be certain of his or her legal position.

3.8 Another problem is the interaction between section 57 and section 62. Firstly, given the purported comprehensiveness of section 57, section 62 may appear otiose. Secondly and more importantly, section 57 and section 62 may not even be compatible with each other: section 57 expressly states that the policy is merely void for want of insurable interest but section 62 has been interpreted in *Harse v Pearl Life Assurance Co*⁵⁰ to mean that such contracts are illegal, with the premiums also being non-recoverable. This is an unsatisfactory state of affairs because the different outcomes prevent a policyholder from knowing his right to a refund of premiums.

(b) England and Wales

3.9 The present position remains that in the LAA 1774 and the common law. However, there is strong support for the Insurable Interest Bill drafted

48 14 Geo III, c 48 (UK).

49 (1830) 10 B & C 724, 109 ER 619, Ct of King's Bench (Eng & Wales).

50 [1904] 1 KB 558, CA (Eng & Wales).

in 2016 (but it has currently been put on hold due to other priorities). This has been amended further by the latest Insurable Interest Bill 2018.⁵¹ This discussion paper will deal primarily with the recommended reforms as they currently stand.

3.10 The UK Law Commissions felt that the prior common law rules for insurable interest in life insurance were too restrictive and thus sought to widen the category of those entitled to insure another person's life. In addition, the Law Commissions recognised that the prior common law rules were often ignored in practice as it was out of step with modern expectations. In fact, certain life insurance had been written that would have been technically illegal under the past law (such as keymen insurance). That was thought to be undesirable. Hence, the Law Commissions sought to modernise the concept of insurable interest so that it works in a wider variety of contexts.

3.11 The key clause of the Insurable Interest Bill 2018 is clause 2. Clause 2(2) of the Insurable Interest Bill 2018 proposes for an insured to have an insurable interest in the life of another person so long as there is a "reasonable prospect that the insured will suffer economic loss if the insured event occurs".⁵² This is broader than the requirement for a legally recognised pecuniary loss at common law as the insured need only show a "reasonable prospect" of economic loss and not a pecuniary interest recognized by law.⁵³ This test is the same in both the 2018 and 2016 Draft Bills.

3.12 Clause 2(3) of the Insurable Interest Bill 2018 then adopts largely the same list (from the 2016 Draft Bill) of non-exhaustive and specific circumstances where insurable interest will exist for the purposes of life-related insurance. The clause is organised into two broad categories of interest, the first being based on specific relationships ("natural affection") and the second being based on policies designed to cover multiple lives. The purpose is to mirror the common law but with certain extensions to

51 Both draft bills are accessible from *Insurance Contract Law: Insurable Interest*, Law Commission website <<https://www.lawcom.gov.uk/project/insurance-contract-law-insurable-interest/>> (accessed 9 December 2019; archived at <<https://web.archive.org/web/20191209075227/https://www.lawcom.gov.uk/project/insurance-contract-law-insurable-interest/>>).

52 Insurable Interest Bill 2018, *id.*, cl 2(2).

53 Law Commission and Scottish Law Commission, "Explaining the Draft Insurable Interest Bill" in *Reforming Insurance Contract Law: Updated Draft Insurable Interest Bill for Review* (June 2018) (**'Insurable Interest Report'**), 5 at [2.24] <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/June-2018-Accompanying-notes-on-draft-Insurable-Interest-bill.pdf>> (accessed 9 December 2019; archived at <<https://web.archive.org/web/20191209075248/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/June-2018-Accompanying-notes-on-draft-Insurable-Interest-bill.pdf>>).

allow more policies to be lawfully written.⁵⁴ Clause 3(a) refers to the first category while clauses 3(b) and (c) refer to the second.

3.13 For natural affection, specified relationships include: (i) the insured himself or herself; (ii) his or her spouse or civil partner (or someone who lives with him or her as such); and (iii) someone treated as the child or grandchild of the insured. These broadened categories are thought to be reflective of England's social construct of familial ties. The Law Commissions remain of the view that no limits are required on the amount of cover for children's lives.

3.14 Further, the 2018 Draft Bill provides for two novel situations in which an insured has an insurable interest. First, clause 2(4) provides that where insurance is purchased by a trustee, the trustee has an insurable interest in the relevant life if the settlor of the trust would have had such an interest. The second is clause 2(5) which provides that a policy can include individuals who do not fall within a category of lives insured at the time of contract, but who subsequently do.

3.15 In addition, the Law Commissions expressly distanced themselves from the common law language of pecuniary interest (as in *Halford v Kymer*).⁵⁵ Hence, the intent of using the term *economic loss* in the reasonable prospect test of category (6) is meant to remove the need to demonstrate a clear legal obligation before insurable interest can be found.⁵⁶

(c) Australia

3.16 Section 18 of the Australian ICA provides that a life policy "is not void by reason only that the insured did not have, at the time when the contract was entered into, an interest in the subject-matter of the contract". As for the need for insurable interest at the time the life insured passed away, it is already the position in common law that insurable interest is not required. It would thus appear that insurable interest is no longer a requirement for life policies in Australia. This is made clear by the Life Insurance (Consequential Amendments and Repeals) Act 1995,⁵⁷ which removed the detailed provisions as to the insurable interests which could exist in certain relationships from section 19 of the ICA.

54 Insurable Interest Report, *id* at [2.30].

55 Above, n 49.

56 Law Commission and Scottish Law Commission, "Life and Other Non-indemnity Insurance" in *Reforming Insurance Contract Law: Issues Paper 10: Insurable Interest: Updated Proposals*, Law Commission website (27 March 2015), 15 at [3.14] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL10_insurable_interest_issues.pdf> (accessed 9 December 2019; archived at <https://web.archive.org/web/20191209075313/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL10_insurable_interest_issues.pdf>).

57 No 5 of 1995 (C'wealth, Aust).

3.17 As reiterated by the Australian Law Reform Commission ('ALRC'), the insurable interest requirement in life policies was said to serve two main rationales: (1) the deterrence of wagering on the wellbeing of the life insured; and (2) the minimisation of the risk of harm to the life insured under the policy.⁵⁸ However, the ALRC has stated thus:⁵⁹

The legislative requirements relating to the interest which an insured must have in the subject matter of an insurance contract are the result of a combination of imprecise drafting and historical accident, rather than implementation of clear legislative policy. Had general gaming legislation been passed earlier than it was, there would have been no need for the Life Assurance Act 1774 (Imp.).

3.18 Furthermore, to insist on having strict insurable interests would undercut the well-established legal position whereby assignments of life policies were freely allowed subject only to compliance with the necessary procedure. Hence, an assignee of the policy need not have an insurable interest in the life of the insured. The ALRC states the rationale for this as such:⁶⁰

The need to allow policyholders to use policies as a form of property, together with the uncertainty that would be introduced into insurance practice if the policyholder were required to have an interest at the date of death of the life insured, constitute an adequate justification for not restricting the existing freedom of assignment.

3.19 However, despite the arguments proffered above, the ALRC ultimately did not call for an abolition of the insurable interest requirement because it was not convinced that insurance companies could be trusted to act in the public interest when deciding whether to underwrite a life policy. In particular, the ALRC stated that it is not sufficient to assert that "criminal law itself prohibits murder" because that alone "does not prevent murders from being committed".⁶¹

3.20 Without further explanation, the ICA was amended in 1995 to abolish the requirement of insurable interest for life policies. Professor Kenneth Sutton notes that it is perhaps the case that the rationales enunciated above no longer hold sway.⁶² Whatever the reasons for its eventual abolition, this radical amendment did not appear to have any negative impact on the insurance industry or murders in Australia.

58 Law Reform Commission (Australia), "Insurable Interest" in *Insurance Contracts* (Report No 20) (Canberra, ACT: Australian Government Publishing Service, 1982) ('**Australian Law Reform Report**'), 67 at [107].

59 *Id* at [117].

60 *Id* at [145].

61 *Ibid*.

62 Kenneth Sutton, *Insurance Law in Australia* (3rd ed) (Sydney, NSW: LBC Information Services, Sydney, 1999) at 531.

(d) Germany

3.21 In Germany, insurable interest is not a requirement for life insurance contracts. Instead, section 150 of the VVG 2008 requires the life insured to give prior written consent where the sum insured exceeds the ordinary burial costs. The consent-based model would, in theory, offer the same degree of protection as insurable interest on the assumption that a life insured will not or is highly unlikely to consent to a stranger taking out a life insurance policy on his life.

3.22 In addition, the consent-based model has the potential to offer a greater degree of protection than insurable interest. Consider, by way of example, the classic case of a husband and wife whose marriage is on the rocks. According to the doctrine of insurable interest, the husband would be entitled to take out an insurance policy on the life of his wife even when the husband already plans to murder the wife to obtain the benefit of the policy. Under the consent-based model, however, the husband would require the wife to provide written consent: should the wife feel that it is unsafe to do so, she will refuse to give consent and this will eliminate the motive for murder from being created. Furthermore, the requirement of consent puts the wife on notice that a motive for murder has been created, allowing her to take precautions if required.

3.23 It should also be pointed out that section 762 of the BGB provides that no obligation is established by gaming and betting. Hence, it would seem that an insured would still have to prove that the contract is not a “game of chance” as defined in the Interstate Treaty on Gambling 2012 (*Staatsvertrag zum Glücksspielwesen in Deutschland* or *Glücksspielstaatsvertrag*).⁶³ A “game of chance” is defined to contain three elements: (1) valuable consideration, (2) the fact that the determination of winnings is entirely or predominantly a matter of chance, and (3) the consideration is given in exchange for a chance to win.⁶⁴ One way could be that the insured must prove that the occurrence of the insured event did not lead to a ‘win’ for himself or herself.

3.24 An important advantage of the consent-based model is the flexibility it provides. A criticism of the doctrine of insurable interest is that the scope of insurable interest is too rigid and narrow, hence preventing insurers from writing legitimate insurance policies. Under the consent-based model (subject to certain exceptions), anyone may take out a life insurance policy on another individual so long as legitimate informed consent of the latter is obtained.

63 GVBl (*Gesetz- und Verordnungsblatt*) 2012, pages 318, 319 and 392, promulgated on 15 December 2011.

64 *Id.*, s 3(1).

3.25 There has not been much discussion about Germany's non-stipulation of the insurable interest requirement. However, the compulsory requirement of consent from the person whose life is being insured is unique to Germany and will be considered in more detail later in this discussion paper.

(e) Discussion

3.26 In the UK, the Insurable Interest Bill sets out six different types of relationships for which insurable interest may be found. In addition, the term *economic loss* (instead of *pecuniary loss*) has been deliberately included in the reasonable prospect test. Should Singapore similarly amend the categories of recognised insurable interest?

3.27 Australia decided in 1995 to abolish the requirement of insurable interest for life policies because it is felt that moral hazards and wagering have already been covered by a plethora of other laws. Is Singapore in a position to adopt such a bold measure and completely leave the regulation of policy underwriting to market discipline?

3.28 Instead of imposing insurable interest as a requirement for life policies, Germany requires the life insured to give prior written consent where the sum insured exceeds the ordinary burial costs. However, there are procedural problems with this approach. Is Singapore willing to experiment with this consent-based model and deal with the procedural problems?

3.29 If we boldly decide that insurable interest is no longer required (as in Australia and Germany), then the problematic interaction between section 57 and section 62 of the IA will no longer be an issue. If instead we decide that insurable interest should be retained (but suitably amended), then we will need to discuss whether section 62 ought to be repealed (because of the illegal contract interpretation in *Harse v Pearl Life Assurance*).⁶⁵ Notably, the UK's Insurable Interest Bill 2018 sought to remove this problem by clarifying that the lack of insurable interest merely renders the contract void but not illegal. Singapore would do well to follow suit if we intend to retain the requirement of insurable interest for life policies.

2. Timing of assessment

(a) Singapore

3.30 Section 57 of the IA states that the requirement of insurable interest must be met at the time of contract formation. Fixing the timing of assessment at the time of contract formation is both over- and under-

65 Above, n 50.

inclusive. First, it is over-inclusive where the policyholder subsequently loses insurable interest in the person's life whilst the policy is still valid. This means that the policyholder may then have an incentive to engage in morally hazardous behaviour as regards the life insured. Even if no morally hazardous conduct were committed, the policyholder could be said to be wagering on the life insured by continuing with the policy despite its lack of any legitimate interest. Secondly, it is under-inclusive by excluding an insured person who subsequently gains a legitimate insurable interest during the course of the policy, thereby eliminating any policy rationale for denying him a claim at the time of loss.

(b) United Kingdom

3.31 Clause 2(1) of the Insurable Interest Bill 2018 clearly provides that the insured must have insurable interest at the time the insurance contract is entered into and not at the time of loss. This is consistent with the position under common law.

3.32 No rationale has been articulated whatsoever for this. The court in *Dalby v India and London Life Assurance Co*⁶⁶ appeared to have arrived at this position by statutory interpretation of the LAA 1774 and also notions of "justice and fair dealing and common honesty"; however, these were left vague and the Law Commissions did not see fit to justify it further.

3.33 A plausible justification for the difference in timing could be because losses under life policies, unlike indemnity policies, are not valued at the time of loss but at the outset of contract formation. Accordingly, where a policyholder insures another person's life and an insurable interest exists at the time of contract formation, he cannot be taken to be wagering on the person's life.

(c) Germany

3.34 The consent-based model cannot provide protection in situations where the life insurance policy is taken out before a relationship breaks down. Consider, by way of example, a husband and wife scenario where the husband may have already taken out life insurance on the life of his wife before the marriage breaks down. In such a case, consent would have been provided earlier by the wife, without considering the future possibility of ill consequences, especially when the marriage was still strong. However, the legitimate life policy has the potential to morph into a motive for murder, and the consent-based model will not offer ample protection. Hence, we may need to explore whether it is necessary to incorporate a rule that states the contract will be terminated where consent of the life insured is withdrawn (the 'withdrawal of consent rule'). The coverage of the policy

66 (1854) 15 CB 365, 139 ER 465, Ct of Exch Ch (Eng & Wales).

ends, and the policyholder will receive a payout based on the amount of premiums he has paid thus far. In such a situation where a marriage breaks down, the wife may withdraw consent and thus protect herself from a potential attempt on her life.

3.35 However, this would likely destabilise the traded life policies market as it could then introduce uncertainty on the validity of the traded life policies. For this reason, it is unlikely that the withdrawal of consent rule will ever be applied.

(d) Discussion

3.36 We may need to address the problem of the policyholder losing insurable interest at the time of the insured event. One possibility is to consider incorporating the following provision in section 178(1) of Ontario's Insurance Act:⁶⁷ "[...] where *at the time a contract would otherwise take effect* the insured has no insurable interest, the contract is void" (emphasis added).

3.37 Another option is to incorporate some form of withdrawal of consent rule if Singapore adopts Germany's consent-based model. If insurable interest is retained, Singapore might consider the possibility of providing some mechanism for the life insured to exercise the right to apply for the policy to be declared void after the policyholder loses insurable interest. However, the repercussion is that this may cripple the traded life policies market.

3. Extent of interest

(a) Singapore

3.38 Section 57(2) and section 62(3) of our IA provide that the insured cannot recover a greater sum than the value of his interest in the event. However, the two sections leave it unclear when a claim will be limited by the value of the insurable interest. Section 57(2) provides that the policy moneys payable under the life policy shall not exceed the amount of the insurable interest at the time the insurance is effected if insurable interest is present excluding the deemed categories. Section 62(3) limits the maximum insurance recovery to the amount of insurable interest "in all cases where there is an interest".

67 RSO 1990, c I.8 (Ont, Can).

(b) Other jurisdictions

3.39 This has not been much of an issue in other jurisdictions because either their statutes are silent on this issue⁶⁸ or the requirement of insurable interest has already been abolished.

3.40 In the UK, the Insurable Interest Bill 2018 is also silent on this. This is because the Law Commissions do not see any clear rationale for limiting the value of policies.⁶⁹ After all, valuations are often uncertain and can change over the length of a policy. Hence, the Commissions have decided to leave it to market forces and the industry's self-regulation.

(c) Discussion

3.41 This question will not arise if insurable interest were abolished. If, on the other hand, insurable interest is retained, we may then need to consider whether there should be no limit as the value of one's life is inherently immeasurable.

4. Requirement of consent

(a) Singapore and the United Kingdom

3.42 In Singapore and the United Kingdom, there is no requirement for consent of the person whose life is insured. Furthermore, the consent of the said person will not render a policy without insurable interest otherwise valid.

(b) Australia

3.43 This issue has been discussed by the ALRC in its 1982 report, which ultimately decided against the requirement of the life insured's consent. The sole reason why consent should matter is because it is a by-product of the requirement that the life insured knows of the existence of the policy so that the proposed option of termination will be an effective one as opposed to an illusory one. However, as noted by the ALRC:⁷⁰

In many, if not most, types of life insurance, the insured will know of the existence of a policy taken out by a third party since he will be required to complete a personal statement before the policy is issued. There are two main classes of life insurance in respect of which a personal statement is

68 Germany has no insurable interest requirement, and only requires consent from the life insured: VVG 2008, above, n 5, s 150. Australia also has no insurable interest requirement: ICA, above, n 3, s 18. For Canada, neither s 178 nor s 306 of the Insurance Act (Ont, Can), *id*, mentions insurable interest as a limit to the quantum of claims.

69 Insurable Interest Report, above, n 53 at [2.74].

70 Australian Law Reform Report, above, n 58 at [141].

not invariably required: insurance on the lives of children and group insurance of employees or debtors. [...] Consent would, in any event, be an impractical and illusory requirement in the case of young children, [...] Inclusion within a plan of group insurance, on the other hand, is most unlikely to increase the risk of destruction by the trustee or creditor of the lives insured.

(c) Germany

3.44 In Germany, section 150 of the VVG 2008 requires the life insured to give prior written consent where the sum insured exceeds the ordinary burial costs. This is the sole condition for effective insurance. Insurable interest is not required at all.

3.45 As a legal concept, consent is based on the understanding that human beings are free to choose the nature of their interactions with others. They are free to court risks, subject themselves to physical and emotional intrusions, and to contract. Consent is thus the ultimate manifestation of free will.

3.46 A fundamental issue of the consent-based model is how the requirement will be enforced. The law cannot merely render an insurance contract which lacks the consent of the life insured void, since the rationale of the consent-based model is regulatory in nature and not meant to protect one contracting party against the other. If the effect of the lack of consent is that the contract is void, the parties may still choose to uphold the contract, and this will not aid the law in reducing the risk of moral hazard or wagering. This necessarily means that the contract must be either rendered illegal, or that penal consequences or sanctions (such as the revocation of an insurer's license) will have to be imposed by regulators on insurance companies that flout these rules.

3.47 Forgery of written consent is a highly critical issue. If the attempt at forgery is successful, firstly, the life insured is not put on notice, and secondly, it means that any person in the world could take out a life insurance on a particular individual. Hence, if forgery goes undetected, the consent-based model would actually increase the possibility of exploitation since anyone can take out life insurance on a particular individual.

3.48 Where the life insured is vulnerable and under the care or control or charge of the prospective policyholder, it may be difficult in practice for the life insured to withhold from giving written consent. The prospective policyholder may obtain the consent via coercion, or unduly influence the life insured. Furthermore, the life insured may not have the resources or power to subsequently revoke consent, or may not do it out of fear of negative repercussions.

3.49 Safeguards may be required to minimise the above-mentioned issues of forgery and illusory consent. One option to address both issues simultaneously is to require that the written consent be witnessed by an

independent third party who must be able to also assess if there is any duress or undue influence involved in obtaining the consent. This would go towards addressing the issues of forgery and illusory consent. However, this would create an additional administrative burden required to take out an insurance policy.

3.50 The requirement of consent is impractical in certain commercial situations. For example, where a company wishes to take out a group life insurance policy on its employees, consent would have to be obtained from every single employee. Arguably, in this situation, the risk of gambling or moral hazard is low and not commensurate with the costs of the additional administrative burden. In Germany, the VVG 2008 has carved out an exception in section 150(2) such that consent of the employees is not required when a company takes out a group life insurance policy. Should Singapore choose to adopt the consent-model, it is submitted that this exception ought to be incorporated as well.

3.51 Another commercial situation that may arise is where a creditor wishes to take out an insurance policy on the life of his debtor. We do not think that the risk of moral hazard is low enough for a similar exception to be carved out in this situation. In such instances, the debtor may be incentivised to withhold consent and use this as a bargaining tool to reduce his debt. It is submitted that there should be a requirement in such instances that consent should not be unreasonably withheld. For example, where A can show a pecuniary interest in B's life, the starting position is that B will be deemed to have provided consent unless B can justify why his consent should be withheld. The implication of this rule is that it would probably require the establishment of a court or tribunal to declare whether it is unreasonable for consent to be withheld for any given case.

(d) Discussion

3.52 Current industry practice and consumer demand place a premium on simplicity of process for applying and purchasing insurance. Lack of formality is at a premium. Introducing this consent requirement would add to the administrative burden, and there is a risk that the local insurance companies would lose their competitiveness because of the extra requirements imposed as compared to other jurisdictions. This may cause, where possible, prospective insureds to seek coverage from insurance companies of other jurisdictions.

3.53 As discussed above, we may explore the possibility of including the withdrawal of consent rule in order to provide fuller protection against the incentive to murder. However, the repercussion is that this may cripple the traded life policies market. For this practical reason, it is unlikely that the withdrawal of consent rule will be applied.

B. INSURABLE INTEREST IN INDEMNITY POLICIES

3.54 The comparative analysis will focus on three areas of insurable interest for indemnity policies:

- (1) The nature of the interest;
- (2) the timing of assessment; and
- (3) the extent of interest.

1. Nature of interest

(a) Singapore

3.55 In Singapore, there is no statutory requirement of insurable interest for indemnity policies under our IA. However, pursuant to the common law position established in *Lucena v Craufurd*⁷¹ and concretised in *Macaura v Northern Assurance Co*,⁷² a policyholder must have insurable interest in the subject matter of his or her indemnity policy before he or she can recover under the policy. The recognised insurable interest must take the form of a legal or equitable interest, which generally takes the form of some proprietary interest in the subject matter. Notably, unlike the requirement of insurable interest for life policies, the want of insurable interest in indemnity policies merely allows the insurers to deny claims, but the insurers cannot render the policies null and void.

3.56 However, even this requirement has been significantly eroded by the line of bailee insurance cases⁷³ and for contractors-all-risks policies,⁷⁴ as the courts have held that mere potential legal liability is sufficient to support a full claim under property indemnity policies. This position has been accepted locally.⁷⁵ In other words, a policyholder need not hold a strict legal or equitable proprietary interest in the subject matter before it can make a valid claim under a property indemnity policy; instead the policyholder need merely show that he has an interest in the form of his potential legal liability as regards the said property.

3.57 The main problem with the current state of law is that it is too restrictive. The bailee and contractor-all-risks policy cases show that the courts are painfully cognisant of the fact and have tried to loosen the

71 (1806) 2 Bos & Pul (NR) 269, 127 ER 630, HL (UK).

72 [1925] AC 619, HL (UK).

73 See *Waters v Monarch Fire and Life Assurance Co* (1856) 5 El & Bl 870, 119 ER 705, [1843–1860] (1856) All ER Rep 654, Ct of Queen’s Bench (Eng & Wales); and *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, HL (UK).

74 *Petrofina (UK) Ltd v Magnaload Ltd* [1984] 1 QB 127, HC (Eng & Wales).

75 For bailee cases, see *Sui Brothers (Pte) Ltd v Norwich Winterthur Insurance (Far East) Pte Ltd* [1993] 1 SLR(R) 8, HC. For contractor-all-risks policies, see *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd* [2013] 1 SLR 1, HC.

restrictive reins around the requirement in the said cases. The main takeaway from those cases is that a policyholder can have legitimate economic interests over a property even though he or she may not have any proprietary rights over the said property; by restricting insurable interest to merely proprietary interests, we find that a significant portion of risks are incapable of being insured for. Even though the courts have somewhat alleviated the problem by extending insurable interest to potential legal liability, it is not nearly enough as economic interests can take forms even beyond potential legal liability.

3.58 Another issue is the uncanny overlap between the insurable interest requirement and the indemnity principle, making one or the other otiose.

(b) United Kingdom

3.59 In the UK, the Law Commissions had previously provided in their 2016 draft bill for situations where an insurable interest will arise for non-life related policies. However, the Law Commissions have completely removed proposals for insurable interest in non-life policies, preferring to leave it to the existing law. The law is effectively the same as in Singapore, set out above. However, it remains helpful to consider the reforms that were considered by the Law Commissions in 2016.

3.60 The Insurable Interest Bill 2016 provided for four situations where an insured has an insurable interest for indemnity policies. The first three mirror the common law for property insurance – if the insured has a right in the subject matter, or arising out of a contract in respect of that subject matter, or has possession or custody of the subject matter. The fourth situation is that an insured has an insurable interest if he or she “will suffer an economic loss if the insured event relating to the subject matter occurs”. This limb is likely to be interpreted in the same manner as the factual expectancy test.

(c) Australia

3.61 Whilst not explicitly stated, section 17 of the Australian ICA presupposes that the assured has an insurable interest in the property insured at the time of loss. This is also the result of the indemnity principle as the assured must prove that he or she suffered an indemnifiable loss before he or she can recover under an indemnity policy, and this necessarily involves proof of an interest in the subject matter.

3.62 More importantly, section 17 stipulates that the suffering of “a pecuniary or economic loss” would be sufficient and it is no defence to the insurer that “the insured did not have an interest at law or in equity in the property”. This creates an additional category of recognised interests

beyond Lord Eldon's strict proprietary test. The affinity with the test propounded by Lawrence J in *Lucena v Craufurd*⁷⁶ is apparent, with the slight difference being that Lawrence J was concerned with the "moral certainty of loss" at the time of contract formation whereas section 17 requires actual loss arising from the happening of an event insured against.

3.63 Briefly, the ALRC's chief criticism of Lord Eldon's test is that it is a "technical rule" that prevented an insured from recovering losses suffered by an insured which the insurer had agreed to indemnify. Further policy rationales for recognising a broader scope of insurable interest have been comprehensively discussed by the Supreme Court of Canada in *Kosmopoulos v Constitution Insurance Co.*⁷⁷

(d) Germany

3.64 As for Germany, there is again no distinct concept of insurable interest. Rather, as noted in section 74(1) of Germany's VVG 2008, the relevant concept is that of "insured interest" and "insurable value". The concept is akin to the indemnity principle. For example, section 88 provides that the insurable value for real property insurance is the amount which the policyholder must spend upon occurrence of the insured event to replace or to restore the insured property to mint condition, subject to betterment. This concept then acts like insurable interest because the absence of insured interest means that the policyholder is not required to pay the premium but the contract is void if the policyholder had intended to obtain a pecuniary benefit by insuring a non-existent interest. In this way, the concepts are merged.

(e) Discussion

3.65 Australia and, possibly, the UK have shifted from Lord Eldon's insistence on strict proprietary rights in preference for a broader nature of insurable interest approximating to Lawrence J's factual expectancy test. However, as alluded to before, given the close to complete overlap between the indemnity principle and the concept of insurable interest in indemnity policies, it may be a neater solution to replace insurable interest with the indemnity principle altogether and simply remedying the indemnity principle to recognise a greater plethora of indemnifiable losses.

3.66 Importantly, we note that the overlap between the indemnity principle and the insurable interest requirement is complete in all but one potential respect – the timing of assessment. The indemnity principle always arises at the time of loss whereas insurable interest can either be assessed at the time of loss or contract formation. However, as will be explained under the next heading of this discussion paper, it is submitted

76 Above, n 71.

77 [1987] 1 SCR 2, 34 DLR (4th) 208, SC (Can).

that this difference in the timing of assessment does not have any significant impact and the indemnity principle is sufficient to guard against the hazards that insurable interest is designed to prevent.

2. Timing of assessment

(a) Singapore

3.67 The insured needs to have insurable interest at the time of loss (as in *Macaura v Northern Assurance Co*).⁷⁸ However, there is a *dictum* from *Sadler's Co v Badcock*⁷⁹ that insurable interest is required at contract formation as well.

3.68 Given the already restrictive conception of insurable interest under the current law, requiring it to be present at the time of contract formation further limits one's ability to properly plan for his financial independence. Consider, by way of example, a potential insured who has a factual expectation of receiving proprietary interest in a chattel and decides to insure the property for the transition period before he or she gains actual possession and hence proprietary rights over the said property: should he or she then suffer a loss after gaining possession of the property, the insurer could nonetheless deny the claim by pointing to the fact that the insured lacked insurable interest at the time of contract formation. This seems unfair.

(b) United Kingdom

3.69 In the UK, clause 3(1) of the Insurance Interest Bill 2016 prescribed that insurable interest in indemnity insurance is required at both the time of contract formation and at the time of loss.

3.70 The insured must have insurable interest in the subject-matter at the time of contract. Alternatively, it suffices if at the time of contract, the insured had a reasonable prospect of acquiring insurable interest during the policy term. Otherwise, the policy is void and effectively worthless. On the other hand, if the insured loses insurable interest that he or she possessed at the outset, the policy is valid; likewise if the policyholder had a reasonable prospect of obtaining an interest which did not in fact materialise.

3.71 Furthermore, clause 3(2) of the Insurance Interest Bill 2016 stipulated that the insured must have had insurable interest at the time of the insured event to make a claim even if the policy is valid. However, this is distinct from the indemnity principle because this did not require the

78 Above, n 72.

79 (1743) 1 Wils KB 10, 95 ER 463, Ct of King's Bench (Eng & Wales).

insured to suffer any loss or for the payment to resemble the loss suffered.⁸⁰

3.72 No rationale has been proffered for the requirement of insurable interest at the time of contract formation but the concerns raised in Part III.B.2(a) for Singapore would not have arisen in the UK simply because the nature of insurable interest recognised under the Insurance Interest Bill was much wider, in that it includes a reasonable prospect of acquiring insurable interest. Hence, an insured will not be left high and dry simply because he or she lacked proprietary interest at the time of contract formation so long as a reasonable prospect of attainment could be shown.

3.73 Given the already broadened scope of insurable interest, if the insured cannot even show a reasonable prospect of attaining some pecuniary interest at the time of contract formation, he or she could then be said to be wagering when the policy was taken out, as any subsequent attainment of an insurable interest would have been unforeseen and thus a matter of luck. Accordingly, the requirement of insurable interest at the time of contract formation may be to guard against the prospect of insured persons gambling.

(c) Australia

3.74 In Australia, section 16 of the ICA abrogates the need for insurable interest at the time of contract formation but section 17 presupposes the existence of insurable interest at the time of loss. This means that the requirement of insurable interest in indemnity policies completely eclipses the indemnity principle.

(d) Germany

3.75 The insured interest referred to above is required both at the commencement of the insurance cover and throughout the policy term. If the policyholder does not have any insured interest at the commencement of cover, he need not pay the insurance premium: section 80(1) of the VVG 2008. However, if the policyholder had insured a non-existent interest intending to gain an illegal pecuniary benefit, the contract shall be void, with the insurer being entitled to the premiums paid up until the time he or she learns of the circumstances establishing the nullity: section 80(3) of the VVG 2008.

3.76 If, on the other hand, the interest is present at the commencement of cover but ceases to exist subsequently, the insurer is entitled to the premiums for the period up until the time it learns of the cessation of the interest: section 80(2) of the VVG 2008.

⁸⁰ Insurable Interest Report, above, n 53 at [3.6].

(e) Discussion

3.77 Pursuant to our observations above, we need to discuss whether the requirement of insurable interest should be completely replaced by a broader indemnity principle that recognises pecuniary and economic losses that need not be strictly legal nor equitable in nature.

3.78 The sole distinction between English and Singapore law in this area may be that Singapore's Civil Law Act⁸¹ prevents wagering contracts from being enforceable (compare the Gambling Act 2005⁸² in the UK which has allowed gambling contracts to be enforceable),⁸³ and hence Singapore does not need the requirement of insurable interest at the time of contract formation to deal with the scourge of wagering as our anti-wagering laws already take care of that.

3. Extent of Interest

3.79 This is generally not an issue for indemnity policies since the indemnity principle would restrict the extent of insurable interest to the extent of loss suffered. However, some concerns may be raised pursuant to the broadening of the nature of insurable interest to the factual expectancy test as the courts would no longer have a legal standard to measure the extent of loss. Lord Buckmaster in *Macaura v Northern Assurance Co*⁸⁴ termed such a calculation as “almost impossible to make”.⁸⁵

3.80 This has not been explored in Australian case law or legislation, but Justice Wilson in *Kosmopoulos v Constitution Insurance Co*⁸⁶ made short work of this counterargument by noting that judges have demonstrated that it is entirely possible for the courts to value intangible interests such as share value, amongst other things, so long as the losses are pecuniary or economic in nature. The factual expectancy test has also not raised any problems with quantification in the United States. The UK Insurable Interest Bill makes clear that quantification of the claim is a matter for the indemnity principle as well.⁸⁷

4. Consultation on the proposed reforms for the law on insurable interest

3.81 The respondents' positions on the proposed reforms related to insurable interest are more varied than that for warranties. Some insurers agreed with the abolition of the insurable interest requirement, while

81 Cap 43, 1999 Rev Ed.

82 2005 c 19 (UK).

83 *Id*, s 335.

84 Above, n 72.

85 *Id* at 627.

86 Above, n 77.

87 Insurable Interest Report, above, n 53 at [3.6].

others preferred just an expansion of the categories of insurable interest. Notably, none of the respondents proposed maintaining the status quo.

3.82 Roughly half of the respondents agreed with abolishing the insurable interest requirement altogether, that is, repealing both section 57 and section 62. The main reason proffered is that the insurable interest requirement restricts the flexibility of insurers to offer novel products related to, for instance, trust entities set up for the legacy planning of high net worth individuals. This impedes the insurers' ability to compete with insurers in other jurisdictions without the insurable interest requirement, such as Australia, Germany and the Isle of Man.

3.83 The insurers which disagreed with abolishing the insurable interest requirement remain concerned with the moral hazard presented by an insured insuring without any insurable interest in the life insured. This sentiment is especially common among the life insurers consulted. Some insurers also cautioned making too drastic a change to the law on insurable interest, pointing out that even the UK has not been able to settle on a position on whether to abolish the requirement.

3.84 However, even the respondents who opposed abolishing the insurable interest requirement do not suggest retaining the status quo. They instead supported the proposal to replace section 57(1)(b)(iv) of the IA with clause 2(2) of the Insurable Interest Bill 2018, which states that "an insured has an insurable interest [in the life of another person] if there is a reasonable prospect that the insured will suffer economic loss if the insured event occurs". However, there is a common concern on the uncertainty over the meaning of *reasonable prospect* and *economic loss*. Some respondents asked for guidelines and non-exhaustive examples to be incorporated in the reformed legislation for greater certainty.

3.85 Having regard to the results of the Consultation, the Subcommittee is of the view that the insurable interest requirement should be abolished for indemnity policies. Such policies only cover the insured up to amount of loss suffered by the insured caused by the insured peril. In such cases, the insured's insurable interest is clear.

3.86 For life-related policies, the respondents' concern with the potential moral hazard is unexpected. Given the notable number of respondents' preference to expand the recognised circumstances in which an insurable interest arises instead of outright abolishing the insurable interest requirement, the Subcommittee recommends taking an incremental approach to the law reform process and proposes replacing section 57(1)(b)(iv) of the IA with clause 2(2) of the Insurable Interest Bill 2018. This will relieve the restriction of the insurable interest requirement while addressing the moral hazard concerns voiced by the insurers.

3.87 However, the Subcommittee does not recommend the provision of examples or further guidelines under statute on the definition of *reasonable prospect* and *economic loss*. The Subcommittee is of the view that the

definition of the terms should be developed by the courts incrementally to accommodate the variety of possible interests a potential policyholder may have. This would address the moral hazard concern by requiring some form of interest on the part of the policyholder without constraining policyholders and insurers within particular types of products that may develop over time. This approach will better allow the law to develop incrementally, guided by the legislated principle of a *reasonable prospect of economic loss*.

3.88 Some respondents also suggested adopting the circumstances set out at clause 2(3) of the draft Insurable Interest Bill 2018 as cases where an insured would be deemed to have insurable interest. However, it is unnecessary to adopt these examples if sections 57(1)(b)(i) to (iii), which are largely similar to the circumstances listed at clause 2(3) of the draft bill, are retained.⁸⁸

3.89 In respect of the timing of assessment, the Subcommittee recommends maintaining the position that the insurable interest requirement is to be satisfied at the point of time the life insurance policy is effected, as provided under section 57(1)(a) of the IA, and not when the insured peril occurs. This is so that the market for traded life policies can be maintained, since requiring insurable interest at the time of loss will render life policies untradeable.

3.90 Finally, the majority of the respondents are not in favour of the withdrawal of consent rule due to the practical issues that may come with its implementation, as discussed above. The Subcommittee therefore does not recommend adopting this rule.

C. RECOMMENDATIONS

3.91 Our recommendations for life-related policies are as follows:

- (1) Repeal section 62 of the IA; and
- (2) retain section 57 of the IA, save that section 57(1)(b)(iv) of the IA be substituted with clause 2(2) of the UK Insurable Interest Bill 2018 and enacted as a standalone provision. Clause 2(2) of the UK bill states that “an insured has an insurable interest [in the life of another person] if there is a reasonable prospect that the insured will suffer economic loss if the insured event occurs”.

3.92 Our recommendation for non-life-related or indemnity policies is to adopt sections 16 and 17 of the Australian ICA, which is to basically remove

⁸⁸ Nonetheless, we would recommend expanding the classes in the IA, above, n 47, s 57(1)(b) to cover insuring one’s grandchildren and parents.

the requirement for insurable interest. The relevant provisions are as follows:

16 Insurable interest not required

A contract of general insurance is not void by reason only that the insured did not have, at the time when the contract was entered into, an interest in the subject-matter of the contract.

17 Legal or equitable interest not required at time of loss

Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that property the subject-matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by reason only that, at the time of the loss, the insured did not have an interest at law or in equity in the property.

CHAPTER 4

BROKERS' RESPONSIBILITY FOR UNPAID PREMIUMS

4.1 Section 53 of the MIA (and the MIA 1906) provides for a broker's liability for premiums of marine insurance policies:

- (1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.
- (2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

4.2 Section 53(1) of the MIA is the codification of a custom under which insurers claim for premiums payable not from the policyholder but from the broker. Although this custom originated from Lloyd's, it extends to marine insurance markets outside Lloyd's as well. It, however, does not appear to apply to non-marine insurance.⁸⁹

4.3 The intention of having this custom is to provide underwriters with some security against unfamiliar policyholders who were usually foreign parties to whom the underwriter had little knowledge of. Underwriters were more familiar with brokers and were therefore more willing to extend credit to the brokers.

4.4 This custom works by creating a legal fiction to the effect of having the broker pay the premium to the insurer, thus discharging the policyholder's liability to pay, and thereafter having the insurer lend the money back to the broker. This creates a personal debt obligation between the broker and insurer and overrides the normal rule of agency law that an agent is not personally liable on a contract effected for its principal.

89 See *Pacific and General Insurance Co v Hazell* [1997] LRLR 65, [1997] 6 Re LR 157, HC (Eng & Wales).

A. OTHER JURISDICTIONS

1. United Kingdom

4.5 The UK Law Commissions considered section 53 of the MIA 1906 in an issue paper published in July 2010,⁹⁰ in which they tentatively observed that:

- (1) The application of section 53(1) is unclear;
- (2) the limited application of section 53(1) is anomalous;
- (3) the common law fiction, which was invented to give effect to the custom before it was codified by section 53(1), has produced unprincipled and conflicting case law;
- (4) even for the marine insurance market, it is unclear whether there is any justification for section 53(1);
- (5) the risk of a broker's insolvency appears to fall on the insurer and the consolidation of brokers may have serious consequences for insurers; and
- (6) the risk of a policyholder's insolvency falls on the broker, which may be a burden for those entering the market.

4.6 The Law Commissions therefore tentatively proposed and sought responses on the following reforms:

- (1) Reverse the rule in section 53(1) of the MIA 1906 such that, by default, the broker is no longer personally liable for the premium;
- (2) requiring brokers to hold client funds paid to them in a segregated bank account to prevent the policyholder from being exposed to double liability where the broker becomes insolvent after the policyholder has already paid the premium to the broker;
- (3) making it possible to contract out of the proposed default position so that the broker could become contractually liable for the premium;
- (4) in the event that the premium has not been paid, requiring the insurer and/or broker to notify the policyholder before the

90 Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Issue Paper 8: The Broker's Liability for Premiums: Should Section 53 be Reformed?*, Law Commission website (July 2010) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL8_Brokers_Liability_for_Premiums.pdf> (accessed 10 December 2019; archived at <https://web.archive.org/web/20191210092540/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL8_Brokers_Liability_for_Premiums.pdf>).

insurer exercised its rights under any premium payment warranties ('PPWs');

- (5) instead of just repealing section 53(1), replacing it with a provision stating the proposed default position and the proposed obligations on any or all of the three parties proposed above; and
- (6) re-enacting section 53(2).

4.7 A summary of responses was published in April 2011.⁹¹ The majority of consultees agreed with the proposal for the default position and that there ought to be complete freedom of contract.⁹² Most also agreed that section 53(1) should be replaced.⁹³ However, most disagreed with imposing an obligation on insurers or brokers to notify the insured in the event of non-payment of the premium. Most also disagreed with having notification as a precondition to exercising a right to cancel. The majority were of the view that obligations on notification should be dealt with by contract.⁹⁴

4.8 The Law Commissions appear to have taken no further publicly known steps to reform section 53 of the MIA 1906 after the consultation. Section 53 therefore remains unchanged.

2. Germany

4.9 There is no useful German case law on the issues concerned here that may afford guidance. The position under German law is very much based on general practice.

4.10 There is no responsibility or liability to insurers on the part of brokers or insurance intermediaries for unpaid premium. Consequently, an insurer's sole recourse is against the insured. The recourse may, broadly, take two forms.

4.11 The first is for the insurer to sue the insured for unpaid premium in the German courts. There is no case law that may be cited as examples where this has occurred. Feedback received from German legal practitioners suggests that it is not common for insurers to write-off unpaid

91 Law Commission and Scottish Law Commission, Insurance Contract Law: Summary of Responses to Issues Paper 8: The Broker's Liability for Premiums: Should Section 53 be Reformed?, Law Commission website (April 2011) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL8_Section-53.pdf> (accessed 10 December 2019; archived at <https://web.archive.org/web/20191210091957/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL8_Section-53.pdf>).

92 *Id* at [3.3].

93 *Id* at [3.22].

94 *Id* at [3.27]–[3.39].

premium as opposed to pursuing the claims against the assured for unpaid premium in the courts.

4.12 The second option is for insurers to cancel the policy. This appears to be the more common option, and policies often contain an equivalent to premium warranty provisions that may be found in, for example, some of the Institute Cargo Clauses ('ITC') provisions.

4.13 If premium remains unpaid, insurers will usually give a two-week notice for premium (or any further or additional premium) to be paid, failing which the policy may be cancelled. It does not matter that there may be prior pending claims – if a premium notice is given and payment is still not made, the insurer can cancel the policy and thereby deny any pending claim that has arisen within that policy period.

4.14 It is not the practice of German insurers to adjust or allow claims and then seek to set off claims against unpaid premium. If premium remains unpaid, the policy is more likely to be cancelled. In practice, therefore, the claim will not get to the stage where it is adjusted or approved but there is still unpaid premium. However, the right of set-off is in theory available.

3. Norway

4.15 Norwegian insurance law is codified and under the Insurance Contracts Act, which was first enacted in 1930 as the Act of 6 June 1930 relating to Insurance Contracts. It has been amended and updated over the years, with the last update under the Act of 19 June 2009 No 77 relating to Insurance Contracts.

4.16 Marine insurance falls within Part A but note must be taken of the exemption set out in sections 1 to 3, which, essentially brings Norwegian marine insurance law in line with English marine insurance law in that freedom of contract is paramount – the insured or assured and the underwriter are at liberty to 'contract out' of the provisions as set out in the respective marine insurance acts, with a few exceptions under Norwegian law.

4.17 Norway is one of the Scandinavian countries, and marine insurance (for example, builders', hull and machinery, loss of hire and war risks policies) taken out on Scandinavian terms are governed by the Nordic Marine Insurance Plan of 2013, Version 2019, which is based largely on Norwegian law. There is a useful commentary on the Nordic Plan available on the Internet.⁹⁵

⁹⁵ *The Nordic Marine Insurance Plan of 2013, Version 2019*, website of the Nordic Association of Marine Insurers <<http://nordicplan.org>>.

4.18 With regard to responsibility of brokers for unpaid premium, unlike in English law where the broker is liable to the underwriter for the premium, there is no such liability on the broker under Norwegian law as the broker is viewed as an agent of the insured. Liability for payment of premium falls on “the person effecting the insurance” and is due on demand, unless otherwise agreed. In the event of non-payment of premium, the underwriter is obliged to serve a 14-day notice before cancellation of cover. Part A, Chapter 5, of the Norwegian Insurance Contracts Act and Part One, Chapter 6, of the Nordic Plan deals with premium.

B. ISSUES

1. Impracticalities

4.19 In the normal course of business, insurers enter into Terms of Business Agreements (**TOBAs**) with brokers. TOBAs govern the conduct of insurance business between brokers and insurers.

4.20 Where a risk transfer TOBA is entered into, the broker collects the premium as the agent of the insurer. Once the broker receives the premium, the premium is deemed to have been paid by the insured. In contrast, in cases of non-risk transfer TOBAs, the broker is the agent of the insured for the collection of premiums.

4.21 However, a TOBA is not likely to displace the provisions of section 53 of the MIA. This means that where a broker becomes insolvent, the insurer will not be able to turn to the policyholder instead to recover the premium. Even if the insolvent broker had sued the policyholder for the premium, the insurer would not receive the premium in full and would be competing with the broker’s other creditors. In the absence of a suitably worded clause in the policy, the insurer may not refuse to pay a loss on the ground that the premium has not been paid.

2. Anomalies with common law

4.22 The fiction that the premium has been paid and then lent back to the broker leads to complex issues and conflicting decisions, especially when it comes to premium payment clauses. An example of such clauses is adjusted premium clauses. Such clauses provide for premium increases in certain circumstances, such as where a vessel enters a war zone. However, under the common law fiction for section 53(1) of the MIA, the premium is deemed to have been paid at inception and thereafter lent back to the broker. This means that additional premium could not have been determined at that later time when the adjusted premium clause is supposed to have been engaged.

4.23 Another example is PPWs. In cases where premium is to be paid by instalments and the PPW states that the insurer can terminate upon non-

payment of an instalment, applying the common law fiction may mean the PPW can never take effect. It is also unclear whether an insurer could rely on a PPW if the broker goes into liquidation. The courts have cast doubt on the conclusion that a marine insurer may never cancel a policy through an automatic termination clause for failure to pay premiums.⁹⁶

3. Redundancy

4.24 In practice, the insurers and underwriters do not appear to be aware of section 53 of the MIA. In cases where premium is outstanding, whether in a lump sum or instalments, the insurers usually inform the brokers who would then contact the insureds. The insurers may threaten to cancel the policy but try to avoid doing so due to the commercial relationship between the brokers and the insurers.

4.25 The issue on premium payment becomes more critical when there is a claim to be paid. The insurer may hold back the claim payment or may set off the claim payment against the outstanding premium. Section 53(1) is rarely invoked to settle the issue of who is liable for the premium or arguments against the holding back and/or setting-off of claims against the premium.

C. RECOMMENDATIONS

4.26 The issues with section 53(1) of the MIA are multi-fold. Its application is unclear, and its limited application is anomalous. The common law fiction, which was invented to give effect to the custom before it was codified by section 53(1), has produced unprincipled and conflicting case law.

4.27 Even in the marine insurance market, it is unclear whether there is any justification for section 53(1). The risk of a broker's insolvency appears to fall on the insurer. The consolidation of brokers may have serious consequences for insurers. On the other hand, the risk of a policyholder's insolvency falls on the broker, which may be a burden for those entering the market.

4.28 Notwithstanding recent case law, it remains possible that the common law fiction could be invoked and relied on by the courts in difficult and in unusual cases. This leaves the law in a state of confusion, which could lead to extremely costly litigation in the event of one of the parties becoming insolvent. Whilst TOBAs provide market flexibility, it cannot solve all the problems of the current law. It seems unlikely that a TOBA

96 See, for example, *J A Chapman & Co Ltd (in liquidation) v Kadirga Denizcilik ve Ticaret AS* [1998] Lloyd's Rep IR 377, CA (Eng & Wales); *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2004] 1 WLR 2820, CA (Eng & Wales); *Allianz Insurance Co Egypt v Aigaion Insurance Co SA* [2008] 2 Lloyd's Rep 595, CA (Eng & Wales).

could entirely exclude section 53(1) because the only parties to a TOBA are the insurer and the broker.

4.29 Finally, section 53(1) is limited to marine insurance only. It is not principled to make the broker personally liable in the marine insurance market but not for other types of insurance.

4.30 As such, section 53(1) should be reformed to make policyholders liable for the premium payments due under their insurance policies. This would allow the insurer to sue the policyholder for the premium, if unpaid. The policyholder receives the benefit of the insurance coverage and so it is the policyholder who should primarily be liable for it. The broker would not be liable for the premium unless it had expressly assumed such liability.

4.31 The marine insurance law practitioners in the Subcommittee found no obvious evidence of policyholder or consumer detriment that would nowadays require special rules such as those in section 53(1). On the other hand, reforming section 53(1) in this way would bring marine insurance law into line with general contract and agency law. It would also enable the parties to agree their own contractual arrangements on issues including credit risk through their TOBAs, allowing greater flexibility.

4.32 In view of the foregoing, in particular the Law Commissions' proposed reform and the responses they received, the Subcommittee recommends the following reforms:

- (1) Repealing section 53(1) and replacing it with a provision stating that unless agreed otherwise, a broker is not personally liable to pay the premium to the insurer; and
- (2) re-enacting section 53(2) with an amendment that makes clear that the lien provided therein should be extended to non-marine insurance as well.

CHAPTER 5

LATE PAYMENT OF CLAIMS

5.1 In 2017, legislative amendments were made to the UK Act. A new section 13A was introduced under the heading “Implied term about payment of claims”. It was stated under section 13A(1) that “It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.” There is no equivalent language in Singapore’s statutory insurance regime.

5.2 The Subcommittee takes the position that it would be advisable for Singapore to consider the introduction of similar statutory language. The introduction of a statutory obligation to make payment within reasonable time would increase the protection afforded to insured persons, who may otherwise suffer prejudice or damage if insurance payments are unreasonable delayed.

5.3 There is a clear public policy interest in ensuring that insurance customers are protected against unreasonable delay in the payment of claims. This point does not appear to be seriously in doubt. For example, the Singapore Insurance Brokers’ Association Code of Practice⁹⁷ contains a specific commitment to consumers that claims will be handled “fairly and promptly”,⁹⁸ and it is a common licensing condition for all insurance companies registered with the Monetary Authority of Singapore that the insurer will treat all policyholders fairly. The same position is also reflected in the British Insurance Brokers’ Association comment that was quoted in the report of the UK Law Commissions entitled *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* (**‘Late Payment Report’**).⁹⁹

97 *Singapore Insurance Brokers’ Association Code of Practice*, Singapore Insurance Brokers’ Association website (11 June 2008) <<https://www.siba.sg/images/upload/codeofpractice.pdf>> (accessed 10 December 2019; archived at <<https://web.archive.org/web/20160911185908/http://siba.sg/images/upload/codeofpractice.pdf>>).

98 *Id* at [7].

99 Law Commission and Scottish Law Commission, “The Case for Reform” in *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353; Cm 8898; Scot Law Com No 238) (Law Commission website (July 2014) (**‘Late Payment Report’**), 260 at [26.8] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc353_insurance-contract-law.pdf> (accessed 10 December 2019; archived at <https://web.archive.org/web/20191210110448/https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc353_insurance-contract-law.pdf>), quoting the British Insurance Brokers’ Association.

Consumers buy insurance to protect their possession and businesses buy to protect their assets and liabilities. Any delay in payment can negate that protection.

A. UNITED KINGDOM

5.4 The Subcommittee recognises that the introduction of section 13A in the UK Act was effected as a response to the anomalous manner in which the law in England and Wales had specifically developed in respect to damages for loss suffered as a result of an insurer unreasonably withholding payment of claims. The Law Commissions in their Late Payment Report noted that, under English law, policyholders are not entitled to damages for an insurer's failure to pay an insurance claim within a reasonable time (or at all).

5.5 The Law Commissions observed that this rule was out of line with ordinary contract principles and was based on a "technical legal fiction that an insurer undertakes to prevent a loss from occurring".¹⁰⁰ Significantly, the Late Payment Report took the view that the English position was "unprincipled and unfair, and should be reformed",¹⁰¹ after making the following observation:¹⁰²

The rule also appears unique. It has not been followed in other common law jurisdictions, or in Scotland. Nor is it applied in contracts for life insurance, or where an insurer undertakes to reinstate property.

5.6 Prior to the introduction of section 13A in the UK Act, the position under English law was based on the "legal fiction" that an insurer's fundamental obligation was not to pay claims, but to prevent the loss occurring in the first place. As such, an insurance policyholder could not claim damages for non-payment of insurance claims. This was because English law did not recognise a claim for damages for the late payment of damages.¹⁰³ This position appears to have been heavily criticised, to the extent of being referred to as a "blot on English common law jurisprudence".¹⁰⁴

5.7 Two cases were identified in the Late Payment Report as setting out the position under English law at the time: *Sprung v Royal Insurance (UK) Ltd*¹⁰⁵ and *Ventouris v Mountain (The Italia Express, No 2)*.¹⁰⁶ The

100 "The Current Law" in the Late Payment Report, *id*, 252 at [25.30].

101 *Id* at [25.32].

102 *Id* at [25.31].

103 *Id* at [25.10].

104 "The Case for Reform" in the Late Payment Report, *id* at [26.4], quoting Malcolm Clarke, "Compensation for Failure to Pay Money Due: A 'Blot on English Common Law Jurisprudence' Partly Removed" [2008] J Business L 291. Clarke himself was quoting *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561 at [92], HL (UK), *per* Lord Nicholls of Birkenhead.

105 [1999] 1 Lloyd's Rep IR 111, CA (Eng & Wales).

Subcommittee notes that neither of these cases has been applied or followed by the Singapore courts for the “legal fiction” as described in the Late Payment Report. However, the Singapore courts have not expressed any position on the issue either way.

5.8 The Late Payment Report’s recommendations appear to have been influenced by the need to address the English law position as set out in *President of India v Lips Maritime Corporation*,¹⁰⁷ in which the House of Lords took the view that there is no valid cause of action in damages for the late payment of damages, and that the only remedy would be limited to interest for such late payment. When *Lips Maritime* was cited in the Singapore High Court in *Sintra Merchants Pte Ltd v Brown Notel Trading Pte Ltd*,¹⁰⁸ the Court did not apply the approach that had been adopted by the House of Lords in *Lips Maritime*, and instead observed that “the Singapore Court of Appeal is yet to consider the views expressed in the *Lips Maritime* case”.¹⁰⁹

B. OTHER JURISDICTIONS

5.9 Other jurisdictions have also enacted specific legislation to ensure the prompt payment of insurance claims: see Chapter 542, Subchapter B, of the Texas Insurance Code, titled “Prompt Payment of Claims”.¹¹⁰ This is despite the fact that Texas law does not appear to have previously applied the legal fiction that prompted the introduction of section 13A of the UK Act, prior to the enactment of its “Prompt Payment of Claims” statute. As such, the fact that Singapore has not adopted the same legal fiction that represented the position under English law does not prevent the introduction of statutory language to ensure that insurance customers are adequately protected against unreasonably late payment of claims.

5.10 For the above reasons, the introduction of similar statutory language in Singapore would be beneficial. This would clarify the scope of protection for insured persons under Singapore law, when confronted with the possibility of an unreasonable delay in the payment of insurance claims.

C. RECOMMENDATIONS

5.11 The obligation to make prompt payment should be imposed on a standard of reasonableness. The insurer should not be required to make immediate payment. It would also be artificial to impose a fixed time frame in which all valid insurance claims must be paid out. In order to

106 [1992] 2 Lloyd’s Rep 281, HC (Eng & Wales).

107 [1988] AC 395, HL (UK).

108 [1996] 1 SLR(R) 809, HC.

109 *Id* at [74].

110 Unfair Claim Settlement Practices Act, added to the Texas Insurance Code by Acts 2003, 78th Leg, ch 1274, s 2, with effect from 1 April 2005.

accommodate the range of circumstances in which insurance claims may be made, as well as to protect the interests of all parties involved, the obligation to make prompt payment should be based on a similar threshold of “reasonable time”.

5.12 Sections 13A(2) and (3) of the UK Act provide some guidance on the meaning of “reasonable time” and the factors that would be taken into account in determining whether the time taken to make payment has been “reasonable”. Under sections 13A(2) and (3), “reasonable time” is said to include a reasonable time to investigate and assess the claim, and what is “reasonable” will depend on “all relevant circumstances”. A non-exhaustive list of examples is provided, including the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside the insurer’s control.

5.13 In addition, the explanatory notes to the UK Enterprise Bill, which introduced the amendments to the UK Act, provides a further illustration to make it clear that an insurer may be found in breach of the obligation to make prompt payment if “it conducts its investigation unreasonably slowly, or is slow to change its position when further information confirming the validity of the claim comes to light”.¹¹¹ Similar guidance and illustrations should be included in the introduction of the statutory obligation to make prompt payment in Singapore. This would provide a degree of guidance to determine whether payment has been made promptly on the facts of each case.

111 “Clause 20: Insurance Contracts: Implied Term about Payment of Claims” in *Enterprise Bill [HL]: Explanatory Notes* (Bill 112 as brought from the House of Lords on 16 December 2015) at [230], website of the Parliament of the United Kingdom (17 September 2015) <<https://publications.parliament.uk/pa/bills/lbill/2015-2016/0063/en/63en06.htm>> (accessed 11 December 2019; archived at <<https://web.archive.org/web/20161026145455/https://publications.parliament.uk/pa/bills/lbill/2015-2016/0063/en/63en06.htm>>). The Enterprise Bill was enacted as the Enterprise Act 2016 (c 12; UK).

CHAPTER 6

CONCLUSION

6.1 For the duty of utmost good faith and its related areas of the duty of disclosure, misrepresentation, warranties and remedies of fraudulent claims, the framework and provisions of the bifurcated insurance contract law regime enshrined in the UK Act and the CIDRA should be adopted, albeit in a single Insurance Contract Act in Singapore. Desirable features of the Australian ICA may be adopted to supplement the provisions under the UK statutes.

6.2 For the requirement of insurable interest in life-related policies, the Subcommittee's recommendations are to:

- (1) Repeal section 62 of the IA; and
- (2) Retain section 57 of the IA, save that section 57(1)(b)(iv) of the IA be substituted with clause 2(2) of the UK Insurable Interest Bill 2018 and enacted as a standalone provision. Clause 2(2) of the UK Insurable Interest Bill 2018 states that "an insured has an insurable interest [in the life of another person] if there is a reasonable prospect that the insured will suffer economic loss if the insured event occurs".

6.3 For the requirement of insurable interest in non-life-related or indemnity policies, the Subcommittee's recommendation is to adopt sections 16 and 17 of the Australian ICA, which is basically to remove the requirement for insurable interest. The relevant provisions are as follows:

16 Insurable interest not required

A contract of general insurance is not void by reason only that the insured did not have, at the time when the contract was entered into, an interest in the subject-matter of the contract.

17 Legal or equitable interest not required at time of loss

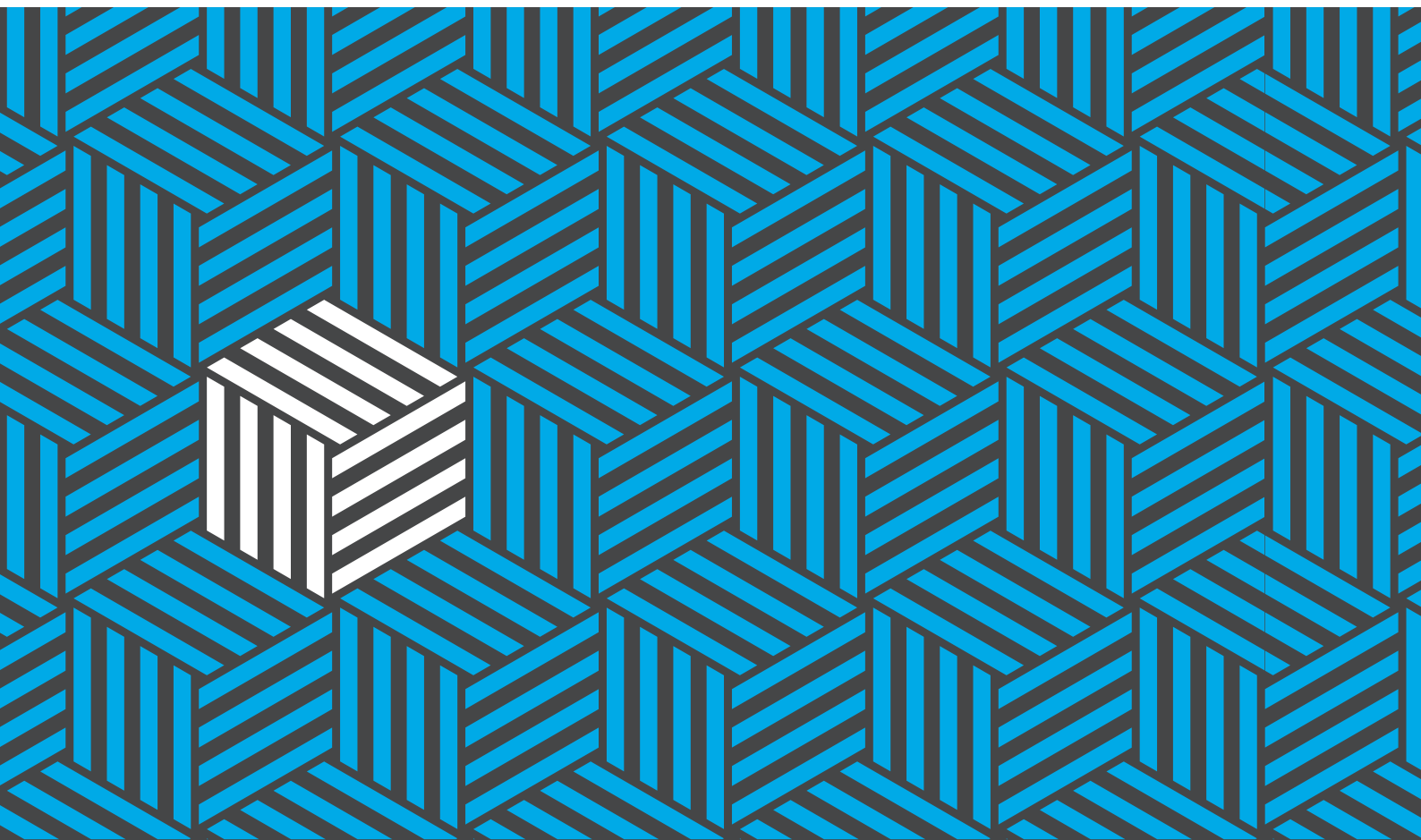
Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that property the subject-matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by reason only that, at the time of the loss, the insured did not have an interest at law or in equity in the property.

6.4 On brokers' responsibility for unpaid premiums under section 53 of the MIA, the Subcommittee recommends:

- (1) repealing section 53(1) and replacing it with a provision stating that unless agreed otherwise, a broker is not personally liable to pay the premium to the insurer; and

- (2) re-enacting section 53(2) with an amendment that makes clear that the lien provided therein should be extended to non-marine insurance as well.

6.5 Finally, with regard to late payment of claims, the Subcommittee recommends enacting a specific provision to require insurers to pay make payment within a “reasonable time”. For the meaning of *reasonable time*, reference may be made to sections 13A(2) and (3) of the UK Act and the explanatory notes to the UK Enterprise Bill. Relevant factors to be considered by the court as well as illustrations should be included under the provision enacted.



ISBN 978-981-14-4502-6 (softcover)
978-981-14-4503-3 (e-book)