UNIVERSITY OF SOUTHAMPTON

UTMOST GOOD FAITH IN MARINE INSURANCE CONTRACTS

A Comparative Study

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ABSTRACT

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This is thesis is a comparative study of the doctrine of utmost good faith in the realm of marine insurance law under three different laws. These are the English Marine Insurance Act of 1906, Egyptian Marine Trade Law of 1990 and Saudi Arabian Commercial Court Law of 1931. The thesis explores and investigates the bundle of rights and liabilities which are generated by the imposition of the doctrine on the assured and his agents before and after the inception of the contract including the time at which a claim for loss is presented. Its central goals will basically be to make a comparative and detailed analysis of the current application of the doctrine and to take advantage of its results to develop and promote the Saudi Arabian doctrine. In particular, the thesis will concentrate on how the doctrine is currently applied, what its aspects of strength, weakness and limitation are and what the consequences of its violation are?

These themes will be carried out through the examination of the key concepts upon which the application of the doctrine is based, namely the duty of disclosure, the duty to refrain from making misrepresentations and the concepts of materiality and actual inducement. Also, due to the fact that the doctrine has different application and remedies after the conclusion of the contract, the thesis intends to devote a separate chapter for its discussion and examination at this stage.

The methodology adopted by the researcher while carrying out this research will fundamentally be to subject each of the doctrine's concepts to a separate and extensive examination, draw up general, critical and comparative comments summing up the main findings and benefit from them in making reformative recommendations to the Saudi Arabian law. The discussion of the rules of the English law, then the Egyptian and then the Saudi Arabian is the pattern to be used in this thesis.

The importance of this thesis appears, besides other factors, in its novelty as being the first thesis to subject the Saudi Arabian and Egyptian doctrines of utmost good faith in the realm of marine insurance to an extensive, comparative and academic research. Therefore, it is hoped that it will make a pioneering contribution to the field of legal studies and lead to a better understanding of the application of the doctrine not only under the Saudi Arabian and Egyptian laws, but also under the English.

Finally, the structure of the thesis is composed of eight chapters. Chapter one will be an introductory chapter. Chapter two is mainly devoted to the consideration of the historical origins of the doctrine. Chapter three and four deal in great details with the rules governing the duty of disclosure and the duty not to make misrepresentations. The application of the rules regulating the concepts of materiality and actual inducement will be the topic discussed in chapter five. The consequences of the non-compliance of the assured or his agent with the requirement of the doctrine of utmost good faith and the remedies available to the underwriter thereunder are dealt with in chapter six. Chapter seven is exclusively devoted to the discussion of the post-contractual application of the doctrine and the consequences of its violation. Chapter eight is the place in which all the findings of the study are comparatively summarised and the reformative recommendations for the development of the Saudi Arabian doctrine are drawn up.

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Chapter [1]: Introduction

1.1. Introduction

The doctrine of utmost good faith (*uberrimae fidei*) is considered to be one of the most fundamental and central doctrines of the law of insurance in general and of marine insurance in particular. This doctrine derives partly from the nature of the contract of marine insurance where one contracting party, usually the assured, is in a stronger position in terms of knowledge than the other party, usually the underwriter, and partly from the practice that originally prevailed in the field of marine insurance business where merchants were in the habit of insuring their vessels after the risk had already commenced. This nature and practice resulted in that the subject-matter of the insurance, the ship or goods, would not normally be available for the underwriter to examine and evaluate and, therefore, the contract would not be entered into on an equal footing. This is because the underwriter was prevented from obtaining sufficient information in order to be able to investigate and anticipate the extent and nature of the risk he was asked to insure.

To overcome this potential inequality of knowledge, all information relating to the subject-matter of the contract must be shared and shared alike between the assured and the underwriter. The contrary view will lead to the consequence that the risk actually insured may totally be different from that one originally intended and understood to be covered by the uninformed party (usually the underwriter). Therefore, it was very natural and practical course for underwriters, in order to carry out their business, to entirely rely upon the information supplied to them by the assureds as being the only source of knowledge enabling them to estimate and evaluate the extent and nature of the proposed risk. This practice gradually crystallized into a reciprocal duty placing all parties to marine insurance contracts under an obligation to observe the highest degree of honesty and good faith. This, in fact, was subsequently reflected in what is now called the doctrine of utmost good faith which requires both the assured and the underwriter, when negotiating a contract of marine insurance and before its legal inception, first to make full, frank and accurate disclosure to each other of all material facts considered to be within the knowledge of one party, but not the other and secondly to refrain from making material misrepresentations. The doctrine does not cease once the contract is concluded, but it continues to control the performance of the contract up to and including the time at which a claim for loss is presented.

The special nature of insurance business and the importance of equality of knowledge for its parties at the time when the contract is being formed was best illustrated by the judgment of Lord Mansfield in the seminal case of *Carter v Boehm*.[1] In this case, Lord

[1] (1766) 3 Burr. 1905.

Mansfield presented in manifest words the grounds upon which the introduction and application of this doctrine are based by stating that

> *"[I]nsurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most 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. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement."*[2]

Therefore, due to the fact that marine insurance contract has become one ~~the~~ of the most commonplace contracts amongst not only business men, but also ordinary people and due to the fundamental and momentous rule which the doctrine of utmost good faith plays in its formation and performance, which may result in that the whole contract being avoided if the doctrine is not fully observed, it is believed that such an important doctrine deserves to be examined and analysed in depth in order to fully and precisely understand its application and the consequences following its violation.

This object has been made even more attractive to tackle by the increasing trend amongst insurers and reinsurers towards setting up the defence of avoidance for failure to comply with the requirement of the doctrine of utmost good faith as an easy way to escape their liability to pay for insured losses, a trend which effectively means that the security which is materially needed for the development and expansion of marine trade is simply abolished.

Accordingly, it will be the chief intention of this thesis to present a comparative and detailed analysis of the bundle of rights and liabilities generated by the imposition of the doctrine of utmost good faith before and after the contract of marine insurance is effected including the time at which a claim for loss is presented. This comparative analyses will be made within the realm of three different legal systems. These are the English Marine Insurance Act of 1906[3], Egyptian Marine Trade Law of 1990[4] and Saudi Arabian Commercial Court Law of 1931[5]. However, due to the fact that the doctrine is usually invoked and applied in respect of the duty of the assured rather than the underwriter, the scope of this thesis will strictly be confined to the discussion and examination of the application of the doctrine in respect of the assured and his agents.

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[2] Ibid., at p. 1909.
[3] Hereafter 'the MIA 1906 [UK]'.
[4] Hereafter 'the MTL 1990 [Egypt]'.
[5] Hereafter 'the CCL 1931 [SA]'.

1.2. The objectives of the thesis

The objectives of this thesis are threefold. The first is to deeply explore and critically examine the treatment given to this doctrine in the context of marine insurance under the English, Egyptian and Saudi Arabian marine insurance laws. This, of course, aims at assessing, evaluating and then presenting the current application of the doctrine under them.

Having achieved this purpose, the subsequent one, which naturally follows, will be to subject the outcome of the first objective to an analytical review in order to precisely identify and then discuss in a comparative manner the aspects of strength, weakness and limitation in the operation of the doctrine under each of them. Therefore, this will constitute the second objective of the thesis.

The third and final aim will be to benefit from the conclusions drawn under the first two objectives to gauge the effectiveness and efficiency of the application of the doctrine under the CCL 1931 [SA] and to consider how best it may, if necessary, be developed or reformed to ensure that it effectively promotes the aim behind its imposition upon the assured and his agents which is to ensure that the contract is entered into on an equal footing and that a fair balance is struck between the interests of the underwriter and the assured.

It seems to be very essential, at the moment, to reveal the reasons behind choosing the foregoing three legal systems in particular and make the discussion of the thesis centres upon them. As far as the CCL 1931 [SA] is concerned, since the researcher is a Saudi Arabian nationality holder and his present research is sponsored by his government, he felt that it would be the least which he could do to express his gratitude and gratefulness to his government to include its law in his thesis and make the development of its defects one of his thesis's primary goals.

The need for the provisions of the CCL 1931 to be developed and brought up to date will further be understood and appreciated by throwing some light on their historical background. The origin of the provisions of the CCL 1931 goes back at least to the 18th Century. This is, in fact, because the CCL 1931 is a mere translation of the Ottoman Commercial Code of 1850 which was also a translation of Part 2 of the French Code de Commerce of 1807 enacted under the Rule of Napoleon Bonaparte.

With regard to the MIA 1906 [UK], the reason for its selection as one of the three jurisdictions discussed by this thesis appears first in the fact that the doctrine of utmost good faith as a modern concept in the field of marine insurance is of English origin and secondly in the fact that the MIA 1906 is one of the most developed and advanced laws in the world in respect of marine insurance trade. Thus, it was thought that the discussion of the doctrine would never be complete and of ability to enrich the field of legal studies if the English law was excluded from the kingdom of this thesis.

As to the MTL 1990 [Egypt], the reason which makes its inclusion within the scope of this study so important is that the former MTL 1883 [Egypt] which was repealed by the new MTL 1990 [Egypt] was a duplicate of the present CCL 1931 [SA]. This is because both the MTL 1883 and the CCL 1931 are originally a mere translation of Part 2 of the French Code de Commerce of 1807. This accordingly means that the examination of the new MTL 1990 will have a beneficial effect on the entire and ultimate goals of the thesis. On one hand, this is because it is a newly reformed Act and therefore its examination will enrich the discussion of the subject-matter of the thesis. On the other one, this is also because it will provide an excellent opportunity to benefit from the recent Egyptian reformative experience in developing the provisions of the CCL 1931.

1.3. The significance of the thesis

The significance of this thesis lies in many aspects. Of which is the quality of originality in respect of the theme it discusses. Although there may be many researches on the doctrine of utmost good faith in the province of English marine or non-marine insurance law, there is no previous single one, to the best of the researcher's knowledge, on the same subject under the new Egyptian or Saudi Arabian marine insurance laws. This is not only true in terms of legal researches written in English language, but it is also so in terms of those written in Arabic. Thus, this thesis should be considered the first of its kind and, so, it is hoped that it will fill an important gap in legal studies and be a starting point for further and future researches in the context of marine insurance under the Saudi Arabian and Egyptian laws.

It is also hoped that it will enrich the on-going discussion over the appropriate application of this doctrine and the legal knowledge in this field. It is further hoped that it will make a valuable and influential contribution to a better understanding of the operation of the doctrine under the English law in general and the Egyptian and Saudi Arabian laws in particular, especially for those who intend to insure or be insured under the Egyptian and Saudi Arabian laws or who are interested in both laws.

Another aspect accounting for the importance of this thesis appears in the fact that it seems to be the first of its kind to take the initiative in attempting to make reformative recommendations to develop or reform the rules governing the doctrine under the Saudi Arabian law and also the first of its kind to direct such recommendations to the Saudi Arabian governmental committee reforming the CCL 1931.

A third, but crucial, aspect appears in the fact that since the rules governing the doctrine of utmost good faith and its related concepts under the Egyptian and Saudi Arabian marine insurance laws have never been subject to any previous investigation, the

achievement of this thesis is not a matter of translation or rearrangement or even a reproduction of what already exists in English or Arabic materials, but it is rather an elaborate search and investigation of a wide variety of general legal literature in order to extract, analyse and clearly present how the doctrine is applied under them.

1.4. The methodology of the thesis

Since this thesis is intended to be an analytical comparison based on the rules of three different legal systems, it would be appropriate to tackle it by using five chronological stages. First, the subject-matter of the thesis will be divided into several topics and each of which will be dealt with in a separate chapter.

Secondly, the examination of each topic will start with an outline of the rules regulating it under each of the three legal systems and the manner by which it is examined and analysed. The third stage will be to subject each topic to an extensive and detailed investigation and analysis.

The fourth stage will be to make general comments summarising the main findings. At this stage, the thesis will be in a good position to distinctly and critically present and compare the aspects of strength, weakness and limitations of each system. It will also be in a good position to explain what seems to be the chief merits of the CCL 1931 [SA] and to indicate in what respects it appears defective or capable of improvement.

The fifth stage will be to utilize the outcome of all the findings as a platform upon which the reformative recommendations to develop or reform the deficiencies of the CCL 1931 [SA] are based.

It should finally be mentioned that, as a matter of clarity and convenience, the discussion of any aspects in this thesis will start by examining and presenting its legal treatment under the English law, for that it is the most developed jurisdiction amongst the three, and then under the Egyptian and Saudi Arabian laws.

1.5. The scope of the thesis

Since, as already indicated above, that the purpose of this thesis is to examine the application of the doctrine of utmost good faith in the field of marine insurance, some certain areas of potential relevance are excluded from its scope.

First, although that the doctrine is mutual and so it equally applies to the underwriter as it applies to the assured, the discussion of the obligation of the underwriter will be excluded from the scope of this thesis. This is logically due to the fact that, apart from the MIA 1906 [UK] which has only one general section requiring the underwriter to observe

good faith[6], neither the MTL 1990 [Egypt], nor the CCL 1931 [SA] has any single section dealing with the underwriter's duty of utmost good faith. Therefore, it will be fruitless and of no advantage to include his duty within the sphere of a comparative thesis as this.

Secondly, since this thesis is mainly concerned with the application of the doctrine within the kingdom of marine insurance, its application in the context of non-marine insurance will only be referred to when it seems to be similar to the marine one.

Thirdly, the inclusion of the English and Egyptian laws within the ambit of the research is not in order to develop them, but it is rather in order to benefit from them in developing the Saudi Arabian law.

Finally, this thesis is principally based upon library materials such as codes, reports, articles, books, case law and all other similar materials in both English and Arabic. However, it should be noted that case law has far less legal importance as a source of law in both the Egyptian and Saudi Arabian laws than in English law. In these two jurisdictions, great reliance is placed on the codes and commentaries on them written by academic jurists. This means that judicial decisions hardly have any legal influence and usually serve as illustrations of the law or, in the absence of any rules in point, of the desired state of law.

1.6. The structure of the thesis

In connection with the structure of the thesis, apart from the introductory chapter and the conclusions and reformative recommendations for the future reforms of the CCL 1931 [SA] chapter, the thesis has another six chapters. Chapter two is devoted to the consideration of the historical origins of the doctrine as well as its definition and reason of enforcement.

Chapter three and four will be dealing with the rules regulating the duty of disclosure and the duty not to make misrepresentations which constitute the main aspects of the doctrine. Besides the consideration of the definitions and legal basis of both duties, both chapters will also examine their extent, time and duration. The consideration of the concept of materiality will be the core of chapter five. This chapter will attempt to present, examine and evaluate, apart from the definition and the time at which materiality is judged, the development of the test used to determine whether an undisclosed or misrepresented fact is material or not. The discussion of the application of the requirement of actual inducement will also be within the sphere of this chapter.

Chapter six deals with the remedies available to the underwriter for the violation of the doctrine at the pre-formation stage. This chapter essentially concentrates on the rules governing the remedy of avoidance and the right to claim damages whether as the sole

[6] S. 17.

remedy or as a commutative one. In this regard, special reference will also be made to the effect of fraud on the remedies available to the underwriter.

While chapter two, three, four, five and six are exclusively devoted to the discussion of the pre-contractual application of the doctrine and the consequences of its violation, chapter seven is antithetically devoted to the consideration of its application and the remedies of its breach after the contract is correctly concluded and legally binding and up to the time at which a claim for loss is presented by the assured to the underwriter.

The reason why this continuing aspect of the doctrine is given special legal consideration in a separate chapter is due to two reasons. The first is that the purpose and application of the doctrine after the conclusion of the contract are distinctly different from its purpose and application before its conclusion. The second reason is because of the on-going discussion over its scope and remedies, particularly in the claims' context. This is especially so under the English law. Both reasons make it essentially necessary to subject it to a separate and distinct investigation.

Chapter [2]: The Historical Origins of the Doctrine

2.1. Introduction

Generally speaking, in the law of contract there is no general duty of good faith requiring all parties to a contract to disclose to each other before the conclusion of the contract all material facts as to the subject-matter of the contract. All that is required of the parties as such is to act honestly in the sense that they do not make false statements. Although this general obligation may be satisfactory for normal contracts, it is not the case for particular contracts called *uberrimae fidei* (utmost good faith) which include those of insurance. In these contracts, higher degrees of honesty than usual are required to the extent that the lack of bad faith is deemed an obligation. The special treatment given to them, as requiring a very high standard of honesty, is because they are entirely founded upon the private and exclusive knowledge of one party (normally the assured), who almost knows everything about the risk, while the other party (usually the underwriter) is relatively ignorant.[7] This basically means that the underwriter will have to rely upon the assured's honesty in making full and accurate communications to him in respect of the risk proposed for insurance. In practical terms, this means that he will be put at the mercy of the assured. So, in order to satisfy such degrees of honesty, the duty of utmost good faith (*uberrimae fidei*) has been imposed upon the contracting parties to the effect that no "*party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.*"[8]

Having stated that, this does not mean that this is the duty of the assured only. The underwriter, however, is under a similar obligation requiring him to make the assured aware of all facts affecting his decision whether to insure or not. Lord Mansfield distinctly pointed out this mutuality of obligation when he stated that

> *"[T]he policy would equally be void, against the under-writer, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium."*[9]

Therefore, in harmony with the doctrine of utmost good faith, both parties are placed under two duties, namely, the duty to disclose to each other all material facts related to the risk to be insured against and the duty not to make material misrepresentations. The failure of either party to comply with these duties will entitle the other one to avoid the contract.[10]

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[7] *Carter v Boehm* (1766) 3 Burr 1905, at p.1909.
[8] Ibid., at p. 1910.
[9] Ibid., at p. 1910-11. This reciprocity was recently established by the judgment of the Court of Appeal and the House of Lords in *Banque Keyser Ullman S. A. v Skandia (U. K.) Insurance* [1989] 3 WLR 25, [CA-Credit], at p. 79; [1990] 2 All ER 947, [HL- Credit], at p. 960.
[10] Ibid., at p. 1909. Also, see section 17 of the English Marine Insurance Act 1906.

Therefore, the purpose of the present chapter is to deal with the doctrine of utmost good faith's definition, reason of enforcement and origins.

2.2. Definition

Although of the difficulty of finding a very conclusive and satisfactory definition for the doctrine of *uberrimae fidei*, there have been many attempts to define it. For instance, that this Latin term is said to mean '*of the utmost good faith.*'[11] The expression is also defined as being *"[T]he most perfect frankness"* and described as being a very important element for the legitimacy of particular contracts in which there is a special relationship between parties, e.g., guardian and ward, solicitor and client, insurer and insured.[12] Moreover, the doctrine is stated to be *"[A] Latin phrase meaning 'of the fullest confidence"*.[13]

However, *uberrimae fidei* could be defined[14] as follows:

> *"it is that principle of law requiring all parties to a contract of insurance to observe a very high degree of honesty and to pay attention to other parties concerns before the conclusion of the contract and which is enforced by commanding the concerned parties to make full and accurate disclosure of all material facts related to the risk to be insured; otherwise the aggrieved party will be entitled to avoid the contract".*

2.3. The reason of the enforcement

It has been for centuries the practice in the field of insurance that when a merchant seeks an insurance cover, he comes to the market presenting his risk and looking for someone to cover it as it is. At earlier time, it was common practice for a contract of insurance[15] to be effected while the ship was still at sea or the cargos already left the port on the basis of '*lost or not lost*' clause.[16] The effect of this clause was to assist the merchants in insuring ships

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[11] Curzon, L. B., Dictionary of Law, 4th ed., (1993), at p. 392, it is further stated that *uberrimae fidei "[A]pplies to a contract (e.g., of insurance) in which the promisee must inform the promissor of all those facts and surrounding circumstances which could influence the promissor in deciding whether or not to enter the contract."* See also Ivamy, E. R. Hardy., Dictionary of Insurance Law, (1981), at p. 153, where *uberrimae fidei* is said to be *"[A]n expression meaning the 'utmost good faith'. A fundamental principle of insurance law is that such faith must be observed by both parties."*

[12] Ivamy, E. R. Hardy., Mozley & Whiteley's Law Dictionary, 10th ed., (1988), at p. 482.

[13] Bennett, C., Dictionary of Insurance, 1st ed., (1992), at p. 333.

[14] This definition has to be deemed as a try by the researcher to define the meaning, requirements and effects of the concept of *uberrimae fidei* in the field of insurance. Also the researcher is not alleging that this definition is better than those which have been cited in the text above nor deeming it as being a very conclusive or satisfactory one.

[15] At that time when the word insurance used to indicate marine insurance. See Park, J. A., A System of The Law of Marine Insurances, 8th ed., (1842, reprinted 1987), Vol. 1, where Park, at p. xliv, stated that *"[W]hen insurance in general is spoken of by professional men, it is understood to signify marine insurances."*

[16] The *'lost or not lost'* is a clause used in marine insurance to enable the assureds to recover under the policy even though the loss has occurred before or at the time of the conclusion of the contract of insurance provided that the assureds are not aware of it. In this regard, see Dover, V., Analysis of Marine Insurance Clauses, 7th (Revised) ed., (1956), where he explained, at p. 15, the meaning of the clause as follows *"[T]hese words make the contract retrospective and where the insurance has attached prior to the conclusion of the contract, make the underwriters liable for a loss which may have already accrued provided the assured was unaware of it when effecting the contract."* He further added that *"[I]n cases where there has been a reported casualty, the application of the "lost or not lost" clausing may be modified in the original slip by the insertion of the wards "free of known casualty"*; Grime, R., Shipping Law, 2nd ed., (1991), at p. 365-6; S. 6 of the Marine Insurance Act 1906 and R. 1 of the rules for construction of policy: Ivamy, E. R. Hardy, Chalmers' Marine Insurance Act 1906, 9th ed., (1983), at p. 13-4 & 150; Ivamy, E. R.

which had already sailed or cargos which had already been in the high seas and which could have been lost or damaged at the time of effecting the policy. According to this practice, it was very difficult, if not impossible, for insurers to investigate and anticipate the extent and the nature of the risk to be insured. This was due to the absence of the subject-matter of the insurance on one hand and also to the lack of any efficient and reliable system of communications on the other one. In addition to this, there was the special nature of the marine trade, which puts an ocean-going vessel at unexpected perils.

Insurers, who were at hazard that they might bear the risk that the subject-matter insured could have been lost prior to the conclusion of the contract, had nothing but to rely upon the presentation of the risk made by the prospective assureds who knew almost everything about it. This was justified upon the grounds that insurance as a real business could not be practised unless insurers would be able to rely upon the honesty of their clients in not keeping back or misrepresenting anything that could influence their judgments in whether to take the risk or not and, if so, on what basis.[17]

Consequently, a principle to the effect that all material facts presented by the assureds or his agent are to be complete and accurate was adopted and enforced. This principle is what is called nowadays 'the doctrine of *uberrimae fidei'* (utmost good faith) which has, at a later stage, become one of the common law principles. This was in *Carter v Boehm* where Lord Mansfield stated that the reason of the rule is to prevent fraud and to encourage good faith.[18]

As this principle developed in the 18th and 19th Centuries, it is now established that it is an absolute one which means that its violation would render a policy of marine insurance avoidable irrespective of whether such violation was intentional or a mere innocent one.[19]

Hardy., Dictionary of Insurance Law, (1981), at p.79; Bennett, C., Dictionary of Insurance, 1st ed., (1992), at p. 210; Dover, V., A Handbook To Marine Insurance, 5th ed., (1957), at p. 216-7; Park, A System of The Law of Marine Insurances, 8th ed., (1842, reprinted 1987), Vol. 1, at p. 36-8.

[17] The information stated above has been drawn on the following sources: Park, A System of The Law of Marine Insurances, 8th ed., (1842, reprinted 1987), Vols. 1 & 2; Raynes, H. E., A History of British Insurance, 1st ed., (1948); Vance, W. R., The Early History of Insurance Law, (1908) VIII Columbia Law Review 1; Holmes, E. M., A Contextual Study of Commercial Good Faith: Good-Faith Disclosure In Contract Formation, (1978) 39 University of Pittsburgh Law Review 381; Clayton, G., British Insurance, (1971); Trenerry, C. F., The Origin and Early History of Insurance, (1926); Dover, V., A Handbook To Marine Insurance, 5th ed., (1957).

[18] Ibid., at p.1911.

[19] Towards the end of the 18th Century, the situation was that the doctrine would be deemed breached if an intentional non-disclosure or misrepresentation was committed. This is evident from *Mayer v Walter* (1782) 3 Dougl. 79, [Marine], where Lord Mansfield held that *"[I]t must be a fraudulent concealment of circumstances that will vitiate a policy."* For the previous citation see Park, A System of The Law of Marine Insurance, 8th ed., (1842, reprinted 1987), Vol. 1 at p. 432, (it ought to be mentioned that Park's book has been cited here as another reference for the case because it includes some citation of Lord Mansfield's judgement, which the original transcript of the case does not have). However, this narrow approach was rejected by many cases. For example *Lindenau v Desborough* (1828) 8 B. & C. 586, [Life], at p. 592, where the plaintiff's defence against the underwriter was that it was declared by Lord Mansfield that *" ... it must be a fraudulent concealment of circumstances that will vitiate a policy."* Bayley J. rejected this contention and stated that *"[B]esides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship."* Also, see the judgment delivered by Lord Cockburn C.J. in *Bates v Hewitt* (1867) 2

2.4. The origins of the doctrine

Generally speaking, the origin of the idea that insurance contracts are *uberrimae fidei* under the English marine insurance law is, in the view of the modern law of insurance[20], attributed to Lord Mansfield's judgment in *Carter v Boehm*.[21] Before this case, it did not seem that there was any conclusive evidence that a distinctive and clear perception of the concept of good faith similar to Lord Mansfield's doctrine ever existed in insurance context.[22] However, before *Carter v Boehm*, ideas and elements of what could be discribed as a duty of good faith of disclosure said to have existed and narrowly enforced. The signs of this duty, which was to the effect that a party to a contract of insurance has to disclose to the other party every material matter when good faith, fair dealings and equity require such disclosure[23], were said to have existed in the Law Merchant[24], Natural Law[25], Continental Law[26] and Equity.[27]

L.R. 595, [Marine], at p. 607; *Ionides v Pender* (1874) L.R. 9 Q.B. 531, [Marine], per Blackburn, J. at p. 537; *Blackburn v Vigors* (1887) 12 App. Cas. 531, [Marine], per Lord Watson, at p. 540.

[20] The modern law of insurance is considered to have started when Lord Mansfield became Lord Chief Justice in 1756.

[21] (1766) 3 Burr. 1905. Also, see Achampong, F., *"Uberrimae Fidei* in English and American Insurance Law: A Comparative Analysis", (1987) 36 International and Comparative Law Quarterly 329, where it was declared that *"[T]he doctrine of uberrima fides was coined in the historic ocean marine insurance case of Carter v Boehm... ."*; Smith, G., Good Faith in Insurance Law, [1961] JBL 268, where he stated that the origin of the doctrine of utmost good faith is attributed to Lord Mansfield' s judgment in *Carter v Boehm;* O'May, Marine Insurance: Law and Policy, (1993), at p. 35-6, where the origin of the principle of *uberrimae fidei* was said to go back to *Carter v Boehm.*

[22] Hasson, R., The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance, [1984] 47 MLR 505, where the writer stated, at p. 508, that *"[I]ndeed, neither I nor anyone else has, to may knowledge, been able to find a case where the defence of uberrima fides succeeded before Lord Mansfield."*

[23] For a very comprehensive analysis of the origin of the duty of good faith disclosure before the case of *Carter v Boehm* see Holmes, E. M., A Contextual Study of Commercial Good Faith: Good-Faith Disclosure In Contract Formation, (1978) 39 University of Pittsburgh Law Review 381, at p. 409-35; Matthews, Paul., New Foundations For Insurance Law: Current Legal Problems: *Uberrima Fides* in Modern Insurance Law, (1987), at p. 39-47; Davis, R., The origin of the duty of disclosure under insurance law (1991) 4 Ins.L.J. 71; Park, Semin., Origin of the duty of disclosure in English insurance contracts (1996) 25 Anglo American Law Review 221; Park, Semin. The duty of disclosure in insurance contract law, (1996), at p. 19-34; Eggers, Peter., & Foss, Patrick., Good faith and insurance contracts, (1998), at chapter 4.

[24] About the duty of good faith to disclose in the early Seventeenth Century, it did not seem that there was more than a duty to refrain from deceiving or not to act with a fraudulent aim. This limited duty could be observed from Malynes' treatise Lex Mercatoria or the Ancient Law Merchant (1622) cited by Holmes, ibid., where the duty of good faith to disclose appeared to be restricted to two cases which are: (i) when the parties who effected the policy saw the vessel when it was thrown away and (ii) where a rotten vessel was fraudulently insured and then cast away in order to make the insurer pay for the loss. All of this was stated by Malynes, cited by Holmes, ibid., as follows *"[O]ther Assurances are made, and these are the most dangerous of all, because they are made upon ships lost or not lost; which is not only in regard that a ship known to be departed, doth not arrive in many months after the appointed place of discharge: but also if any news doe come that the ship and goods is cast away, never the less if the insurance be made with the words (lost or not lost) the Assurors bear the adventure of it, unless it can be proved that the parties who caused the Assurance to be made, did see the ship when it was cast away, in this case it is a fraud; as the fraudulent dealing of him that had a rotten ship, and caused Assurance to be made upon her, and caused the same to perish or sink at the seas, to make assurors to pay for his rotten ship, which could not be sold by him."*

[25] Hugo Grotius, who was a leader of a new school of jurists in the Seventeenth Century, placed a more modern duty of good faith to disclose than that limited one in the Law Merchant. His duty in connection with the law of insurance was stated, in his classic work: De Jure Belli Ac Pacis (1625), reprinted in 2 Classics of International Law (1925) at Ch. XII, xxiii, discussed and cited by Holmes, ibid., that *"[A] contract for securing against risk, which is called insurance, will be null and void if either of the contracting parties knew that the property had either arrived at the destination in safety or had been lost."* He further advanced a general and natural contract law duty of disclosure, which, in fact, is very similar to the present principle of utmost good faith in the law of insurance.

But, it was William Murray, Lord Mansfield, who was, as Lord Diplock described, *"a Scot with a broader educational background than the generality of English judges of his time"*,[28] who revealed and transfigured the obscure ideas and signs of good faith which existed in the Law Merchant, Natural Law, Continental Law and Equity into a coherent body of law.[29] This what he did in *Carter v Boehm*[30], where a general, distinctive and well

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This was presented as follows: *"[T]he person who is making a contract with anyone ought to point out to him the faults of the thing concerned in the transaction which are known to himself."*

[26] For this purpose see the Marine Ordinances of Louis XIV, (L'Ordonnance de la Marine de) enacted in 1681, Title Sixth of Insurance, 30 F. Cas. 1212-13 (1897), considered and cited by Holmes, ibid., which is deemed to be one of the seminal Acts of insurance law. Concerning the duty of good faith, see the following subsections. Subsection XXXVIII stated that *"[W]e declare void all insurances made after the loss or arrival of the effects insured, if the insured knew, or could know of the loss, or the insurer of the arrival, before the signing of the policy."* Also, subsection XXXIX presumed the assured to *"... have known of the loss, and the insurer of the arrival of the effects insured, if it be found that the news might have been brought from the place of the loss or arrival of the ship, to that of the signing of the policy, after either of those happened, and before the signing; allowing a league and a half per hour, without the prejudice of such other proofs as may be brought"*. In addition, subsection XL further mentioned that. *"[H]owever, if the insurance be made upon good or bad news, it shall subsist; except it be made appear, by other proofs than that of the league and half per hour, that the insured knew of the loss, or the insurer of the arrival of the ship, before the signing of the insurance."*

[27] Although before *Carter v Boehm* no coherent doctrine of *uberrimae fidei* might have existed, an exploration of the available cases proved that such a duty, though was not as clear and fully developed as that of Lord Mansfield, was found at earlier time to the extent that a limited duty to disclose and to refrain from fraud was enforced. The earliest case found by the researcher was before Lord Chief Justice Holt, in the reign of William and Mary (1689-1702), (Anonymus) Skin. 327, N. 5, [Marine], regarding an insurance policy which was not good for fraud. In this case, Lord Holt held that if the goods were insured as being the goods of a Hamburgher, who was an ally whereas, the goods were the goods of a Frenchman who was an enemy; then, this was a fraud, and the insurance was not good. In another case heard in Chancery Division, *De Costa v Scanret* (1723) 2 P. WMS. 170, [Marine], 24 English Rep. 686, where a merchant who received news that a ship similar to his had been taken at sea, insured it without informing the insurers of such news. Lord Chancellor Macclesfield stated that this was a fraud and the policy was accordingly void for the insured's non-disclosure. In Lord Macclesfield own wards it was said that *"[T]he insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it."* See also *Seaman v Fonereau* (1743) 2 Stra. 1183, [Marine], where Lord Chief Justice Lee declared that *" ... as these are contracts upon chance, each party ought to know all the circumstances."* Accordingly, it could be concluded that Chancery Court which was imbued with blend of ideas of Good faith and Conscience from Equity and Natural Law, seemed to have practised a minimal duty of good faith to disclose before *Carter v Boehm's* Case.

[28] Tulane Law Review (1967) XLI No. 2.

[29] This was clearly admitted by Lord Mansfield, in *Carter v Boehm* at p. 1919, that it was *"natural equity"* which had the main role in creating and developing it as a recognised principle in the Chancery Court. This truth could be supported by the fact that merchants used to bring their disputes before the said court which, in the course of its judgments, found it very important to adopt a duty of disclosure, as that one applied to *Da Costa v Scandret* (1723) 2 P. WMS. 170, which was, to some extent, similar to the one existed in the merchant customs. For this purpose, see Corbin., A. L., The Uniform Commercial Code-Sales; Should it be enacted?, (1950) 59 The Yale Law Journal 821, at p. 822-4. It was also stated by Yates, J., in *Hodgson v Richardson* (1764) 1 Black W. 463, that *"[T]he concealment of material circumstances vitiates all contracts, upon the principles of natural law"*. A further support was given in the decision of *Financiere de la Cite v Westgate Insurance Company Limited* Case, [1988] 2 Lloyd's Rep. 513, at p. 549-50, where it was confirmed that the duty of disclosure stemmed from the jurisdiction originally exercised by the Court of Equity to prevent imposition. Moreover, see Raynes, H. E., A History of British Insurance, 1st ed., (1948), at p. 163, where he, after mentioning Lord Mansfield, stated that *"[T]o him we owe, by his decisions in leading cases, much of the marine insurance law as it stands to-day. This does not mean that every rule established by his decisions was new: such may have been the rule honoured in practice among merchants and underwriters for centuries previously, but by his decisions in the court the practice secured the force of law."*; Park, A System of The Law of Marine Insurances, 8th ed., (1842, reprinted 1987), Vol. 1, chapter X at p. 408. For further information concerning the Chancery Court and the ideas of equity and good faith therein, see generally: Potter, Harold., Historical Introduction to English Law and its Institutions, 3rd ed., (1948), Baker, J. H., The Law Merchant and the Common Law Before 1700, (1979) 38 The Cambridge Law Journal 295; Uscs, I., Early English Equity, (1885) I LQR 163; Powell, R., Good Faith In Contracts, (1956) 9 Current Legal Problems 16; Coing, H., English Equity and The Denunciatio Evangelica of The Canon Law, (1955) 71 LQR 223, Vinogradoff, P., Reason and Conscience in Sixteenth Century Jurisprudence, (1908) 24 LQR 373; Radin,

established principle of good faith in the field of insurance was shaped, announced and also applied. By doing this, he developed the existing ideas, implanted them into the Common Law, gave them the force of law and allowed them to expand and develop in the future. His decision was afterwards adopted by the draftsman of the English Marine Insurance Law 1906 as the basis of s. 17 which regulates the application of the doctrine of utmost good faith in marine insurance.

It would be of interest to add that it was Lord Mansfield's comprehensive knowledge of English and other foreign laws which had played a major role in giving him the capability for reforming those ambiguous ideas of good faith into a complete, remarkable and well defined set of rules admirably regarded as a coherent doctrine of good faith.[31] Accordingly, it was Lord Mansfield's opinion which was the transitional vehicle between the fore-going ideas and elements and what it may be called the modern law of insurance.[32]

With regard to the position under the Egyptian and Saudi Arabian marine insurance laws, although that they are both Islamic countries where observing full honesty and sincerity

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M., The Conscience of The Court, (1932) XLVIII LQR 506, Barbour, W., Some Aspects of Fifteenth Century Chancery, (1917-18) XXXI (31) Harvard Law Review 834, Adams, G. B., The Origin of English Equity, (1916)) XVI (16) Columbia Law Review 87, O'Connor, J. F., Good Faith in English Law, (1990); D'entreves, A. P., Natural Law, 5th ed., (1960); St. German's., Doctor and Student, Vol. 91 (1974); Holmes, ibid., at p. 419.

[30] (1766) 3 Burr 1905. It was about a policy of insurance against the loss of Fort Marlborough in the Island of Sumatra in the East Indies, by its being taken by a foreign enemy. Following the taken of the Fort by the French, an action to recover under the policy was brought. The underwriter objected and alleged that there had been fraud by the concealment of material facts, which were the weakness of the Fort and the probability of its being attacked by the French. The case came before Lord Mansfield, who found a verdict for the plaintiff.

[31] In this regard, see Marshall, Samuel., A Treatise on the Law of Insurance, 2nd ed., (1808), Vol. I, at p. 29-30, cited by O'May in Marine Insurance: Law and Policy, (1993), at p. 3, where it was pointed out that *"[F]rom the books of the common law, very little could be obtained; but upon the subject of marine law, and the particular subject of insurance, the foreign authorities were numerous and in general satisfactory. From these and from the information of intelligent merchants, he (Lord Mansfield) drew those leading principles which may be considered as the common law of the sea, and the common law of merchants, which he found prevailing throughout the commercial world, and to which every question of insurance was easily referable. Hence the great celebrity of his judgments, and hence the respect they command in foreign countries."*; Park, ibid., Vol. 1, cited by O'May, also reported that Lord Mansfield's *" ... decisions and dicta are the foundations of our insurance law and through the acceptance of them by eminent American judges they lie at the base of the American decisions. He took full advantage of all he could gather from all the continental ordinances and codes existent in his day, accepting his legal principles largely from these sources. The practices and customs of trade he learnt from mercantile special jurors out of whom he gradually trained a body of experts in insurance matters. To them he most carefully expounded the law and in his judgment he cited foreign authorities freely."*; Dover, A Handbook to Marine Insurance, at p. 32, where he, concerning the broad education of Lord Mansfield, asserted that *"[T]o him most of the credit for placing marine insurance law on a sound basis in this country. He thoroughly studied and applied the various Continental Ordinances previously enumerated and correlated them with Common Law and business practices, drawing largely on l'Ordonnance de la Marine."* Moreover, Raynes, H. E., A History of British Insurance, 1st ed., (1948), at p. 175, expressed a similar view that *"Lord Mansfield, in his decisions and directions to the jury, took the greatest trouble to search and to use records of custom both there and abroad, and of the ordinances and codes which existed in other countries at the time. From these he extracted the principles, and applied them with logic and discernment to the cases before him."*; Corbin, A. L., The Uniform Commercial Code-Sales; Should it be enacted?, ibid., at p. 822, where he observed that Lord Mansfield *" ... was regarded by some of his successors as a dangerous innovator. He was a Scot whose training in Civil Law had given him a juristic outlook far beyond the English shores."*; Baker, J. H., The Law Merchant and The Common Law Before 1700, (1979) 38 (2) Cambridge Law Journal 295, at p. 297, where the writer after discussing how the custom may become part of the law, stated that *"[T]he final stage was for the courts to take judicial notice of mercantile custom and to treat it as part of the law. This feat is usually attributed to Lord Mansfield: It was very largely as a result of Lord Mansfield's special jury system that it was found possible to "weld commercial usage into the main body of English law without the sacrifice of elasticity" [Fifoot]. His practice was to incorporate customs into his judgments, and so to establish them as binding rules for the future."*

[32] The modern law of insurance is considered to have started when Lord Mansfield became Lord Chief Justice in 1756.

and acting in good faith is a moral obligation imposed by the rules of the Islamic Law upon the parties to all contracts[33], the origin of the doctrine of utmost good faith in the Egyptian and Saudi Arabian marine insurance laws is not of religious origin. In other words, the concept that parties to a contract of marine insurance are bound to accurately acquaint each other with all material facts bearing upon the risk proposed for insurance is not derived from the rules of the Islamic Law.

This could be explained, on one hand, upon the ground that the idea of insurance where an assured goes to an underwriter or an insurance company seeking to insure his ship or goods against perils of the sea in return of a sum of money, was not known by early Islamic jurists.[34] Therefore, the contract of marine insurance, which was the first type of insurance introduced into the Islamic world, was not discussed or regulated by them[35]. On the other, this is because the provisions regulating marine insurance trade, including the doctrine of utmost good faith under the Egyptian and Saudi Arabian marine insurance laws are of western origin, namely French.

In Egypt, marine insurance is regulated by Part 5 of the Marine Trade Law of 1990[36] repealing the previous Marine Trade Law of 1883 which was a mere translation of Part 2 of

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[33] This moral obligation was clearly laid down in many different verses by the Holy Quran, which is the primary and supreme source of the Islamic Law and which, in the Islamic belief, is the divine words of Allah, revealed to Prophet Muhammad (peace be upon him), whose duty was to deliver it unchanged to the people. In one general and broad verse, Allah says in Surat Al Ma'ida, verse 1: *"O you who believe! Fulfil all obligations ... ."* In Surat An Nisa, verse 29, also Allah says: *"O you who believe! Eat not each other's property by wrong means, but let there be amongst you trade and business through mutual good-will ... ."* Moreover, Allah says in Surat Al Anfal, verse 27: *"O you who believe! Betray not the trust of Allah and the Messenger, nor misappropriate knowingly things entrusted to you."* On the other hand, this obligation was also emphasised upon many times by the second primary source of the Islamic Law, which is the Sunna of the prophet Muhammad (peace be upon him), comprising the hadith which is all the sayings, doings and consents of the prophet (peace be upon him); viz. what was practiced in his presence without his disapproval. This source, on one hand, is very imperative to the understanding of the Holy Quran text in addition to being supplementary to its legislative principles and doctrines. For instance, it was reported by Ibn Majah, Sunan Ibn Majah, (in Arabic), Vol. II, 1st ed., (1313 A.H.), at p. 8, that the prophet (peace be upon him) said: "a trustworthy and an honest, truthful businessman will rise up with the martyrs on the day of Resurrection." It was also reported by An Nisaburi, Sahih Muslim, (1978), (in Arabic), Vol. III, at p. 1164, No. 47, that the prophet (peace be upon him) said: "if both parties speak the truth and make manifest, their transaction shall be blessed. But, if they conceal and lie, then the blessing of their transaction shall be destroyed." A further moral obligation prohibiting fraudulent behaviour in all dealings is obvious from a hadith reported by Abu Daud, Sunan Abi Daud, (in Arabic), Vol. III, at p. 272, No. 3452, where the prophet (peace be upon him) declared that "he who defrauds us is not of us." For more information about the moral obligation to observe utmost good faith in all transactions, also see Doi, Abdur Rahman. I., Shariah: The Islamic Law, (1984), chapter 20, at p. 348-55.

[34] Az Zaraqa, M. A., Nizam At Ta'myn, (The Law of Insurance – in Arabic), 1st ed., (1984), at p. 20. In addition, Az Zaraqa stated that marine insurance business was known in the Islamic countries for the first time in the 18th Century only. Lashin, Fatahiy., 'Aaqd At Ta'myn Fi Al Figh Al Aislami', (The Contract of Insurance in The Islamic Jurisprudence: A Comparative Study - in Arabic), (Ph.D. Thesis), (undated), Faculty of Law, University of Cairo, at p. 19, stated that insurance contracts could even have entered the Islamic World as early as the 17th Century. Also, see Aisawi, Ahmed. Aisawi., Aaqd At Ta'myn Min Wa Jahat Nazar Al Shari'a Al Islamiyah Wa Al Qanun, (The Insurance Contract From The Shari'a and The Law Point of View – in Arabic), (1962) 2 Al-Ulum Al-Qanuniya Wal-Iqtisadiya (Legal and Economic Sciences Journal) 1, at p. 18; Abu Jayab, Sa'diy., At Ta'myn Bayna Al Hadir Wa Al Aibaha, (Insurance Between Banning and Permission – in Arabic), 1st ed., (1983), at p. 11-12.

[35] Sweis, Rajai. K., Construction Insurance in the Arab Gulf Area, (1991), at p. 19.

[36] This law was enacted as Law No. 8 on 22/4/1990. It was published in the Egyptian Official Gazette in a supplement to Issue No. 18 on 3/5/1990 and came into effect on 3/11/1990.

the French *Code de Commerce* 1807 enacted under the Rule of Napoleon Bonaparte.[37] In fact, the history of Part 2 of the French *Code de Commerce* 1807 goes back as early as the 13th – 15th Centuries. This, according to William Tetley, is due to the fact that Part 2 was based upon the *Ordonnance de la Marine* of 1681[38] which was partly derived from the 13th Century *Roles of Oleron*[39] and partly from the 15th Century *Consolato del Mare*.[40] In the same manner, marine insurance in Saudi Arabia is governed by Chapter 11 of the Commercial Court Law of 1931[41] which is a mere translation of the Ottoman Commercial Code of 1850 which, like the Egyptian law, was also a translation of Part 2 of the French *Code de Commerce* 1807.[42]

On the other hand, since, as stated by William Tetley[43], *the Roles of Oleron* and *Consolato del Mare "are the inspiration and source of the Ordonnance de la Marine 1681 in France and the general maritime law of England"*, it could be argued that the origin of the doctrine of utmost good faith in England and France is from, or at least partly derived from, the same sources, namely *the Roles of Oleron* and *Consolato del Mare*. This would, if established, lead to the conclusion that although the origin of the doctrine under the English marine insurance law is an amalgamation of those ideas and principles existed in the Law Merchant, Natural Law, Continental Law and Equity, whereas its origin under the Egyptian and Saudi Arabian marine insurance laws is the provisions of the French *Ordonnance de la Marine* of 1681, the doctrine in all of them is probably derived from one source.

2.5. General comments

Having mentioned that, it is very clear that the source of the English doctrine of utmost good faith is traced back to the judgment of Lord Mansfield in *Carter v Boehm*. Whereas its source under the Egyptian and Saudi Arabian marine insurance laws is the French *Ordonnance de la Marine* of 1681. It should also be clear that on the ground of the above conclusion, coupled with the observation that the English and French maritime laws

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[37] Ta Ha, M. K., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at para.16-18, (hereafter Ta Ha).

[38] Maritime Liens and Claims, 2nd ed., (1998), at p. 18 & 24, (hereafter Tetley, W. Maritime Liens and Claims).

[39] Ibid., at p. 13-18. The *Roles of Oleron* was a codification of shipping law principles and reported judgments related to the maritime trade of the Atlantic coast of Europe and England.

[40] Ibid., at p. 21-22. *Consolato del Mare* was a codification of maritime customs applied in the maritime cities of the Western Mediterranean.

[41] This law was enacted as a law by the Royal Decree No. 32 on 31/5/1931. It was published in *Umm Al Qura*, the Saudi Arabian Official Gazette, from 7/8/1931 until 26/2/1932 in Issues No. 347-376, and came into effect since then.

[42] Mohammed, Mohammed. Abdul Al Jawad., Al Tatawar Al Tashri'iy Fi Al Mamlakah Al Arabiyah Al Su'udiyah, (The Development of Legislation in the Kingdom of Saudi Arabia – in Arabic), (1977), at p. 182; Abdur Raheem, Tharwat., Sharh Al Qanun Al Bahry As Su'di, (The Elucidation of the Saudi Arabian Maritime Law- in Arabic), 1st ed., (1985), at p. 5; Haberbeck, Andreas., & Galloway, Mark., Saudi Shipping Law, (1990), at p. 16-7, (hereafter Haberbeck & Galloway, Saudi Shipping Law).

[43] Tetley, W., Maritime Liens and Claims, at p. 18.

are derived from one source, there is a very high probability that the historical origin of the doctrine, in all of them, is one.

Chapter [3]: The Duty of Disclosure

3.1. Introduction

As a general rule, parties to a contract are under no legal duty, at the time of making a contract, to disclose to each other material circumstances, which if known, would influence their decisions whether or not to enter into the contract and, if so, upon what terms. This rule, which is know in sale contracts as *"caveat emptor"*, let the buyer beware, is based upon the dominant principle that each contracting party is bound to look after his own interests and not those of anybody's else. For instance, a landlord would not be liable in deceit if he failed to disclose to the tenant, at the time of making the contract, the property's defects.[44] Yet, this rule would not be invoked if there was a positive misrepresentation made by one of the parties, in which case the aggrieved party would be entitled to avoid the contract and probably claim damages.[45]

However, there is a number of exceptional cases where a contracting party will be held liable if he fails to disclose to the other party material facts, in respect of the subject-matter of the contract, known or deemed to be so to himself or to his agent.[46] The most significant of which are contracts *uberrimae fidei*[47], in which one of the parties is exceptionally in a stronger position in terms of knowledge than the other. As a result, the former is placed under an additional duty to disclose all such unknown and material circumstances to the ignorant one. The failure to do so will provide the aggrieved party with, if he chooses to do so, the right to avoid the contract. Of those contracts described as *uberrimae fidei*, those of insurance of all types (marine, fire, life, burglary etc.) form the main group.

Therefore, in the insurance context, it is the duty of the assured and the underwriter, before and up to the conclusion of the contract, to disclose to each other all material facts concerning the risk to be insured against, which may influence their judgments in whether to effect the contract or not and, if so, upon what terms. Although this duty is mutual, it has been until recently recognised and deemed by the courts as being the duty of the assured alone.

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[44] *Keates v The Earl of Cadogan* (1851) 10 C. B. 591; *Turner v Green* [1895] 2 Ch. 205.

[45] Chitty on Contracts, 27th ed., (1994), Vol. 1, Ch. 6, at para.333, (hereafter Chitty); Treitel, G. H., The Law of Contract, 8th ed., (1991), Sec.7, at p. 349, (hereafter Treitel).

[46] For more information about this issue see: Chitty, Vol. 1, Ch. 6, at para.333; Treitel, Sec.7, at p. 349; Allen, David. K., Misrepresentation, (1988), at p. 21. A duty of disclosure will normally exist in situations when there is a representation falsified by later events; statement literally true, but misleading; custom; contracts *uberrimae fidei* such as insurance and family arrangements; contracts in which there is a limited duty of disclosure, for example, suretyship or guarantee; sale of land; certain compromises and exemption clauses; fiduciary relationship; statute; duty to clarify legal relationship.

[47] *'Uberrimae fidei'* is a Latin phrase meaning "of the utmost good faith" and indicating that a duty of disclosure existing before the conclusion of the contract forms an essential component of those contracts described as such.

Having, in the previous chapters, examined and discussed in great details the doctrine of utmost good faith, the aim of this chapter is to further examine the doctrine through dealing with the duty of disclosure which is one of its aspects. This will be carried out by examining the rules regulating the duty under the English, Egyptian and Saudi Arabian marine insurance laws in turn. In order to make the examination of this duty clearer and more understandable, this chapter will be divided into the following headings: the definition of the duty, its legal basis in the insurance context, the provisions governing its application and general comments.

3.2. Definition

Although of the importance of the duty of disclosure as one of the fundamental principles of the insurance law, its exact meaning or legal basis is unfortunately not defined or clarified by the MIA 1906 [UK], nor the MTL 1990 [Egyptian], nor the CCL 1931 [SA]. However, some highly regarded judges and writers have defined the duty as follows:

Arnould defined the term as

> *"...the suppression of or neglect to communicate, a material fact within the knowledge of one of the parties which the other has not the means of knowing, or is not presumed to know."*[48]

Some other authorities have, on the other hand, defined the act of non-compliance with the duty, which is known as concealment or preferably and correctly as non-disclosure. Phillips was of the view that concealment would be

> *"[W]here one party suppresses or neglects to communicate to the other a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favourable to himself, and which is known, or presumed to be so, to the other."*[49]

He further added that it was "... *the unwitting omitting to state a material fact is a concealment.*"[50] Whereas, Marshall deemed it to consist of "... *the suppression of any fact or circumstance material to the risk.*"[51]

In *London Assurance v Mansel*[52], Jessel stated that

> *"Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact."*[53]

Tindal, C.J., advanced a rather clearer definition in his judgment in *Elton v Larkins*[54] where he said:

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[48] Arnould, Law of Marine Insurance and Average, 16th ed., (1981), Vol. 2, at para.475, (hereafter Arnould Vol. 2)
[49] Phillips, Ins., at s. 531, (hereafter Phillips).
[50] Ibid., at s. 546.
[51] Marshall, Samuel., A Treatise on the Law of Insurance, 2nd ed., (1808), (hereafter Marshall).
[52] (1879) 11 Ch. D. 363, [Life].
[53] Ibid., at p. 370.

"[A] material concealment is a concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether, or not to effect it except at a large premium than the ordinary premium."[55]

Also Ivamy[56] Curzon[57] Brown[58] Bennett[59] respectively defined the term as:

"A failure by the insured to disclose material facts to the insurers with the result that they are entitled to avoid liability under the policy.", "Failure to perform a duty to make known relevant material information.", "Non-disclosure of a material circumstance probably amounting to fraud." and *"The wilful failure to disclose a material fact by a proposer for insurance."*

Moreover, Salzman[60] relying upon Black's Law Dictionary[61], stated that it is

"...the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter;..."[62]

Although it is now established that the duty of disclosure is an absolute one which means that its violation would render a policy of marine insurance voidable irrespective of whether such violation was intentional or innocent, from the above definitions, it seems clear that the early definitions such as those delivered by Jessel in *London Assurance v Mansel*, Tindal, C. J., in *Elton v Larkins*, Marshall and Arnould concentrated upon fraud or intentional suppression as a requirement to constitute non-disclosure. So, if the non-disclosure was not intentional, then it would not affect the validity of the policy. This is evident from the use of some words such as suppression or concealment. This orientation, which was afterwards criticised and annulled[63], seems to be a mere adoption of the abandoned judgment[64] advanced

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[54] (1832) 5 Car. & P. 385, [Marine].
[55] Ibid., at p. 392.
[56] Ivamy, E. R. Hardy., Dictionary of Insurance Law, (1981), at p. 93.
[57] Curzon, L. B., Dictionary of Law, 4th ed., (1993), at p. 119.
[58] Brown, H. R., Dictionary of Marine Insurance Terms, 4th ed., (1973), at p. 75.
[59] Bennett, C., Dictionary of Insurance, (1992), at p. 72.
[60] Salzman, I. Gary., Misrepresentation and Concealment in Insurance, [1970] 8/No.2 American Business Law Journal 119. (hereafter Salzman).
[61] 6th ed., (1990), at p. 289.
[62] Salzman, at p. 119.
[63] The term *"concealment"* does not really represent the correct nature of the duty's breach, for that it implies that there was an intention that the underwriter should not be informed of material circumstances, while, in fact, a mere innocent non-disclosure will also entitle the underwriter to avoid the contract. This was the view of Kay L.J. in *Asfar v Blundell* (1896) 1 Q.B.D. 123, [Marine], at p. 133, which was stated as follows: *"I agree that concealment is something more than non-disclosure: it is the keeping something back which it is the duty of the assured to bring specifically to the notice of the underwriter."* The same view was adopted by Welford and Otter-Barry, The Law relating to Fire Insurance, 4th ed., (1948), at p. 132, Clarke, A. Malcom., The Law of Insurance Contracts, 2nd ed., (1994), at p. 549, Arnould, Vol. 2, at para.475, where it was mentioned that *"[I]n former editions the term concealment was used, but this is misleading as it implies an intention to deceive, whereas mere accidental failure to disclose material facts is a sufficient breach of the duty. The term non-disclosure is the one known in general use, and it has been preferred in this edition."*; Halsbury's Laws of England, 4th ed., (1994), Vol. 25, at para.350, (hereafter Halsbury), where it was declared that: *"[T]his duty is a positive duty to disclose and a mere negative omission constitutes a breach; it is, therefore, misleading to use the word 'concealment' in relation to the duty as it tends to suggest a positive breach of a negative duty as distinct from a negative breach of a positive duty."* and by Black's Law Dictionary, 6th ed. (1990), where it was stated, at p. 289, that *"[A] "concealment" in law of insurance implies an intention to withhold or secrete information so that the one entitled to be informed will remain in ignorance."*
[64] See *Lindenau v Desborough* (1828) 8 B. & C. 586, [Life], at p. 592, where the plaintiff's defence against the underwriter was that it was declared by Lord Mansfield that *" ... it must be a fraudulent concealment of circumstances that will vitiate a policy."* Bayley J. rejected this contention and stated that *"[B]esides the cases already*

by Lord Mansfield in *Mayer v Walter*[65], where he stated that *"[I]t must be a fraudulent concealment of circumstances that will vitiate a policy."*[66]

It ought also to be mentioned that the concept of materiality forms an important ingredient of the development of the definition of the duty of disclosure. This is because it is seen as a limiting factor restricting the scope of the duty to the disclosure of material facts only. The importance of this concept and its effect upon the scope of the duty of disclosure would be deeply examined and commented upon in the chapter entitled 'the concept of materiality and actual inducement'.

Unfortunately, none of above definitions is satisfactorily complete. This is partly because all of them are only defining the breach of the duty rather than the duty itself and partly because none of them takes into account the reciprocal nature of the duty. Therefore, the duty might be defined as

> *"a duty imposed upon all parties to a contract of marine insurance to disclose to each other before the conclusion of the contract all material facts concerning the risk to be insured against, which, if so disclosed, would influence the judgment of either party whether to enter into the contract or not and, if so, upon which terms and at what premiums, with the effect that the aggrieved party will be entitled to avoid the contract."*[67]

3.3. The legal basis of the duty

Speaking of the English marine insurance law, the duty that an assured is required before the conclusion of the contract to inform an underwriter of all material facts affecting the risk insured and which would influence the latter's decision whether to insure or not finds its legal basis in the wording of ss. 18(1) of the MIA 1906. It reads as follows:

> *"[S]ubject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract."*

Similarly, under the Egyptian and Saudi Arabian marine insurance laws, the duty of disclosure is enforced by s. 361 of the MTL 1990 [Egypt][68] and s. 342 of the CCL 1931 [SA][69]. Section 361 of the MTL 1990 states that

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mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship." Also, see the judgment delivered by Lord Cockburn C.J. in *Bates v Hewitt* (1867) L.R. 2 Q.B. 595, [Marine], at p. 607; *Ionides v Pender* (1874) L.R. 9 Q.B. 531, [Marine], per Blackburn, J. at p. 537; *Blackburn v Vigors* (1887) 12 App. Cas. 531, [Marine], per Lord Watson, at p. 540.

[65] (1782) 3 Dougl. 79, [Marine].

[66] Park, A System of The Law of Marine Insurance, 8th ed. (1842, reprinted 1987) Vol. 1 at p. 432. It must be mentioned that Park's book has been cited here as another reference for the case because it includes some citations of Lord Mansfield's judgement, which the original transcript of the case does not have.

[67] It ought to be admitted that this definition is a mere try from the researcher to clarify what is meant by the term disclosure as a legal duty imposed upon parties to a contract of marine insurance.

[68] Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), Dar Al Jami'ah Al Jadyadah Ln Nashir, Egypt, at p. para.670, (hereafter Ta Ha).

"[T]he insured must pay the insurance premium and expenses at the place and time agreed upon. He shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."[70]

Whereas s. 342 of the CCL 1931 reads as follows:

"[I]f the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof, regardless of whether the risk is not as grave as that which appears to result from such silence or statement, or the risk, other than supposed risk results, which is a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void; such silence, or false statement or difference shall cause the insurance policy to lapse, even though an event occurs to cause the loss and perishing of the insured items."[71]

3.4. The provisions regulating the application of the duty

The rules governing the duty of disclosure are contained in ss. 18 and 19 of the MIA 1906 [UK], s. 361 of the MTL 1990 [Egypt] and s. 342 of the CCL 1931 [SA]. The English rules are now established to represent not only the law with regard to marine insurance contracts, but also the law of other types of insurance such as fire, life, guarantee, burglary etc.[72]

This also seems to be the position under the Egyptian law where, apart from s. 764 stating the remedy available in the field of life insurance in case there has been non-disclosure or misrepresentation by the assured, there is no provision in the Civil Code 1948[73] regulating this duty. Due to this lack of enactment it has been the customary practice of the Egyptian courts to impose a similar duty to that contained in s. 361 of the MTL 1990 as

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[69] Haberbeck, Andreas., & Galloway, Mark., Saudi Shipping Law, (1990), at p. 233-5; (hereafter Haberbeck & Galloway); El-Sayed, Hussein. M., Maritime Regulations in the Kingdom of Saudi Arabia, (1987), at p. 192-4, (hereafter El-Sayed).

[70] It ought to be stated that there is no official translation of the Egyptian MTL 1990 and, therefore, the translation of any section or sub-section referred to in this thesis is based upon the translation done by Mohammed, Ahmed., The New Marine Trade Law 1990, (1995).

[71] Since there is no official translation of the Saudi Arabian CCL 1931, the translation used in the discussion of the Saudi Arabian marine insurance law will be based upon that one done by James Whelan in his work entitled 'The Maritime Laws of the Arabian Gulf Cooperation Council States', (1986), V. II, at p. 54-81. This is because it is the only translation available of the law to the researcher

[72] *Carter v Boehm* (1766) 3 Burr 1905, at p. 1910, where Lord Mansfield declared that the doctrine of utmost good faith also applies to all sorts of contracts and dealings. This was also asserted in many cases such as *London Assurance v Manset* (1879) 11 Ch D 363, [Life], per Jessel, at p. 367; *Brownlie v Campbell* (1880) 5 App Cas 925, per Lord Blackburn at p. 954; *Greenhill v Federal Insurance* [1927] 1 K.B. 65, per Scrutton LJ at p. 76, *Rozanes v Bowen* [1928] 32 L.IL. Rep. 98, [CA-Jewellery], per Scrutton LJ at p. 102; *Godfrey v Britannic Assurance* [1963] 2 L.IL. Rep. 515, per Roskill, J. at p. 528; *Lambert v Co-Operative Insurance* [1975] 2 Lloyd's Rep. 485, [CA-All risks], per Mackenna, J. at p. 487 and Cairns LJ. at p. 492; *Highland Insurance v Continental Insurance* [1987] 1 Lloyd's Rep. 109, [Reinsurance], per Steyn, J. at p. 113-14, where he stated that *"[I]t is also important to bear in mind in 1975 the Court of Appeal unanimously took the view that in relation to matters of non-disclosure and misrepresentation there is no difference between marine and non-marine insurance law. Respectfully I would add that the Marine Insurance Act, 1906, was a codification of the common law; that the common law should be presumed to be the embodiment of common sense; and that common sense rebels against the idea that there should be a difference between marine and non-marine insurance in relation to non-disclosure and misrepresentation."*

[73] This code, which repealed the Civil Code of 1883 in force in the national courts and the Civil Code of 1875 in force in the Mixed Courts, was enacted as Law No. 131 on 16/7/1948. It was published in the Egyptian Official Gazette in Issue No. 108 (duplicate) on 29/7/1948 and came into force on 15/10/1949.

representing the customary law in respect of marine and non-marine insurance.[74] Therefore, it could be said that s. 361 should be taken as stating the duty of disclosure applicable to marine and, when it is appropriate and nothing is stated to the contrary, other types of insurance.

As far as the Saudi Arabian law is concerned, this issue does not appear to have caused much concern. This is due to the fact that although Chapter 11 of the CCL 1931 is exclusively concerned with marine insurance contracts, it is, in fact, the only official law governing insurance business in the Kingdom. So, in theory, its provisions should be taken as representing the customary law in this matter, unless there is something to the contrary.

Therefore, since, in essence, there is no difference between the duty in marine and non-marine insurance, the discussion of this duty under marine insurance contracts will, when it seems appropriate to do so, involve the discussion of the duty under other types of insurance contracts. This will be through the following sub-sections: the duty of the assured, the duty of the agent, facts which need not be disclosed and the duration of the duty.

3.4.1. The duty of the assured

As it has been stated, the assured's duty of disclosure is governed under the English law by ss. 18(1) of the MIA 1906. This subsection places the assured under a positive duty to make all that is material to the risk proposed for insurance available to the underwriter to consider and take into account before being able to decide whether to insure or not and, if so, at what rate and upon what conditions. According to ss. 18(1), the assured is not only required to disclose all that which is material being within his knowledge, which is usually referred to as actual knowledge. His duty is rather more extensive to the extent that he is even under an obligation to disclose those material facts, which although are not currently within his actual knowledge, they, as a matter of business, ought to be known to him in the ordinary course of business. This type of knowledge is usually referred to as presumed knowledge. The mere negative attitude in not performing this duty, whether intentionally or innocently, will render the policy voidable at the suit of the underwriter. This heavy duty has been imposed upon the assured as a result of a general presumption that the special facts required for the estimation of the risk are only known to the assured and about which the underwriter,

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[74] Arafa, Mohammed. Ali., Sharh Al Qanun Al Madany Al Jadyd Fi At Ta'myn Wa Al Aaqud Al Saghirah, (The Elucidation of the New Civil Code in Insurance and Small Contracts – in Arabic), 2nd ed., (1950), at p. 145-6, (hereafter Arafa); Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), 2nd ed., (1990), Vol. 7 (Part 2), at para.613, (hereafter Al Sanhuri, Vol. 7/2); Yihya, Abdul Wadood., Al Mujaz Fi Aaqd At Ta'myn, (The Concise in the Contract of Insurance – in Arabic), (undated), at p. 138-40, (hereafter Yihya).

who is asked to cover the said risk, knows nothing. Lord Justice Scrutton stated this in *Greenhill v Federal Insurance Company Ltd.*[75] as follows:

> *"... insurance is a contract of the utmost good faith, and it is of the gravest importance to commerce that that position should be observed. The underwriter knows nothing of the particular circumstances of the voyage to be insured. The assured knows a great deal, and it is the duty of the assured to inform the underwriter of everything that he is not taken as knowing, so that the contract may be entered into on an equal footing."*[76]

This was also expressed by the judgment of Kennedy LJ[77] who stated that

> *"... no class of case occurs to my mind in which our law regards mere non-disclosure as a ground for invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in deference to the plain exigencies of this particular and most important class of transactions. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and, generally, is, as to some of them, the only person who has the knowledge; the underwriter, whom he asks to take the risk, cannot, as a rule, know, and but rarely has either the time or the opportunity to learn by inquiry, circumstances which are, or may be, most material to the formation of his judgment as to the acceptance or rejection of the risk, and as to the premium which he ought to require."*[78]

Admittedly, ss. 18(1) imposes upon the assured a comparatively wide duty to place in front of the underwriter, prior to the conclusion of the contract, all material circumstances relating to the risk presented for insurance, contained in both his actual and constructive knowledge. Any failure upon the part of the assured to discharge this cumbersome duty will result in that the underwriter is entitled to avoid the contract.[79] It is noteworthy to mention that the term *'circumstance'* used in the formation of ss. 18(1) has a limited scope in that, as is indicated by ss. 18(5) of the MIA 1906[80], it *"includes any communication made to, or information received by, the assured"*.[81]

The duty under the Egyptian[82] marine insurance law almost resembles that imposed under the English law in the sense that the assured is required to acquaint the underwriter of all material circumstances in respect of the risk proposed for insurance which are known to him, otherwise the underwriter is entitled to avoid the contract.

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[75] [1927] 1 K.B. 65.
[76] Ibid., at p. 76-7.
[77] *London General Omnibus v Holloway* [1912] 2 K.B. 72, [CA-Guarantee]. This assumption was also confirmed in *Joel v Law Union and Crown Insurance* [1908] 2 K.B. 863, [CA-Life], per Fletcher Moulton L.J., at p. 885.
[78] Ibid., at p. 85-6.
[79] It must be mentioned that avoidance here does not mean that the contract is automatically avoided but it is avoided at the option of the underwriter.
[80] The MIA 1906.
[81] It should be noted that the scope of the term *'circumstance'* was recently extended by the judgment of Diamond, Q.C. in *Simner v New India Assurance* [1995] LRLR 240, [Reinsurance], at p. 253, to cover any material information which the assured suspected its existence, but refrained from making enquiries about it. This sort of knowledge was referred to by using the phrase *"turning a blind eye"*. See also the presumed knowledge's section (below).
[82] S. 361 MTL 1990.

Nevertheless, the position under the Saudi Arabian law[83] is rather different. This is due to the fact that while the English and Egyptian rules impose a broad duty upon the assured to disclose all that is material to the risk, the Saudi Arabian rule is to some extent limited. This is because, apart from the obligation to disclose particulars which are of relevance to the formation of the policy, the assured, according to s. 342, is under no further duty to volunteer any additional circumstances. This would be the case irrespective of their materiality to the risk insured and irrespective of whether they would affect the judgment of the underwriter whether to insure or not. Examples of particulars deemed relevant to the formation of the policy and, therefore, are to be disclosed are those which are set out in s. 325 of the CCL 1931.[84] These include, amongst others, the name of the assured, the name and value of the insured ship or ships or goods, the insurance consideration etc. The scope of the duty and, therefore, the amount of particulars to be disclosed would, as such, vary depending upon the type of insurance being effected. For instance, if the subject- matter of insurance is cargo, then the assured's duty of disclosure will include, in addition to particulars mentioned in s. 325, the condition, nature of the goods, whether they are damageable or perishable, the methods ought to be used to preserve and ship them etc.

Therefore, it is very clear that there is a tremendous difference between the scope of the duty to voluntarily provide the underwriter with everything material to the risk insured affecting his decision in respect of the acceptance of the insurance and the calculation of the premium as stated by ss. 18(1) of the MIA 1906 [UK] and 361 of the MTL 1990 [Egypt] on one hand and the scope of the duty to only supply information needed and relevant to the making of the policy as stated by s. 342 of the CCL 1931 [SA] on the other one. As a result, underwriters insuring risks governed by the Saudi Arabian law, as a matter of precaution, are advised to make detailed inquires about all that they think is material to know and which is not covered by either s. 342 of the CCL 1931 or the clauses of the policy in question. Failing that means that underwriters would run the risk of finding themselves responsible for the losses of risks which they either did not intend to insure at the agreed premiums or conditions or did not intend to insure at all.

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[83] S. 342 CCL 1931.

[84] This section states that the policy must include the following particulars: *"[A]n insurance policy may be either official or made between both parties only, and prepared without leaving blank spaces and stating the following particulars: (1) the year, month, day and hour of signature and sealing; (2) the name, surname and domicile of the insured, and the capacity in which he signs as owner or commission agent; (3) the nature and price or estimated value of the insured goods and items, and the amount of the insurance; (4) the risks covered by the insurer, (5) the time and date of commencement and expiry of the risks covered with regard to the insurer; (6) the insurance consideration; (7) the name of the master and name and type of the vessel; (8) the name of the place from which the goods are, or will be, shipped; (9) the name of the port to which the vessel has proceeded; or will proceed; (10) the ports and quays from which the vessel shall load or unload goods, or which the vessel will enter or approach; (11) the fact that both parties have agreed to refer any dispute that may arise to arbitration, if applicable, for settlement; (12) all conditions agreed between the parties."*

3.4.1.1. The ambit of the duty

Since it is the duty of the assured to disclose to the underwriter all material facts within both his actual and deemed knowledge, the following subsection will be devoted to the exploration and examination of the scope of each of these two types of knowledge.

3.4.1.1.1. Actual knowledge of the assured

It is so clear under the English law that it is the duty of the assured to make sure that the underwriter in front of whom the application of insurance is placed is as fully aware of all material circumstances concerning the risk in question as the assured himself. So, whatever material in the actual knowledge of the assured must be disclosed to the underwriter. This is precisely formed by ss. 18(1) of the MIA 1906, which states that

> *" ... the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured ... ."*

It is submitted that making a fair presentation of the risk to the underwriter would satisfy this obligation.[85] To comply with this duty the assured essentially has to disclose what is in his actual knowledge. If he is a natural person, this means the disclosure of what is known to him personally[86], whereas, if it is a company, the applicable test[87] is the disclosure of what is known to a director or an employee at an appropriate level.[88]

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[85] This is what was said by Kerr LJ in *C.T.I. v Oceanus* [1984] 1 Lloyd's Rep. 476 [CA-Marine], at p. 496.

[86] *PCW Syndicates v PCW Reinsurers* [1996] 1 Lloyd's Rep. 241 [CA-Reinsurance], per Staughton, L.J. at p. 254.

[87] The question of whose knowledge or acts is to count as the knowledge or acts of the company used to be answered by applying the test of who is the *'directing mind and will'* of the company so that his acts or knowledge became those of the company. This test, which came from the judgment of Viscount Haldane LC in *Lennards Carrying v Asiatic Petroleum* [1915] AC 705, was described by the judgment of The Privy Council in *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 BCLC 116, delivered by Lord Hoffmaan as not being appropriate in all cases. This was due to the fact that the term *'the directing mind and will'* of a company could be attributed to different persons with regard to different activities and not only to those who have general management and control of the company. Therefore, the test should, as it was suggested in *Meridian Global Funds,* be always a matter of interpretation. This test was adopted and affirmed by Staughton, L.J. in *PCW Syndicates v PCW Reinsurers* ibid., at p. 254, who stated that *"[T]he extent of the knowledge of a company can only be determined by reference to the rule of law which makes the enquiry necessary."* Accordingly, as Staughton, L.J., at p. 253, mentioned, there is *"... no reason to restrict the knowledge of a company under s. 18 to what is known at a high level, by the directing mind and will. I would have thought that knowledge held by employees whose business it was to arrange insurance for the company would be relevant, and perhaps also the knowledge of some other employees."* In respect of those who are neither directors nor employees, Staughton, L.J., at p. 254, further submitted that *"[T]here is no need to create some doctrine by which others become the company's directing mind or will, or the agents of the company to know things"* He justified that upon the existence of the principle of the constructive knowledge of the assured contained in s. 18 which he described as being *" ... a quite sufficient test to deal with the knowledge of agents and others to whom he* [the assured] *may have entrusted all or part of the running of his business."* In this regard, also see *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 [CA-Company]; *Manifest Shipping v Uni-Polaris Insurance (The Star Sea)* [1995] 1 Lloyd's Rep. 651, per Tuckey, J. at p. 659-660; [1997] 1 Lloyd's Rep. 360, per Leggatt, L.J. at p. 374-9, [CA].

[88] The judgment of The Privy Council in *Meridian Global Funds* ibid., and, so, the view adopted by Staughton, L.J. in *PCW Syndicates v PCW Reinsurance* ibid., were both later upheld by Saville, L.J. in the Court of Appeal in *Group Josi Re v Walbrook Insurance* [1996] 1 Lloyd's Rep. 345 [CA-Reinsurance], where he said, at p. 366, that *"... there is no automatic formula to be applied to answer this sort of question* (whether there are natural person whose knowledge of the alleged material circumstances is to be attributed to the reinsured companies?). *The answer depends on the circumstances i.e. upon the interpretation or construction of the relevant substantive rule... ."*

The assured would not be relieved by disclosing part of the information if it subsequently appeared that that which had not been communicated was material.[89] Nor is the duty satisfied when the assured, before disclosing the facts, takes upon himself the duty of computing or interpreting them instead of disclosing what exactly he knows or receives and leaving the underwriter to form his own judgment.[90] The obligation of the assured would even extend to those matters about the correctness or reliability of which there is doubt[91] and regardless of whether the assured believes them to be material or not.[92]

This duty will also extend to the disclosure of circumstances which are concerned with the honesty and integrity of the assured or his business. This type of information, which is now called *'the moral hazard'*, refers to the disclosure of any previous convictions or offences committed and any pending allegations as such.[93] Although that such circumstances may not be directly connected with the proposed risk for insurance, the importance of their disclosure springs out of their impact upon the judgment of the underwriter. In this sense, these facts may give the underwriter an indication that the would be assured is not that sort of persons whose risk can easily or at all be accepted or may suggest that the proposed assured is likely to be an additional risk. This was clearly illustrated by the judgments respectively given by Slesser L.J. in *Locker and Woolf v Western Australian Insurance*[94] and by Forbes J. in *Reynolds v Phoenix Assurance*[95] as follows:

> *"[I]t is elementary that one of the matters to be considered by an insurance company entering into contractual relations with a proposed assured is the question of the moral integrity of the proposer-what has best been called the moral hazard."... "[T]he object of requiring disclosure of circumstances which affects the moral risk is ... to discover whether the proposer is a person likely to be an additional risk from the point of view of insurance."*

Moreover, the existence of a proposal form would not abrogate or limit the general application of the duty of disclosure so as to make it unnecessary for the assured to disclose

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[89] *Kirby v Smith* (1818) 1 B. & Ald. 672, [Marine]; *Westbury v Aberdein* (1837) 2 M & W 267, [Marine].

[90] *Macdowall v Fraser* (1779) 1 Dougl. 260, [Marine], per Lord Mansfield.

[91] *De Costa v Scandret* (1723) 2 P. WMS. 170, [Marine], where Lord Chancellor stated that *"[T]he insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it... ."* Also see *Seaman v Fonereau* (1743) 2 Strange. 1183,[Marine]; *Lynch v Hamilton* (1810) 3 Taunt. 37, [Marine], at p. 44-5; *Lynch v Dunsford* (1811) 14 East. 494, [Marine], at p. 497-8; *Morrison v The Universal Marine Insurance* (1873) L.R. 8 Exch. 197, [Marine].

[92] *Lindenau v Desborough* (1828) 9 B. & C. 586, [Marine], where Bayley J at p. 592 and Littledale J. at p. 593 respectively stated that *"... the proper question is, whether any particular circumstance was in fact material? And not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material." ; "... I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was in truth material... ."; Brownlie v Campbell* (1880) 5 App Cas 925, per Lord Blackburn, at p. 954; *Life Association of Scotland v Foster* (1873) 11 Session Cas. 3rd Ser. 351, [Life], per Lord President Inglis at p. 359-60; *Joel v Law Union & Crown Insurance* [1908] 2 K.B. 863. [AC-Life], per Fletcher Moulton L.J., at p. 883-4; *Godfrey v Britannic Assurance Company, Ltd.* [1963] 2 Ll.L. Rep. 515, [Life], per Roskill, J. at p. 529.

[93] Note that the disclosure of spent convictions or offences is subject to the provisions of The Rehabilitation of Offenders Act 1974 according to which the assured is exempted from the need to disclose certain previous convictions and information ancillary to them.

[94] [1936] 1 K.B. 408 [CA-Fire], at p. 414.

[95] [1978] 2 Lloyd's Rep. 440, at p. 460.

any other material facts not being dealt with in the said form[96] and nor would its absence modify it so as to relieve the assured of his duty to make complete, accurate and honest disclosure.[97] However, the proposal form may sometimes have the effect of limiting or modifying the duty of disclosure if its questions are so framed so as to require the disclosure of certain information only or to confine the application of the duty to a certain period of time.[98]

Furthermore, it is also the duty of the assured upon each renewal of the policy to correct or amend, when it is necessary, any earlier disclosures and to make the underwriter aware of all the new material circumstances which have come out and which may influence his judgment whether to renew the policy or not.[99] It follows that any non-disclosure previously committed, which would render the original policy avoidable, will not avoid the renewed policy if it is corrected before its renewal.[100]

However, the assured is not required in conformity with his duty to disclose circumstances which he does not know or which cannot reasonably be deemed or expected to be within his actual knowledge.[101] It must be mentioned that, in reinsurance contracts, a

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[96] *Schoolman v Hall* [1951] 1 Ll.L.Rep. 139, [CA-Jewellery], where Cohen L.J. after referring to the observations of Lord Dunedin in the House of Lords in *Glicksman v Lancashire and General Assurance* [1927] AC 139, [HL-Burglary], where he said, at p. 143, that apart from the questions of the proposal form, *"... there is the duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk."*, proclaimed, at p. 142, that *"... applying those observations here, while the insurers have stipulated that the answers to the fifteen questions "shall be the basis of the contract," that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but it does not relive the proposer of his general obligation at common law to disclose any material which might affect the risk which was being run, or which might affect the mind of the insurer as to whether or not he should issue a policy."*

[97] *Woolcott v Sun Alliance & London Insurance* [1978] 1 Lloyd's Rep. 629, [Fire], where Caulfield J., at p. 633, announced that *"[T]he duty, in my judgment, rested on the plaintiff, when he completed his application form for a loan, to disclose his criminal record, for, by that application, he was accepting that the society would effect the insurance of his property on his behalf as well as their own behalf. I do not think the absence of a proposal form for insurance modifies in any degree the duty of disclosure on the plaintiff. The plaintiff knew the society would be effecting a policy of insurance on their own behalf and on his behalf, and accordingly, in my judgment, there was a duty upon the plaintiff to disclose such facts as a reasonable or prudent insurer might have treated material."*

[98] This what was expressed by Asouith LJ in *Schoolman v Hall* ibid., at p. 143, *"[I]t is unquestionably plain that questions in a proposal form may be so framed as necessarily to imply that the underwriter only wants information on certain subject-matters, or that within a particular subject-matter their desire for information is restricted within the narrow limits indicated by the terms of the question, and, in such a case, they may pro tanto dispense the proposer from what otherwise at common law would have been a duty to disclose everything material."*

[99] *Pim v Reid* (1843) 8 Man. & G. 1, [Fire], in which Cresswell J. announced that *"[N]o fresh proposal appears, therefore, to be expressly required on either side at the end of the first year; but it may then be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance."* The observation of Cresswell J. were adopted and applied by Astbury J. in *In re Wilson and Scottish Insurance Corporation* [1920] 2 Ch. 28, [Fire/Motor], at p. 31.

[100] Halsbury, Vol. 25, at para.476.

[101] *Joel v Law Union & Crown Insurance* [1908] 2 K.B. 863 [AC], affirming [1908] 2 K.B. 431. Fletcher Moulton L.J. was of the opinion that *"[T]he duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But, the question always is, Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an insurance company of all the casual headaches he had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of that character, but he cannot be held*

similar duty is also enforced upon the reassured who has to place before the reinsurer those information held within his actual knowledge with regard to the risk presented for reinsurance.[102]

If the assured fails to communicate to the underwriter any single material fact, he will be in breach of his duty and the contract will become voidable at the instance of the underwriter. The duty is breached whether the failure to disclose was the result of an intentional act to mislead the underwriter or merely of a mistake, omission, indifference, forgetfulness, or negligence.[103] This is simply because the underwriter is deemed to have been misled to make a contract which he would not have made[104] had he known the undisclosed fact.

The position under the Egyptian law is the same. So, the assured seeking to insure his risk must disclose to the underwriter what he actually knows in respect of the risk. This is quite manifest from the wording of s. 361 of the MTL 1990, which states that

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liable for non-disclosure in respect of facts which he did not know."; *Swete v Fairlie* (1833) 6 Car. & P. 1, [Life], where it was held that the failure of the person whose life was insured to disclose to the underwriter that he was afflicted with a disorder tending to shorten his life, did not vitiate the policy, for that his type of illness was of the nature that it prevented him from knowing that he was suffering from it; *Fowkes v The Manchester and London Life Insurance* (1862) 3 F. & F. 440, [Life], in which Cockburn, C.J. stated that the person whose life was insured was not liable for not disclosing the fact that he had some symptoms of gout about which existence he did not know and which only an experienced medical man could detect as denoting the presence of gout in the system.

[102] *China Traders' Insurance v Royal Exchange Assurance* (1898) 2 Q.B. 187, [CA-Marine], in which Vaughan Williams L.J., at p. 193, affirmed that *"[A] reinsurer is himself an assured who takes upon himself the duty, not only before but after the contract comes into operation, to act with the greatest good faith."*; *SAIL v Farex* [1995] LRLR 116 [CA-Reinsurance], where Dillon, L.J., at p. 141, stated that ss. 18 and 19 are representing the law applicable to both insurance and reinsurance.

[103] *Carter v Boehm* (1766) 3 Burr. 1905, at p. 1909. For a line of cases establishing the same view see *Macdowall v Fraser* (1779) 1 Dougl. 260; *Buse v Turner* (1815) 6 Taunt. 338; *Lindenau v Desborough* (1828) 8 B. & C. 586, at p. 592; *Wheelton v Hardisty* (1857) 8 E. & B. 232, [Life], at p. 273; *Traill v Baring* (1864) 4 De G. J. & S. 318, [Life], at p. 328; *Bates v Hewitt* (1867) L.R. 2 Q.B. 595, [Marine], at p. 607; *Life Association of Scotland v Foster* (1873) 11 Session Cas. 3rd Ser. 351, at p. 359-60; *Joel v Law Union and Crown Insurance* [1908] 2 K. B. 863; *Murphy v Sun Life Assurance Co. Of Canada* [1964] 44 D.L.R. (2d) 369, at p. 375; *Godfrey v Britannic Assurance* [1965] 2 Ll.L.Rep. 515; and *Anglo-African Merchants v Bayley* [1969] 1 Lloyd's Rep. 268, [Goods], at p. 275. A contrary view to the effect that a policy would not be vitiated for non-disclosure unless it was fraudulent was expressed by Lord Mansfield C. J in *Mayer v Walter* (1782) 3 Dougl. 79. For the following citations see Park's The Law of Marine Insurance, at p. 432: *"[I]t must be a fraudulent concealment of circumstances, that will vitiate a policy."* Also, Hasson in his article titled 'The doctrine of uberrima fides in insurance law- a critical evaluation' [1969] 32 MLR 615, at p. 618, stated that the judgment of Burrough, J. in *Friere v Woodhouse* (1817) Holt 572, [Marine], seems to share the same view and, so, to require the underwriter to show that there was fraud before being able to avoid the contract for non-disclosure. However and apart from the inconsiderable acceptance it received in the field of Life Insurance where Lord Campbell C. J. in *Wheelton v Hardisty* (1857) 8 El. & Bl. 231, mentioned, at p. 273, that *"[I]n the present case the plaintiffs were neither guilty of misrepresentation nor of fraudulent concealment.... ."*, Cockburn, C.J. in *Fowkes v The Manchester and London Life Insurance* (1862) 3 F. & F. 441, where his judgment seems to be holding that the mis-statements must be wilful to vitiate the policy and Lopes, L. J. in *Hambrough v The Mutual Life Insurance Company of New York* (1895) 72 L.T. 140, [Life], who declared, at p. 141, that *"[N]ow I think this is a very good statement of the law: In policies of insurance on life, an erroneous statement respecting the life insured, or mere silence respecting a material fact, in the absence of any fraudulent intention, does not avoid the policy, unless the policy contains an express proviso that it shall be conditional upon the truth of the declaration made by the insured."*, *Mayer v Walter* was almost completely ignored and not followed by subsequent judges who continued avoiding policies of insurance upon the ground of non-disclosure regardless of whether it was fraudulent or otherwise.

[104] The required effect of an undisclosed material fact upon the decision of an underwriter whether to enter into a contract or not and, if so, upon what terms will be discussed in Chapter [5].

> *"[T]he insured ... shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."*

This duty was confirmed by the judgment of the Court of Cassation[105] where it was stated that

> *"[A] contract of insurance is one of those contracts which are based upon good faith and the truthfulness of the statements singed by the assured and any fraud in such statements or non-disclosure of the true situation would make the insurance void. This is because the assured is bound to inform the underwriter of all the circumstances required to enable him to estimate the risk to be insured and its graveness ... and the non-compliance with this duty would cause the insurance to become void."*

The scope of this obligation will usually include, as was pointed out by Al Sanhuri[106], the disclosure of two types of facts. First, personal facts which illustrate what kind of person the assured is. This type which is normally known as *'moral risk'* will encompass facts linked with the character of the assured, his insurance record, his carefulness, his solvency etc. Whereas, the second type is objective facts which relate to the description of the nature, circumstances and extent of the risk to be insured.

So, when the assured did not disclose the right size of the ship upon which the insured goods were shipped, the Mixed Court of Appeal before which the case came held that this was a non-disclosure of a material fact and it would avoid the policy irrespective of the contention of the assured that they were misled by the owner of the ship as to its correct size.[107] In the same manner, it was held by the Court of Cassation that if the assured, in a life policy, did not state that he was suffering from an illness in his kidneys, the underwriter would be able to avoid the policy.[108] The Mixed Court of Appeal also held that the non-disclosure of the assured who was a pharmacist that he was working with explosive substances entitled the underwriter to rescind the contract when it was discovered that his death was due to an explosion in his pharmacy while he was making missiles.[109] To the same effect the same Court held that the non-disclosure of some previous robberies in a burglary

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[105] Collection of the Court of Cassation's Judgments, 25/5/1981, Case No. 286, Judicial Year 47, p. 1583, [Burglary]. The judgment of this case was recently reaffirmed by the decision reported in Collection of the Court of Cassation's Judgments, 26/5/1991, Case No. 188, Judicial Year 56, p. 1205, [Life].

[106] Al Sanhuri, V. 7/2 at para.614. To the same effect also see Yihya, at p. 143-44; Arafa, at p. 146-49, Al Badrawi, Abdul Mun'am., At Ta'myn (The Insurance – in Arabic), (1981), at para.125, (hereafter Al Badrawi).

[107] Mixed Appeal 7/4/1926, Gazette 17, p. 199, [Marine].

[108] Collection of the Court of Cassation's Judgments, 30/11/1967, Case No. 269, Judicial Year 34, p. 1773. Also, see the judgment of the Mixed Court of Appeal where it held that the non-disclosure of the fact that the assured had had pulmonary tuberculosis which afterwards caused his death would avoid the policy; Mixed Appeal 9/12/1925, Civil Collection, Year No. 38, p. 90, [Life]. In the same case, it was further held that the contract would also be void if the assured made another person attend the pre insurance medical examination instead of him. Moreover, it was held that the non-disclosure of the special particulars of the health of the assured would make the policy voidable. For this, see Mixed Court of Appeal 26/11/1930, Civil Collection, Year No. 43, p. 44, [Life] and Mixed Appeal 25/1/1939, Civil Collection, Year No. 51, p. 134, [Life].

[109] Mixed Appeal 9/6/1937, Gazette 28, No. 114, p. 128, [Life]. Also, see Mixed Appeal 19/4/1944, Civil Collection, Year No. 56, p. 124, [Life], where the non-disclosure of the assured's health condition was held material and made the insurance voidable.

insurance[110] or the non-disclosure of the assured's real job in a casualty insurance[111] or the non-disclosure of the fact that other underwriters had refused to insure the assured's life in a life insurance[112] or the non-disclosure of the name and character of the real assured in a fire insurance[113] would avoid the insurance

As it is the case under the English law, this duty also applies to reinsurance contracts governed by the Egyptian law. As a result, a reassured has to disclose to a reinsurer all material particulars bearing on the risk proposed for insurance and which would affect the judgment of the reinsurer as to the acceptance of the reinsurance and, if so, the fixing of the terms of the policy and the calculation of the premium required.[114]

However, the position under the Saudi Arabian law is not comparatively the same. By looking into the words of s. 342 of the CCL 1931, which is that *"[I]f the insured keeps silent about ... particulars ...he should mention in the insurance policy, the insurance policy made out shall in respect to the insurer be deemed to be null and void ..."*, it is obvious that the assured is not obliged to make full disclosure of what is material within his actual knowledge. He is only bound to disclose limited material particulars which are relevant to the policy.[115] In other words, the duty of the assured to disclose all material fats within his actual knowledge is restricted to the disclosure of those particulars contained in s. 325 and to any other facts required by the terms of the policy. It follows that any other vital circumstances affecting the decision of the underwriter are not to be disclosed even if they are actually known to the assured, provided that they are not subject to direct questions by the underwriter.

But, if the insurance is being on cargo, an additional and wider duty of disclosure is therefore required. According to s. 342[116], this extra duty requires the assured to make sure that there are no discrepancies between the particulars of the cargo disclosed and, then, inserted in the policy and those stated in the bill of lading. So, if the assured failed to disclose the same details, his non-disclosure will cause the policy to be *"null and void"*.[117]

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[110] Mixed Appeal 7/4/1937, Civil Collection, Year No. 49, p. 180.
[111] Mixed Appeal 28/5/1919, Civil Collection, Year No. 31, p. 316, in this case, the assured stated that he lived on the profit of the investment of his own assets while he was in fact working as a seaman; Mixed Appeal 9/6/1937, Gazette 28, No. 114, p. 118, [Casualty].
[112] Mixed Appeal 4/6/1903, Civil Collection, Year No. 15, p. 340. Also, see Mixed Al Askandariyah 6/2/1933, Gazette 23, No. 269, p. 229, [Life], where the assured did not tell the insurance company that he had also effected additional insurances upon his life with other insurance companies.
[113] Appeal 2/2/1933, R 45, p. 154.
[114] Yihya, Abdul Wadood., Ai'adat At Ta'myn, (Reinsurance – in Arabic), (undated), at p. 104-5; Yihya, Abdul Wadood., Ai'adat At Ta'myn, (Reinsurance – in Arabic), (1962) 2 Al Qanoun Wal Iqtisad Journal 1, at p. 91-3.
[115] El-Sayed, at p. 193; Haberbeck & Galloway, at p. 233.
[116] " *... if the particulars do not conform to those shown in the bill of lading ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... .*" Also, see Haberbeck & Galloway, at p. 233; El-Sayed, at p. 193.
[117] Ibid.

This narrow application of the duty of disclosure was also confirmed by the case law. So, in *the Flying Falcon*[118], which was a case about a marine policy upon a ship, the insured company informed the insurance company that the ship run aground and became a constructive total loss and, therefore, it would claim its loss under the policy. The insurance company refused to pay alleging, *inter alia*, that it was induced to insure the ship by the non-disclosure of the character of one of the directors of the insured company a fact which if it had been known to it, it would not have accepted to insure the ship under any terms. The dispute was referred to an arbitral panel, which after considering the circumstances of the case found a verdict for the insured company. By applying a limited duty of disclosure, the arbitral panel stated that since this fact was not required by the policy, then the insured company was under no duty to disclose it. If, the arbitral panel added, the characters of the directors of the insured company were all important to the insurance company, it should have specifically inquired about them or make them covered by one of the terms of the policy.[119]

Similar award was also given by the arbitral panel in its judgment under a policy of fire insurance[120]. In this case, the assured, who was a press company, insured its buildings and printing machine against fire. The insured buildings and the printing machine were both damaged by fire resulted from a change in the structure of the insured buildings and the assured claimed its loss. The insurance company rejected the claim upon the ground that the assured had breached a warranty that it should inform the insurance company of any changes made to the insured building. The dispute was brought before an arbitral panel which, subsequently, held the insurance company responsible for the loss. In its judgment, the arbitral panel stated that in insurance contracts, it is the duty of the assured to observe utmost good faith and not to withhold, as stated in s. 342 of the CCL 1931, any matter relevant to the contract in question.[121]

Thus, according to s. 342 of the CCL 1931, it seems to be of little importance, if not at all, to identify whether a material non-disclosed fact was or was not within the assured's actual knowledge. This is because the only situation where the determination of whether a non-disclosed fact was actually known to the assured or not would be of importance is when

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[118] Arbitral award 12/12/1995, [Marine].

[119] Ibid., at p. 18.

[120] Arbitral award 18/5/1993, [Fire]. Also, see arbitral award 19/10/1986, [Buildings], where the arbitral penal gave judgment to the same effect. A contrary view to the limited duty of disclosure was however expressed by the arbitral award issued on 22/12/1986 under a house insurance. In this case, the assured claimed to be indemnified against the loss of his valuable carpets and jewellers, but the insurance company rejected his claim on the ground of the non-disclosure of the real value of the subject-matter of the insurance. In its judgment which was for the assured, the arbitral penal adopted and applied a wider duty of disclosure than that contained in s. 342 of the CCL 1931. The panel was of the opinion that it was the duty of the assured to disclose to the insurance company before the conclusion of the contract all material facts which would help it to estimate the risk to be insured and to decide whether to insure or not and, if so, upon what premium. Unfortunately, this case seems to be the only case where a comprehensive duty of disclosure similar to that applied under the English and Egyptian was clearly expressed.

[121] Arbitral award 18/5/1993, [Fire], at p. 14.

the alleged non-disclosure is in respect of a fact covered by s. 342 or the terms of the policy, or a direct question by the underwriter. Ultimately, it could be said that unless the non-disclosed fact is one which is the duty of the assured to pass on to the underwriter as explained above, it matters not that it was actually known to the assured at the time he effected his insurance.

Apart from that, it should be added that as it is the duty of the assured to make disclosure under the insurance contract, it is also the duty of the underwriter when he reinsures his risk to make similar disclosure to the reinsurer. This was actually emphasised upon by the arbitral panel in its award delivered on 18/5/1993, in which it stated that it was very essential that assureds and underwriters must adhere to the general customary insurance rules including the duty of disclosure in both insurance and reinsurance contracts.[122]

3.4.1.1.2. Presumed knowledge of the assured

Having, in the first place, required the assured to disclose what is material within his actual knowledge, ss. 18(1) of the MIA 1906, in the second place, referred to a further duty to be accomplished by him, which is the disclosure of facts which although he does not actually know, he could reasonably have known in the usual course of business. This principle, which is now called the principle of the deemed knowledge, is plainly laid down as follows:

> " *... the assured must disclose to the insurer, before the contract is concluded, every material circumstance ... and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him...* "

A close look at the case law shows that the assured is obliged in connection with the principle of the deemed knowledge to disclose two types of material facts. First, material facts which should have been known or discovered in the usual course of business by him. Accordingly, the assured would not be allowed to justify his failure to communicate a material fact upon the ground that he was unaware of it if it subsequently appeared that such a fact was of the nature that it could have reasonably been ascertained by him in the normal course of business.[123] The fulfillment of this duty would require the assured to take reasonable means[124] to acquaint himself with all that ought to be within his deemed

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[122] Ibid.

[123] This duty was declared by Cockburn, C. J. in *Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 511, [Marine], at p. 521 as follows: *"[T]he insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge... "*; This decision was upheld in *Blackburn, Low & Co. v Vigors* (1887) 12 App. Cas. 531, [HL-Marine], per Lord Halsbury L.C. at p. 537.

[124] *Proudfoot v Montefiore*, ibid, at p. 521, where it was stated that the underwriter contracts with the assured upon the basis that the latter will take the necessary measures to keep himself informed of all material circumstances as to the risk in question; *London General Insurance v General Marine Underwriters Association* [1921] 1 K.B. 104, [CA-Marine], per Lord Sterndale, at p. 109-110, where he held that the reassureds, who omitted reading a Lloyd's casualty slip in their possession before instructing their broker to insure, ought to have taken steps to examine and avail themselves of its information.

knowledge. But, this does not necessarily mean that he has to institute detailed investigations before submitting his application of insurance to the underwriter, for the sole sake of obtaining or identifying facts that might be material to the risk.

This what was held in *Australia & New Zealand Bank v Colonial & Eagle Wharves* where McNair J. stated that he was referred to no authority to the effect that the assured owes such a duty to the underwriter.[125] This principle seems nevertheless to be subject to the proviso that the assured must not neither intentionally disregard the existence of any defects in the system of his business, nor withhold back any suspicions or misgivings which he knows.

This principle was adopted by MacGillivray[126] and was recently referred to by Judge Diamond in *Simner v New India Assurance.*[127] In his judgment, Judge Diamond was not merely supporting McNair J.' s decision. In fact, he transformed McNair J.' s decision into a clearer and more rational rule of law. That is to the effect that the assured does not, as a general principle, owe the underwriter a duty to make any detailed enquiries in order to comply with his duty of disclosure. But, if the former suspected or had good reasons to suspect the existence of material facts to be disclosed and, nevertheless, deliberately turned a blind eye and refrained from making inquires, whatever would have been revealed by such enquiries, would be taken as being known by him. His submission was that this exceptional duty would exclusively apply to that type of knowledge expressed in the phrase *'turning a blind eye'*. This was declared as follows:

> *"[I]t is clear that knowledge includes not only "any communication made to, or information received by the assured" (s. 18(5)) but also the kind of knowledge expressed in the phrase "turning a blind eye". If the assured, suspicious of a material circumstance which ought to be disclosed, turns a blind eye and refrains from enquiry, he is to be regarded as knowing whatever such enquiry would have revealed."*[128]

Having mentioned that, it ought now to be very manifest that according to the authority of *Simner v New India Assurance* and *Australia & New Zealand Bank v Colonial & Eagle Wharves* the rule ought to be that no investigations or enquiries are to be carried out, in the ordinary course of business, unless there are good grounds to oblige the assured to do so.

However, an important qualification as to the application of the rule of the deemed or constructive knowledge was recently introduced by the Court of Appeal in *Economides v Commercial Assurance.*[129] This was that the rule was to apply only to assureds who were insuring their risks within the phrase *"in the ordinary course of business"* and not to private

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[125] [1960] 2 Lloyd's Rep. 241, [All-risk], per McNair J. at p. 252, who said *"I have been referred to no authority to suggest that the board of a company proposing to insure owe any duty to carry out a detailed investigation as to the manner in which the company's operations are performed, and I know of no principle in law which leads to that result."*
[126] 8th ed., (1988), at para.641.
[127] [1995] LRLR 240, [Reinsurance].
[128] Ibid., at p. 253.
[129] [1997] 3 WLR 1066, [CA-Household Contents].

individual assureds whose sole duty, as submitted by Simon Brown L.J. with whom judgment Peter Gibson L.J. and Sir Iain Glidewell were in agreement, was only to disclose what was material within their actual knowledge. In other words, what was Simon Brown L.J. in fact saying was that the principle of deemed knowledge must not operate, unless the assured was effecting the policy for commercial purposes. Otherwise, all that a private individual ought to do was to disclose what was material within his actual knowledge and nothing else. In reaching this conclusion, Simon Brown L.J. mainly depended upon the judgments of Saville L.J. in the Court of Appeal in *Group Josi Re v Walbrook Insurance*[130], Lord Macnaghten in the House of Lords in *Blackburn, Low & Co. v Thomas Vigors* [131] and Fletcher Moulton L.J. in the Court of Appeal in *Joel v Law Union & Crown Insurance Company* [132]. His decision, which really deserves quoting in full was framed as follows:

> *"[I]t is clearly established that an assured such as this plaintiff, effecting insurance cover as a private individual and not "in the ordinary course of business," must disclose only material facts known to him; he is not to have ascribed to him any form of deemed or constructive knowledge."*[133]

Conscious of the effect of this narrow application of the rule of constructive knowledge, Brown L.J. further added that although the assured was under no duty to make additional inquiries as to detect facts which ought to be known by him and, then, disclosed, he was under an obligation of honesty. This is to say that he would nevertheless be held liable for non-disclosure if he did wilfully and deliberately shut his eyes[134] as to the existence of other material facts which he did not actually known, but which he would have known had he inquired about them.[135]

> *" ... I have not the least doubt that the sole obligation on an assured in the position of this plaintiff is one of honesty. Honesty, of course, requires ... that the assured does not wilfully shut his eyes to the truth. But that, sometimes called Nelsonian blindness-the deliberate putting of the telescope to the blind eye-is equivalent to knowledge, a very different thing from imputing knowledge of a fact to someone who is in truth ignorant of it."* [136]

In fact, *Economides v Commercial Assurance* seems to be the only clear and direct case in this point. Therefore, its real effect and whether it would substantially confine the deemed knowledge's notion to the case of commercial insurances only is something which need to be further examined and confirmed by the courts before it could be said to be established.[137]

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[130] [1996] 1 Lloyd's Rep. 345, [CA-Reinsurance], at p. 366.
[131] (1887) 12 App. Cas. 531, [HL-Marine], at p. 543.
[132] [1908] 2 K.B. 863, [CA-Life], at p. 884.
[133] *Economides v Commercial Assurance* ibid., at p. 1077.
[134] He described this type of conduct as *"Nelsonian blindness"*.
[135] Ibid., at p. 1078. Also, see per Peter Gibson L.J. at p. 1083 and per Sir Iain Glidewell at p. 1084.
[136] Ibid., at p. 1078.
[137] For further examination and comments upon the effect of the judgment of the Court of Appeal in this case see Bartlett, A., and Egan, M., Utmost good faith: misrepresentation and non-disclosure (1997) 141 Sol. J. 952;

Apart from that, it should be added that if the ignorance of the assured to disclose a material fact considered to be within his constructive knowledge was due to his intentional failure to make reasonable inquires, this would constitute fraud on his part and the policy would, as such, be avoidable.[138] Likewise, the policy would be voidable if the same happened even through his unintentional failure. This, as it was earlier stated, is due to the fact that the underwriter contracts with the assured on the basis that all material information in the latter's knowledge, in the ordinary course of business, is disclosed.[139]

The second type of material facts, which is considered to be within the assured's constructive knowledge and, therefore, needs to be disclosed, is those known to his agents.[140] Accordingly, it is also part of the assured's deemed knowledge to disclose to the underwriter whatever is material within the knowledge of his agents. However, the term agent in this regard has a very circumscribed meaning and must not be unreservedly taken to mean that the assured would be affected by the knowledge known to any of his agents regardless of the extent of their capacities to bind him. This is because it is now generally established that the expression agent only applies to a limited category of agents[141] described by Lord Halsbury, L.C. in *Blackburn, Low & Co. v Vigors* as *'agents to know'*[142]. As a result, neither the knowledge of agents to insure, nor any other agents who have so *'limited and narrow authority'* to bind the assured and to whom he does not look for information will be within

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Hird, N., How to make a drama out of a crisis [1998] JBL 279; Clarke, M., Misrepresentation of value-Honest belief (1998) CLJ 24 and Mitchell, C., English insurance decisions 1997 (1998) LMCLQ 411, at p. 416.

[138] *Blackburn, Low & Co. v Vigors* ibid., per Lord Halsbury L.C. at p. 537, where he expressed his view as follows: *"I can quite understand that when a man comes for an insurance upon his ship he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without responsibility of knowledge, this is fraud."*

[139] Ibid., where he further stated that: *"But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others-his captain, or his general agent for the management of his shipping business,-the knowledge which the underwriter has a right to assume the owner possess when he comes to insure his ship."* The same point was further examined and supported by the judgment of Lord Watson at p. 539-40; the same view was adopted by Lord Sterndale in the Court of Appeal in *London General Insurance v General Marine Underwriters Association*, ibid., where the plaintiffs (the reassureds) neglected reading a Lloyd's casualty slip containing material information to the risk proposed for reinsurance.

[140] Ibid., at p. 537. It must be mentioned that this principle was firstly stated by Cockburn, C.J. in *Proudfoot v Montefiore*, ibid., at p. 521 and was subsequently approved by the House of Lords in *Blackburn, Low & Co. v Vigors*.

[141] *Blackburn, Low & Co. v Vigors*, ibid., per Lord Halsbury L.C. at p. 537-8 and per Lord Watson at p. 541; *Australia & New Zealand Bank v Colonial & Eagle Wharves* ibid., at p. 254; *Simner v New India Assurance*, ibid., at p. 254-5.

[142] This type of agents will normally include the ship-agent as it was held in *Fitzherbert v Mather* (1785) 1 T. R. 12, [Marine]; the master of the ship as it was held in *Gladstone v King* (1813) 1 M. & S. 35, [Marine]; the general agent of the assured as it was held in *Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 510. Although it was also held in *Stewart v Dunlop* (1785) 4 Brown. 483, that the clerk of the assured was one of such agents, a contrary view was expressed in *Australia & New Zealand Bank v Colonial & Eagle Wharves* ibid., in which the clerk of the assured was held not to have been within those type of agents to whom the assured looked for information and of whose knowledge he was bound to be aware. However, *Australia & New Zealand Bank v Colonial & Eagle Wharves* must now be looked at in the light of the recent judgment of Staughton L.J. in *PCW Syndicates v PCW Reinsurers* [1996] 1 Lloyd's Rep. 241, at p. 254, where he refused to restrict the knowledge of a company under s. 18 to what is only known at a high level. Also, see Arnould Vol. 3, at para.639.

the application of the constructive knowledge of the assured according to ss. 18(1) of the MIA 1906.

Correspondingly, the assured would be accountable for the non-disclosure of a material fact which would otherwise have been disclosed had it been, in due course, communicated to him by his agent employed for the purpose of keeping him rightly informed of material circumstances bearing upon the risk under insurance.[143] Therefore, it was submitted that it is the duty of the assured to take reasonable steps to insure that he is well acquainted with information that is deemed to be known by him in the normal course of business.[144]

As to the ground upon which the knowledge of an agent is said, for the purpose of s. 18(1), to be that of the assured, it was submitted that is owing to two reasons. The first is that whenever a loss caused through the negligence or fraud of a third person must fall upon either of two blameless parties, it ought to be borne by that party who trusted or employed the person guilty of the negligence or fraud. [145] The second is that if the agent is to be allowed not to disclose material circumstances without hazard to his principal, the former might be instructed by the latter not to make any disclosure and to remain silent.[146]

In the light of recent cases[147], none of the above two reasons was however accepted as representing the correct explanation. It was the principle, originally advanced in *Proudfoot v Montefiore*[148] and subsequently echoed in *Blackburn, Low & Co. v Vigors*[149], that the underwriter contracts

> *"on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principle."* [150]

which is now generally accepted as giving the right ground of the deemed knowledge rule. This acceptance appears from the judgment of Saville, L.J. in *PCW Syndicates v PCW Reinsurers,* where he said that

> *"[T]he underwriter is entitled to contract on the basis that "agent to inform" has in the ordinary course of business given the assured all relevant information and that the assured has in turn disclosed it."*

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[143] *Berger and Light Diffusers v Pollock* [1973] 2 Lloyd's Rep. 442, [CA], where it was held by Kerr, J. at p. 461, that the fact that the bill of lading was claused was considered to have been within the assureds' knowledge, since it was known to their shipping agents.

[144] *Proudfoot v Montefiore*, ibid., at p. 521; *London General Insurance v General Marine Underwriters Association* ibid., at p. 109-110; *Simner v New India Assurance* ibid., at p. 254-5.

[145] *Fitzherbert v Mather,* ibid., at p. 16; *Proudfoot v Montefiore,* ibid., at p. 522.

[146] *Gladstone v King,* ibid., at p. 38.

[147] Generally see *Simner v New India Assurance,* ibid., *Group Josi Re v Walbrook Insurance* ibid., *PCW syndicates v PCW Reinsurers* ibid.; Arnould, Vol. 3, at para.631-2.

[148] Ibid., at p. 522.

[149] Ibid., per Lord Watson at p. 541.

[150] It should be noted that the phrase 'the agent employed' refers, as it is now agreed, only to agents employed for keeping the assured informed (agents to know) and to whom s. 18(1) applies. This is to distinguish them from the other type of agents whose role is to effect the insurance and to whom s. 19 applies.

This principle was recently subject to a lengthy analysis and, then, received recognition from Diamond in *Simner v New India Assurance.*[151] Due to the importance of Diamond's decision it is thought that it deserves to be given a deep consideration.

In his judgment, he first rejected to consider the principle as a case of imputation of the knowledge of the agent to the assured and then went on to state that

> *"[T]he principle is rather different, namely that both parties contract on the basis that the assured has disclosed both material facts within his knowledge and also material facts that would have been within his knowledge if the agents whom he employed to provide knowledge of the subject matter of the insurance, or in the ordinary course of his business ought to have employed, had communicated to the assured in ordinary course such facts as the agent knew or ought to have known in the ordinary course of business."*[152]

As far as the above judgment is concerned, it is unmistakable that it was rather laid down in very broad words[153] to the extent that if it was approved, it would inevitably extend the deemed knowledge of the assured stated in s. 18(1). This is because he submitted that the assured is deemed to know what his *'agent knew or ought to have known in the ordinary course of business'*. Undoubtedly, this will be tantamount to extending the assured's deemed knowledge to include not only what his agent knows (the agent's actual knowledge), but also what his agent ought to have known (the agent's deemed knowledge).

Taking the statement that *'the assured is taken to know what ought to be known by his agent'* into careful examination, it does not appear that such a statement could be sustained or recognised as being in accordance with the established principles of law. This is for several reasons as follows:

First, it is contrary to the judgments delivered by the cases upon which the notion of the assured's deemed knowledge is held to be based, namely *Fitzherbert v Mather, Gladstone v King, Proudfoot v Montefiore* and *Blackburn, Low & Co. v Vigors.*

In *Fitzherbert v Mather,* it was stated by Ashhurst, J that

> *"[O]n general principles of policy, the act of the agent ought to bind principal ; because it must be taken for granted, that the principal knows whatever the agent knows."*[154],

in *Gladstone v King,* Lord Ellenborough, C. J. said that

> *"[I]f then the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy, would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principle... ."*[155]

and in *Blackburn, Low & Co. v Vigors,* Lord Watson announced that the underwriter

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[151] Ibid.
[152] Ibid., at p. 254-5.
[153] See Arnould Vol. 3, at para.640.
[154] (1785) 1 T. R. 12, at p. 16.
[155] (1813) 1 M. & S. 35, at p. 38.

"is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal."[156]

It is very obvious that all the judgments stated above were undoubtedly imposing a duty upon the assured to know what was known to his agent and nothing else. Secondly, the cases upon which Diamond's principle depended[157] have nothing at all to support the contention that the assured is presumed to know what ought to be known by his agent.

Thirdly, no single case seems, so far, to have held anything from which the said extension might be said to have been derived[158], nor anything can be seen from both the available authorities and the words of ss. 18(1) to indicate that a similar principle was present in the mind of the draftsman or that it reflects the Common Law view in this matter.

Fourthly, it remains to be said that that Diamond's principle does not quite fit in with the judgment delivered in the Court of Appeal in two recent cases. The first, is *Group Josi Re v Walbrook Insurance*[159], where Saville, L.J., after showing his agreement with the base of the deemed knowledge of the assured as it was stated in *Blackburn, Low & Co. v Vigors*, expressed that the deemed knowledge notion is *'carefully circumscribed'*[160]. The second is *PCW Syndicates v PCW Reinsurers*[161] in which Staughton, L.J. made it clear that the current view is strongly opposed to any extension to the duty of disclosure of the assured. He phrased his point in careful terms as follows:

"[I]t seems to me that ss. 18 and 19 are carefully framed so as to describe what must be disclosed. ...If it be thought that the draftsman has overlooked the topic of agents in listing what must be disclosed, one very soon discovers that he had not see s. 19."[162]

In conclusion, it is of great importance to affirm that the duty of the assured to disclose what is known to his *'agent to know'* must be strictly confined or limited to what is actually known to the agent.

The duty of the assured to disclose what is material within his deemed knowledge under the Egyptian law is not as clearly determined as it is under the English law. This is first due to the absence of any legal obligation requiring the assured to disclose what is material in his presumed knowledge in the provision of the MTL 1990. All that the assured is bound to perform pursuant to s. 361 of the MTL 1990, which lays down the assured's duty of disclosure, is to *"give correct data ... on the conditions and status of which he is aware"*.

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[156] (1887) 12 App. Cas. 531, at p. 541.
[157] These cases were stated by the judge to be *Fitzherbert v Mather, Gladstone v King, Proudfoot v Montefiore* and *Blackburn, Low & Co. v Vigors.*
[158] This conclusion was drawn up from the cases that were available to the researcher and must be accordingly judged.
[159] [1996] 1 Lloyd's Rep. 345.
[160] Ibid., at p. 365-6.
[161] [1996] 1 Lloyd's Rep. 241.
[162] Ibid., at p. 254.

This is secondly due to the existence of a division amongst the Egyptian jurists in respect of whether, in the light of the absence of a legal requirement to this effect, the assured is still under a duty to disclose material circumstances which although he does not actually know, he ought to have known. While the minority[163] is of the opinion that it is in accordance with justice and sound reasoning to require the assured to only disclose circumstances which he actually knows, the majority[164] is of the opinion that it is not in pursuance of the requirement of good faith to excuse the assured for the non-disclosure of a material fact if it should have been within his actual knowledge had he not been careless. In the majority view, the role of the assured in performing his duty of disclosure is an active one compelling him to do his best to acquaint himself with circumstances which he is able to know or ought to be deemed so. This will require him to make reasonable effort to inform himself or keep himself informed of material circumstances bearing on the risk to be insured. The only excuse for the assured to escape his liability, as the majority view submitted, is when it could be proved that the non-disclosed fact could not reasonably be said to be within his deemed knowledge.

Thereupon, although s. 361 of the MTL 1990 does not literally require the assured to disclose what is material in his presumed knowledge, it could be argued, as it is the view of the majority of the Egyptian jurisprudence, that the disclosure of this type of knowledge is also required. This can be inferred from at least the seeming intention of the draftsman who although does not in fact require the disclosure of deemed knowledge, he requires it by implication which appears from the imposition, as the English law, of a broad duty of disclosure upon the assured.

This approach could also be supported by the wording of ss. 350(1)[165] which deals with a special type of non-disclosure arising whenever a contract of insurance is concluded after the occurrence of either the loss or the destruction of the subject-matter insured or its safe arrival. This type of insurance is permissible under the Egyptian law provided that the contract is concluded before the news of the loss or the safe arrival of the subject-matter insured reaches the contracting place or the place of the assured and the underwriter,

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[163] Yihya, at p. 145-6; Sharaf Al Diyn, Ahmed., Ahkam At Ta'myn, (Insurance Rules – in Arabic), 3rd ed., (1991), at para.220, (hereafter Sharaf Al Diyn); Ibrahim, Jalal. Mohammed., At Ta'myn: Dirash Muqaranh (Insurance: A Comparative Study – in Arabic), (1989), at para.343, (hreafter Ibrahim); Lutfi, Mohammed. Husam. Mahmud., Al Ahkam Al 'amh Li Aaqd At Ta'myn, (The General Rules of The Insurance Contract – in Arabic), 2nd ed., (1991), at p. 181, (hereafter Lutfi).

[164] Al Sanhuri, Vol. 7/2, at para.615; Al Badrawi, at para.127; Ta Ha, at para.672; Mustafa, Abu Zayid. Abdul Baaqi., At Ta'myn, (The Insurance – in Arabic), (1984), at p. 163-4; Khidr, Khamis., Aaqd At Ta'myn Fi Al Qanun Al Madany, (Insurance Contract in The Civil Law – in Arabic), 1st ed., (1974), at para.86 (hereafter Khidr); Al Mahdi, Nazih. Mohammed Al Sadiq., Aaqd At Ta'myn, (The Insurance Contract – in Arabic), (undated), at p. 256; Awad, Ali. Jamal Al Diyan., Al Qanun Al Bahry, (The Maritime Law – in Arabic), (1987), at para.531, (hereafter Awad).

[165] *"An insurance contract concluded after deterioration and waste of the objects insured thereby, or after the arrival of such objects shall be null and invalid, if it is established that news about the arrival or destruction of such objects had reached the contract signing place or the place where the insured party or insurer is found, before the insurance contract was signed."*

otherwise the contract is void. Surely, when the MTL 1990 considers the contract void if the said news reaches the place of the contract or of the contracting parties without requiring their actual knowledge of the said news as a precondition, this indicates that it considers presumed knowledge as a significant factor in avoiding the contract in this type of non-disclosure. Therefore, it is clear that it is the intention of the MTL 1990 that material facts within the presumed knowledge of the assured, at least in one occasion, are to be taken into account when the duty of disclosure is performed.[166]

As far as the Saudi Arabian law is concerned, it is not clear whether or not the CCL 1931 puts the assured under an obligation to disclose material particulars which are supposed to be within his constructive knowledge. No help can be sought from the wording of s. 342 of the CCL 1931, which is completely silent on this issue and only states that

> *"[I]f the insured keeps silent about ... particulars ...he should mention in the insurance policy, the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*

Although of the absence of any statutory ground upon which the assured can be said to be under an obligation to make disclosure of his presumed knowledge as it is the case under the English and Egyptian laws, on the strength of the case law, the assured seems to be still bound to make such type of disclosure. This was the view expressed by the arbitral panel in its decision delivered on 19/10/1986 which seems to be the only authority in point. In this case which was about buildings insurance, the assured presented a claim to the insurance company to be indemnified against the loss caused to the insured building by a stormy rain. The insurance company rejected the claim upon the ground of the non-disclosure of defects existing in the building prior to the effecting of the insurance. The dispute was referred to arbitration. The arbitral penal held that it was the duty of the assured to disclose those required facts which he knew or should have known. But, the penal further stated, since these defects were not actually known to the assured and could not reasonably have been known to him, then it was not his duty to disclose them.[167]

Like the Egyptian law, the availability of this duty under the Saudi Arabian law could also be inferred from the wording of ss. 359[168] and 360[169] of the CCL 1931 which regulate

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[166] However, if the contracting parties have genuine doubts and want to avoid being subject to the principle of constructive knowledge enforced by ss. 350(1), they can effect the insurance upon the basis of *'good or bad news'; 'lost or not lost'*. In this case, according to ss. 350(2), the contract would be held valid even if the object insured was lost or safely arrived provided that neither the assured nor the underwriter had actual knowledge of such loss or safe arrival. This is distinctly laid down by ss. 350(2) which reads as follows: *"[I]f the insurance contract is concluded on the proviso of good or bad news, it shall not be invalidated unless the insured party is established to have been aware personally, and before signing the insurance contract, of the destruction and waste of the object insured under the contract, or that the insurer was personally aware, before concluding the contract, of the arrival of the object insured thereby."*

[167] Arbitral award 19/10/1986, [Buildings], at p. 14-5.

[168] *"If insurance is purchased after the perishing and loss of the goods or after reaching the agreed destination, and the insured knows that they had perished and were lost, or if the insurer is not aware that the goods have reached their destination, or if it is probable that the insured had received news of their loss and perishing, or the insurer had received*

situations where the object insured has been or might have already been lost or safely arrived at the time the insurance policy is being signed. In both sections, the presumed knowledge of the assured or the underwriter of the loss or safe arrival of the object insured is deemed sufficient to avoid the contract.[170] Thereupon, it seems very reasonable to advance that since constructive knowledge is required to avoid the contract on the ground of non-disclosure according to ss. 359 and 360, constructive knowledge would also be required when considering whether or not there is non-disclosure on the part of the assured. At any rate, this conclusion does not appear to be against the provisions of the CCL 1931 and it is the seeming intention of the legislator.

On the other hand, as it was stated in respect of actual knowledge, the determination of whether a non-disclosed fact is or is not within the assured's deemed knowledge would be of little significant under the CCL 1931. This is because the duty of disclosure of the assured is a limited one and, so, the application of the principle of presumed knowledge would be restricted to those facts which is the duty of the assured to disclose either pursuant to s. 342 or the terms of the policy or the direct questions of the underwriter.

It ought finally to be added that having examined and acknowledged that there is high probability that the deemed knowledge principle would apply to assureds insuring their risks under Egyptian and Saudi Arabian laws, it is still not clear whether the application of this principle would apply to both commercial and private insurance like the English law[171] or be confined to commercial insurance alone.

3.4.1.1.2.1. The test according to which the deemed knowledge of the assured is judged

Apart from what has been earlier said, it does not seem to be quite clear what is the appropriate test in the light of which the constructive knowledge of the assured in the ordinary course of business is judged? In other words, is what the assured is deemed to know

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news that the goods have reached their destination, before they sign the policy, such insurance shall be deemed null and void."

[169] *"If the vessel is lost or perished and it is ascertained that news could have come from the place where the vessel perished or arrived, or the place which receives news of her perishing, to the place where the insurance policy had been made before signing the same, the probability set down in the preceding Article shall stand."*

[170] As it was stated in respect of the Egyptian law, if the contracting parties, under the Saudi Arabian law, are not sure about the state of the insured object and wish to avoid having the contract avoided because of this imputation of constructive knowledge, they can effect the contract upon the basis of *'good or bad news'*; *'lost or not lost'*. In this case, the policy will stand valid even if there is a probability that news of the destruction or safe arrival of the object insured might have reached the place where the contract is being concluded or the place of the assured or the underwriter. There needs to be actual knowledge of such news on the part of the assured or the underwriter before avoidance of the contract can take place. This is the effect of s. 361 of the CCL 1931 which reads as follows: *"[I]f the insurance is conditional on good or bad news, the probability set down in the preceding Articles* (ss. 359 and 360) *shall not stand and the said policy shall not be rescinded unless it is proved that the insured was aware of the loss of the insured items or if news is received by the insurer about the vessel's arrival at destination, before the policy is signed."*

[171] Note that under the English, it was recently held by the Court of Appeal in *Economides v Commercial Assurance* [1997] 3 WLR 1066, that the use of the phrase *"in the ordinary course of business"* in the wording of ss. 18(1) must confine the application of the principle of deemed knowledge to commercial insurance only. However, this proposition does not appear to have been established yet.

in the normal course of business judged according to what a prudent assured carrying on the same business within the same circumstances ought to know? Or is it judged according to what the particular assured in question in the usual course of his business ought to know? The significance of this issue springs from the existence of two different views, the first of which requires the disclosure of what ought to be known by the particular assured carrying out his business according to his own practice, which is known as the subjective test. This view stems its strength from the judgment of McNair J. in *Australia & New Zealand Bank v Colonial & Eagle Wharves*[172] In this case, McNair J. rejected the contention of the insurers that the defendant (the board of the company insured) had failed to disclose material facts with regard to the company's system of operation, which could have been easily ascertained or discovered, had they made those investigations that any prudent board in the same circumstances would have made. This was stated as follow:

> *"... the submission that the board of the defendant company ought to have known the material facts because they would have known them if they had made such inquires as to their system as a reasonable prudent board of such company in the ordinary course of business would have made, in my judgment fails both in law and on the facts. I have been referred to no authority to suggest that the board of a company proposing to insure owe any duty to carry out a detailed investigation as to the manner in which the company's operations are performed, and I know of no principle in law which leads to that result. If a company is proposing to insure wages in transit, I cannot believe that they owe a duty to the insurers to find out exactly how the weekly wages are in fact carried from the bank to their premises, though clearly they must not deliberately close their eyes to defects in the system and must disclose any suspicions or misgivings they have. To impose such an obligation upon the proposer is tantamount to holding that insurers only insure persons who conduct their business prudently, whereas it is a commonplace that one of the purposes of insurance is to cover yourself against your own negligence or the negligence of your servants. As to the facts, it seems to me that any reasonable inquires the board could be expected to make would only have revealed, as was proved to be the fact, that the system in operation for many years had in fact worked satisfactorily in the sense that no difficulty had arisen and no claim had been made."*[173]

The test was supported by Arnould[174] and MacGillivray[175]. This also seems to be presumably the view of Judge Diamond in *Simner v New India Assurance*[176], for he cited the proposition of Arnould being in favour of the subjective test.

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[172] [1960] 2 Ll.L.Rep. 241.

[173] Ibid., at p. 252.

[174] Vol. 2, at para.640, where it was declared that *"[T]he test of what 'ought to be known' by the assured is not, therefore, an objective test of what ought to be known by a reasonable, prudent assured carrying on a business of the kind in question, but a test of what ought to be known by the assured in carrying out his business in the manner in which he carries on that business; the underwriter takes the risk that the business may be run inefficiently unless the circumstances are such that the assured knows or suspects facts material to be disclosed. To hold otherwise would be tantamount to saying that underwriters only insure those who conduct their business prudently, whereas it is commonplace that one of the purposes of insurance is to obtain cover against the consequences of negligence in the management of the assured's affairs."* See also Arnould V. 3, at para.640, where this view was also maintained and further supported by the editor who said *"[W]e consider the better view to be that stated in paragraph 640... ."*

[175] 8th ed., (1988), at para.641, where it was expressed that *"... the assured is only presumed to know what he should ordinarily have discovered in the normal course of his business prior to the insurance cover becoming effective. It is quite wrong to fix the assured with knowledge of matters which he might have discovered had he reorganised his usual business schedule or methods on the days in question. While, of course, the assured cannot plead his ignorance when he has intentionally failed to make inquires, equally it does not appear to be the law that an assured must conduct a special investigation so as to discover all possible material facts which should be disclosed to the insurer, unless he has reason to suspect their existence."*

On the other hand, the other view submits that the presumed knowledge of an assured should be similar to that of what ought to be known by a rational and prudent assured in the usual course of the business in question. This test, which is known as the objective test, was adopted by the Court of Appeal in *London General Insurance Company v General Marine Underwriters Association.*[177] In this case, the plaintiffs (the reassureds) received a Lloyd's casualty slip containing material information to the risk they proposed to reinsure with the defendants (reinsurers). Due to the pressure of business at the reassureds' office, the said slip was not read and, so, the reinsurance was effected without disclosing its contents. The defendants were held entitled to judgment on the ground of non-disclosure of a material circumstance. This was stated by Lord Sterndale as follows:

> *"[I]f it were a question of their having done their best, so far as the pressure of business would allow, to make themselves acquainted with the casualty slips, and of their not being able to do so in time to stop the broker's instructions, I think it might have been difficult to deal with such a case, but there is no such case before us. They never did anything at all and I do not see my way to differ from the learned judge when he comes to the conclusion that if they had taken steps to examine these casualty slips they might and would have found out this casualty in time to communicate with their brokers before 4 o'clock when the reinsurance was effected."*[178]

As it was the case with the subjective test, the objective one was also supported by Clarke[179] and it seems to be further recognised be the judgment of Phillips, J. in *Inversiones Manria v Sphere Drake Insurance (The Dora).*[180] In this case, although Phillips, J. was dealing with the duty of the agent who effected the insurance according to s. 19, his judgment was in support of an objective test of what ought to be known by an agent in the ordinary course of business. He held that the normal course of business required the agent to check on the skipper's character. Therefore, had the agent made such a check, he would have discovered the criminal record of the skipper.[181]

Although that both tests received some support, the first one seems, if it is taken as representing the current state of the law, to be abolishing the whole idea of the constructive knowledge notion which seems to be imposed as a protection against those reckless assureds

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[176] [1995] LRLR 240, at p. 255.
[177] Ibid.
[178] Ibid., at p. 109-110.
[179] He firstly showed his support in his article entitled 'Failure to disclose and failure to legislate: is it material?- I. [1988] JBL 206, at p. 212. In the third edition of his book 'The Law of Insurance Contracts' (1997), he maintained the same view with some modifications to include, as it seems, the effect of the judgment of Diamond, Q.C. in *Simner v New India Assurance*. He laid down his view, at para.23-8C, as follows: *"[W]hile it is true that in principle cover extends to negligence by the assured, once the cover has been contracted, it does not follow from that that the insurer assumes the risk of negligence in the presentation of information, on the basis of which the insurer will decide whether to take or how to rate the risk. It would be odd if the law applied an objective standard to inferences that the proposer draws from what he knows, as well as an objective standard of materiality by reference to the prudent insurer or, sometimes, the reasonable assured, and yet allowed the proposer to conduct his business in such a negligent way that facts never come to his attention in the first place, so that the objective rules are never allowed to bite. At the very least, he cannot "turn a blind eye" to material facts and, more than that, it is submitted that he is taken to know what he should know in the ordinary course of his kind of business."*
[180] [1989] 1 Lloyd's Rep. 69, [Marine].
[181] Ibid., at p. 94-5.

who may escape the liability of being actually acquainted with material knowledge. In other words, accepting the subjective test is tantamount, on the first hand, to encouraging careless assureds to keep conducting their business in such a negligent manner that facts never come to their knowledge and to allowing them, on the other, to determine the scope of their constructive knowledge, namely what to know and what not to know. Also, the adoption of the subjective test where the law will be ambiguous and each case will be assessed upon its own circumstances and according to whether the assured is prudent or careless appears to be in complete contradiction with clarity, generality and applicability to every case as being the main features of any recognised rule of law. Finally, it will be in line with the words of the MIA 1906, which adopted an object test of materiality[182], if the determination of the existence of a material fact within the constructive knowledge of an assured is also to be according to that of a reasonable and prudent assured carrying on the same type of business.

In respect of the Egyptian law, the issue is rather settled and it is generally accepted that the test according to which a non-disclosed fact is or is not taken to be known to the assured is an objective one, namely what ought to be known by a prudent assured.[183] This is to say that the assured will be held liable for the non-disclosure of an important fact, though he does not actually know it, if it is proved that a prudent assured in the same circumstances knows it. It follows that a reckless assured would not be allowed to avail himself of his recklessness in not knowing a material fact if such a fact was held to be within his constructive knowledge according to the prudent assured test.

As far as the Saudi Arabian law is concerned, although, as it has been discussed, the assured is seemingly under a duty to disclose material facts in his presumed knowledge, the test according to which the scope of such knowledge is decided does not appear to be regulated by the Saudi Arabian jurisprudence or the case law. This could be due to the fact that the duty of disclosure of the assured under the Saudi Arabian law is so limited and, so, there has been no need to refer to the notion of presumed knowledge to find out whether a non-disclosed fact ought to be within the assured presumed knowledge or not. Nevertheless, it seems to be appropriate, whenever there is a necessity for such a notion, to adopt the objective test and this will be for the same reasons proposed for such adoption under the English law.

3.4.2. The duty of the agent to insure

Initially, it is the duty of the assured when he personally insures his risk to inform the underwriter of all consequential matters concerning the subject-matter of insurance. But, due

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[182] Ss. 18(2) states that: *"[E]very circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

[183] Al Sanhuri, Vol. 7/2, at para.615; Khidr, at para.86; Al Badrawi, at para.127; Al Mahdi, at p. 255-6.

to the arising practice of assureds in the course of their business to employ agents for the purpose of insuring on their behalves, underwriters usually find themselves bound to deal with and heavily rely on those agents to fulfill the requirement of the duty of disclosure which is originally imposed on their principals. Such a situation makes it necessary to require the agent insuring on behalf of his principal to inform the underwriter of all material circumstances surrounding the risk as if insurance is made by the principal himself. By virtue of that this subsection aims at exploring and examining the legal treatment which each of the three legal systems has given to the duty of disclosure of the agent to insure.

In connection with the English law, like his principal, it is the duty of the agent, if it happens that insurance is effected through him, to disclose to the underwriter before the conclusion of the contract all material facts bearing on the risk to be insured. This obligation is distinctly imposed upon the agent by s. 19 of the MIA 1906 which provides that

> *"[S]ubject to the provisions of the preceding section as to circumstances which need not be disclosed where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-*
> *(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and*
> *(b) Every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent."*

However, the position under the Egyptian and Saudi Arabian laws is totally different. While the agent is subject to a separate and direct obligation to disclose by s. 19 of the MIA 1906, he is comparatively under no duty of disclosure at all under the MTL 1990 and the CCL 1931.

As far as the Egyptian law is concerned, there is in fact no apparent explanation why the draftsman of the MTL 1990 omitted to regulate the agent's duty of disclosure. However, it was submitted by Al Sanhuri[184] and Yihya [185]that since there are no specific rules dealing with the agent's duty of disclosure either in marine or non-marine insurance fields, he, while effecting a policy of insurance on behalf of his principal, will be governed by the general law, namely the law of agency. This was further supported by the decision of the Mixed Court of Appeal[186] where it was held, in a policy of marine insurance, that if the owner of the goods instructed a bank to ship and insure his goods, the bank, while effecting the insurance, would be deemed the agent of the goods' owner and, so, his action will be governed by the rules of the law of agency.

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[184] Al Sanhuri, Vol. 7/2, at para.572. Also, see Mursi, Mohammed Kamil., Sharh Al Qanun Al Madany Al Jadyd, Al Aaqud Al Musammat, Al Juzau Al Thalith, Aaqd At Ta'myn, (The Elucidation of the New Civil Code, The Named Contracts, Part Three, The Insurance Contract – in Arabic), (1952), at para.59.

[185] Yihya, Abdul Wadood., Al Mujaz Fi Aaqd At Ta'myn, (The Concise in the Contract of Insurance – in Arabic), (undated), at p.151.

[186] Mixed Appeal 29/12/1926, Civil Collection, Year No. 39, p. 115, [Marine].

By applying the general rules of agency[187], an agent insuring on behalf of his principal under the Egyptian law will be required, as if the insurance is being effected by the principal himself, to disclose to the underwriter all material facts in respect of the risk proposed for insurance, which he knows or ought to know.[188] Failing that will entitle the underwriter to avoid the contract as if the non-disclosure was on the part of the principal.[189]

Like the Egyptian law, the CCL 1931 also omitted to impose any duty of disclosure upon the agent of the assured. No guidance as to why the duty of the agent is not regulated can be found in the provisions of the CCL 1931 or even in the case law[190]. The customary rule in such a situation will be that all disputes or enquiries concerning the obligations and rights of the agent of the assured while he is effecting an insurance policy on behalf of his principal ought to be governed by the general law. This is to say the Shari'a Law which constitutes the general law of the Saudi Arabian law.

According to the rules of the Shari'a Law, if an agent, provided that he acts within the scope of the authority conferred upon him by the principal, effects a contract on behalf of his principal, the contract will bind the principal as if he has effected the contract himself. Therefore, all obligations and rights resulting from such a contract will be deemed those of the principal who will be, as such, responsible for any wrong acts, omissions, or fraud committed by his agent during the time of the agency.[191]

By applying these rules to the field of insurance, it appears clear that if an agent is instructed to effect an insurance policy, he is under a duty to make disclosure of material circumstances of the risk to be insured to the underwriter. If he failed to perform this duty,

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[187] Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), (1964), V. 7 (Part 1), at paras.301-309; Mursi, Mohammed. Kamil., Sharh Al Qanun Al Madany Al Jadyd, Al Aaqud Al Musammat, (The Elucidation of the New Civil Code, The Named Contracts – in Arabic), (1949), at paras.226-8; Arafa, at p. 406-15.

[188] Ss. 104(1) and 104(2) of the CC 1948 respectively state that *"[I]f the contract is effected through delegation, the character which would be taken into account in regard to the consent's deficiencies and the actual or constructive knowledge of some special circumstances, will be the character of the delegate and not of the principal." "[B]ut, if the delegate is an agent and is acting according to certain instructions given to him by his principal, the principal cannot plead, as a defence, that his delegate is ignorant of circumstances which he himself knows or ought to have known."* It ought to be mentioned that due to the unavailability of any official translation of the CC 1948 the above translation is the researcher' s one.

[189] S. 105 of the CC 1948 states that *"[I]f the delegate, within the limits of his delegation, effects a contract under the name of his principal, all duties and rights resulting from such a contract will be the principal's ones."*

[190] In fact, there is only one Saudi Arabian case which clearly discussed the duties and rights of an insurance agent, namely Arbitral award issued on 14/10/1987, [Reinsurance]. But, unfortunately, the case omitted to state anything as to the duty of disclosure of the assured's agent. In this case which was about a reinsurance policy, the reassured presented several claims to the reinsurers through their insurance agent. Their claims were rejected on the ground that the reassureds did not follow the usual procedures in the settlements of their assured's claims which resulted in that they became responsible for losses which they should not have been responsible for had they followed the proper procedures of settlement. In its judgment which was for the reassureds, the arbitral panel did briefly discuss the duties of the insurance broker in front of his principal, but failed to make any statement about his duty of disclosure.

[191] Al Sanhuri, Abdur Razzaq., Masadir Al Haq Fi Al Figh Al Islami, (Sources of Obligation in the Islamic Jurisprudence – in Arabic), V. 5, (1953-54), at p. 260-1; Hassanuzzaman, S. M., The liability of Partners in Islamic Shirkah (1971) 10 Islamic Studies 319, at p. 321.

the underwriter would be entitled to avoid the contract as if this failure was attributed to the principal himself.

Nevertheless, although it is established that the agent of the assured is under a duty of disclosure, the scope of this duty is still uncertain. Would his duty be fulfilled by the disclosure of those facts, which his principal instructed him to disclose, or he is further required to disclose material facts which he knows or should have known, but which his principal does not know? In fact, there does not seem to be a clear-cut answer to this question. This is partly because the duty of disclosure of the agent is not distinctly regulated and partly because there is no general duty of disclosure under the Shari'a Law. Undoubtedly, this is one of those deficiencies which the reformer of the CCL 1931 need take care of.

Having mentioned that, apparently, apart from the English law, neither the Egyptian law nor the Saudi Arabian law has specifically regulated the duty of the assured's agent in the insurance context. Therefore, its discussion under this subsection will have to be based upon the treatment given to it by the English law. But, before embarking upon the consideration of this issue, it must be borne in mind that the duty of disclosure of both the assured and his agent is, to a large extent, the same with some differences that distinguish each duty from the other. Therefore, the ensuing subsection is strictly not intended to be a mere repetition of what has already been said in the preceding one. Instead, its aim is only to focus upon those matters that are considered peculiar to the duty of the agent.

3.4.2.1. The basis on which a policy is avoided by the agent to insurer's non-disclosure

Although it is now established that s. 19 of the MIA 1906 is based upon the judgment of the House of Lords announced in *Blackburn, Low & Co. v Vigors*[192], there is still an argument about what is the real basis upon which a contract of insurance is vitiated by a non-disclosure attributed to the agent to insure, just as if it is a non-disclosure by the assured himself? In fact, the debate centers on the effect of the judgments given in the House of Lords and whether they support the view based upon the doctrine of imputation of knowledge according to which the contract will be vitiated because the knowledge of the agent to insure is to be imputed to or deemed to be that of his principal, or, alternatively, whether they support the view grounded upon the principle that the insurance is made voidable because the agent to insure is himself bound to make full disclose to the underwriter as his principal is.

In reality, the issue was deeply examined by Phillips J in *Deutsche v Walbrook Insurance*[193], where he accepted the suggestion that there was a division amongst the

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[192] Ibid.
[193] [1994] CLC 415 [Reinsurance].

members of the appellate Committee in *Blackburn, Low & Co. v Vigors* as to this matter[194] and proceeded his judgment accordingly. It was argued, before him, that the view of the majority consisting of Lord Halsbury L.C., Lord Watson, and Lord FitzGerald support the principle that the knowledge of an agent to insure is to be imputed to his principal. The minority view, on the other hand, was said to be grounded upon an independent duty of disclosure separately imposed upon the agent to insure himself. This view was said to be found in the following part of Lord Macnaghten's decision:

> *"[B]ut that is not because the knowledge of the agent is to be imputed to the principal but because the agent of the assured is bound as the principal is bound to communicate to the underwriters all material facts within his knowledge."*[195]

Although that the decision of Lord Macnaghten was submitted to Phillips J to have been referred to with approval by Hoffmann L.J. in *El Ajou v Dollar Land Holdings* [196], he, after considering both arguments, reached the conclusion that he was persuaded that the view of the majority of the Court was to prevail.[197]

The point was subsequently under consideration in the Court of Appeal in two cases, namely *SAIL v Farex*[198] and *PCW Syndicates v PCW Reinsurers*[199]. In *SAIL v Farex,* Hoffmann, L.J. with whose judgment Dillon, L.J.[200] was in full agreement held that Phillips J.'s judgment could not be sustained and formulated his disagreement as follows:

> *"[W]ith respect to Mr. Justice Phillips, I think that Lord Macnaghten was right. His analysis is supported by the structure of Marine Insurance Act, 1906, which distinguishes between the duty of the insured in s. 18 to disclose matters within his knowledge and the duty of the agent in s. 19 to disclose matters within his. The latter section would not have been necessary if the knowledge of the agent was imputed to the insured. It is also supported by the actual decision in Blackburn in which the knowledge of an agent was not imputed to the insured because, he had not actually concluded the contract."*[201]

In *PCW Syndicates v PCW Reinsurers*, Staughton, L.J. did not accept the view delivered earlier by Phillips, J. and held that s. 19 is an enactment of Lord Macnaghten's view. He stated that as follows:

> *"[W]hat in my judgment is clear is that s. 19 enacted Lord Macnaghten's view. Since in the present case it is agreed that the Act has the same effect as the common law, we are presumably entitled to conclude that Lord Macnaghten's view was the common law."*[202]

Having reached this point, it does not seem to be erroneous to state that it is now settled at least, as it was stated by Arnould [203], below the House of Lords that the duty of

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[194] It was stated by Staughton, L.J. in *PCW Syndicates v PCW Reinsurers*, at p. 255, that it was not apparent whether there was such a division or not.
[195] Ibid., at p. 542-3.
[196] [1994] 2 All ER 685 [CA], at p. 702.
[197] Ibid., at p. 429-30.
[198] [1995] LRLR 116 [CA-Reinsurance].
[199] Ibid.
[200] Ibid., see per Dillon, L.J. at p. 142-3.
[201] Ibid., at p. 150.

disclosure imposed by s. 19 is based upon the speech of Lord Macnaghten that that the reason why a policy of insurance is vitiated by a material non-disclosure committed by the agent to insure as if it is committed by his principal is because the agent himself is placed under a an equal but separate duty of disclosure.

3.4.2.2. The scope of knowledge to be disclosed by the agent to insure

At the beginning, it should be emphasised and made clear that the object of the duty of disclosure contained in s. 19 is not to make the agent to insure merely disclose what the assured is required to disclose under ss. 18(1), otherwise, it is submitted, there will be no need for the existence of s. 19.[204] Evidently, s. 19 is enacted as a supplementary duty to that of the assured in order to be activated whenever the insurance is being effected by an agent.

Consequently, as ss. 19(a) states, when an agent is instructed to effect a policy of marine insurance, it is his duty as a representative of the assured to communicate to the underwriter every material circumstance which is known to himself.[205] This actual knowledge will doubtlessly encompass all facts known by him as to the subject-matter of the insurance whether they are actually or presumably known to his principal or not.[206] Besides that, he is also required to disclose what is within his constructive knowledge or as it is stated in ss. 19(a) what the agent ought to know or to have been communicated to him in the ordinary course of business. Such deemed knowledge seems to be limited to two types of circumstances, namely circumstances which an agent to insure in his position, in the usual course of business, should know[207] and circumstances which are known to any other brokers and which should have been communicated to him. Although this last type of circumstances is within the knowledge of intermediaries who, in fact, do not deal directly with the underwriter and, therefore, no duty of disclosure is imposed upon them, such knowledge is considered by ss. 19(a) to have been communicated by them, in the ordinary course of business, to the agent actually negotiating the cover with the underwriter.[208]

This will, of course, exclude circumstances which the assured himself is bound to declare to the underwriter, for these will however fall inside the sphere of ss. 19(b). As a result, it is also the duty of the agent, according to ss. 19(b), to disclose to the underwriter all information that has been or ought to have been communicated to him by the assured and

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[202] Ibid., at p. 255.
[203] Vol. 3, at para.638.
[204] *PCW Syndicates v PCW Reinsurance* [1996] 1 Lloyd's Rep. 241, at p. 258.
[205] *Blackburn, Low & Co. v Vigors* (1887) 12 App. Cas. 531, per Lord Watson at p. 541.
[206] Ibid., at 541. See also *PCW Syndicates v PCW Reinsurers,* ibid., where Saville, L.J., at p. 258, gave judgment to the same effect.
[207] *Inversiones Manria v Sphere Drake Insurance (The Dora)* [1989] 1 Lloyd's Rep. 69, [Marine], where Phillips, J., at p. 95, held that the agent of the assured ought in the ordinary course of business to have known the criminal record of the skipper.

which, otherwise, would have been communicated by the assured to the underwriter according to ss. 18(1) had the insurance been effected by him. This will include the disclosure of what is within the assured's actual and constructive knowledge. It naturally follows that it is immaterial that the inability of the agent to furnish the underwriter with complete and accurate information was due to the fact that he was not placed in possession of such information by his principal.[209] The only excuse, as it appears, which will relieve the agent from disclosing under ss. 19(b) is when the undisclosed fact comes to the knowledge of the assured as late as he is prevented from communicating it to the agent before he effects the insurance.[210]

Having considered that, it ought to be added that, as his principal, it matters not that the agent's failure to discharge his duty was intentional[211] or otherwise[212], for that the result in both cases is the same which is that the underwriter is kept ignorant of the facts needed to assess the risk in question and, therefore, will be entitled to avoid the contract.

3.4.2.3. The test to be applied to the deemed knowledge of the agent to insure

> *" ... an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him .. "*

As far as the constructive knowledge of an agent to insure is concerned, it may seem relevant to discuss the exact test which ought to be assigned to the application of the deemed knowledge in the ordinary course of business. Does what ought to be known by the agent in

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[208] This what was stated by Saville, L.J., at p. 258-9, in *PCW Syndicates v PCW Reinsurers* ibid., and at p. 366 in *Group Josi Re v Walbrook Insurance* [1996] 1 Lloyd's Rep. 345.

[209] *Webster v Foster* (1795) 1 Esp. 407, [Marine], where the broker purposely received no information from the assured as to the ship proposed for insurance and so was prevented from making full disclosure; *Bufe v Turner* (1815) 6 Taunt. 338, [Fire], where the assured unintentionally thought a fact was not material and did not communicate it to his agent.

[210] *Fitzherbert v Mather* (1785) 1 T. R. 12, where Lord Mansfield held, at p. 15, that the policy was void because the agent of the assured knew that the ship insured was lost and had full opportunity to send such news to the assured before he effected the insurance; *Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 510, where Cockburn, C.J. held, at p. 519, that the policy was void because the agent of the assured purposely sent the news of the lose of the ship and its cargo to his principal by a letter instead of using electric telegraph which was a speedier mean of communication in general use at that time; *London General Insurance v General Marine Underwriters Association* [1920] 26 Com. Cas. 52, where Lord Sterndale, at p. 110, gave judgment to the reinsurers on the ground of non-disclosure of a material fact contained in a Lloyd's casualty slip received by the reassureds who had not omitted to read it, would have been able to communicate its information to the broker before effecting the reinsurance; *C.T.I. v Oceanus* [1984] 1 Lloyd's Rep. 476, where Parker, L.J., at p. 518, stated that the material information as to previous claims did not come to the assureds' knowledge too late to be communicated to their agent.

[211] *Blackburn, Low & Co v Haslam* (1888) 21 Q.B.D. 144, [Marine]; *Hambrough v The Mutual Life Insurance Company of New York* (1895) LXXII L.T. 140, [Life], where the policy was effected by the fraud of the assured's agent.

[212] *Rickards v Murdock* (1830) 10 B. & C. 527, [Marine], where the agent omitted to disclose to the underwriters when the letter ordering him to insure was received and that the assured ordered him to wait for thirty days after the reception of the letter before effecting the insurance; *Russell v Thornton* (1859) 4 H. & N. 788, [Marine]; affirmed in (1860) 6 H. & N. 140, [CA], where the assured communicated the undisclosed fact to their agents who did not disclose it to the underwriter and the contract was avoided; *Krantz v Allan* [1921] 9 Ll.L.Rep. 310, [Burglary], where the undisclosed fact was thought to have been immaterial by the agent; *Rozanes v Bowen* (1928) 32 Ll.L.Rep. 98, [CA-Jewellery].

the normal course of business refer to what ought to be known by the actual agent in question in the ordinary course of his business (a subjective test)? Or does it refer to what ought to be known by a prudent agent in the ordinary course of business (objective test)? Generally speaking, this issue does not seem to have arisen before, nor to have been discussed by many authorities. The importance of its consideration however appears in that it may affect the scope of the deemed knowledge of the agent and this could afterwards be reflected upon the amount of knowledge he is deemed to know and, then, disclose. For instance, given that the test to be applied is what ought to be known by the actual agent in the ordinary course of his own business. Given also that the agent in question is negligent and that in his course of business he does not make himself acquainted with important sources of information, such as the Casualty or Shipping Lists at Lloyd's etc., particularly when he is instructed to insure ships or goods at remote ports. Then, what ought to be known by him, in such circumstances, is naturally much less than that which is deemed to be known by a reasonable agent acquainting himself with the available sources of information in the ordinary course of business.

Like the position of the assured's deemed knowledge, the matter does not seem to be settled, since that both tests were supported. The subjective test was approved by the judgment delivered by Mansfield C. J. and Gibbs J. in *Wake v Atty*.[213] In this case, the broker omitted before effecting the insurance to go to his office to check his letters where a letter stating that the ship was lost was waiting for him. It was argued on behalf of the defendant that whenever it was the habit of some persons to receive letters concerning their business from many places, they ought, before carrying on their business, to have checked their letters for further information or instructions, especially if they were brokers. It was further argued that leaving the matter to the discretion of a broker to choose whether to call at his office to check his letters for further information or instructions or not, would expose the business of effecting insurance to enormous frauds. On the other hand, it was argued on behalf of the plaintiff that the broker was not neglect in effecting the policy before first calling at his office to check his letters, for that he had not the slightest doubt that he was to receive any additional information or instructions as to the policy at issue. The matter was left to the jury who found that the broker was justified in what he had done and a verdict was entered for the plaintiff accordingly.

A contrary view supporting the objective test was recently advanced by the judgment of Phillips, J. in *the Dora*.[214] In this case, one of the grounds upon which the defendants (underwriters) sought to avoid the policy was the non-disclosure of the criminal record of the skipper of the insured yacht. The agent to whom the management of the yacht was entrusted

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[213] (1812) 4 Taunt. 494, [Marine].

by the assureds was also the person responsible for effecting the insurance upon the said yacht. The agent denied that he was aware that the skipper had any criminal convictions. Phillips, J. accused the agent of not making enquiries to check on the skipper's character a matter which the agent ought in the normal course of business to have made. His judgment was that had the agent made such check, as he was required in the ordinary course of business to make, he would have learned of such a material circumstance. Thereupon, he held that the criminal convictions were material facts and should have been known to the agent and to the plaintiffs in the ordinary course of business.

Having mentioned that, it appears, as it has been said before[215], that the adoption of the subjective test would be contrary to the aim behind the imposition of the deemed knowledge notion which seems to be a devise used to find out, by referring to what is normally and commonly known by agents involved in the same business, whether or not the agent under consideration is justified in not being acquainted with the undisclosed fact. Besides that, the objective test seems to be supported by the wording of ss. 19(a) of the MIA 1906 which uses the unequivocal phrase *'in the ordinary course of business'* which implies that the test is intended by the draftsman to be an objective one, otherwise the phrase *'in the ordinary course of his business'* could have been used instead.

3.4.2.4. The capacity according to which an agent is required to disclose

With regard to the agent's duty of disclosure, it appears to be very important to determine the exact capacity according to which he is required to disclose what is within his knowledge. Is he obliged to disclose all that known to him acquired in any capacity? Or is his duty only confined to the knowledge acquired by him in his capacity as an agent of the assured on behalf of whom he is effecting the insurance? The authorities as to this issue seem to differentiate between the agent's actual and deemed knowledge.

With regard to the deemed knowledge, it seems that the agent's duty of disclosure is confined to circumstances acquired by or communicated to him in his capacity as an agent of the assured on whose behalf he is effecting the insurance. Consequently, any knowledge acquired by or communicated to him in any capacity other than this capacity need not be disclosed. This was the view expressed by Arnould whose view seems to be the only authority available in this point. This was declared as follows:

> *"[T]he rules under section 19(a) as to disclosure of circumstances which in the ordinary course of business ought to be known by or to have been communicated to the agent effecting the insurance would appear necessarily to be restricted to information with which the broker*

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[214] *Inversiones Manria S.A. v Sphere Drake Insurance* ibid.

[215] See subsection: '3.4.1.1.2.1. The test according to which the deemed knowledge of the assured is judged' above, particularly the reasons advanced there to support the assured's objective test of knowledge.

should ordinarily be supplied in his capacity as the assured's agent. The words "ordinary course of business" point to this conclusion."[216]

Conversely, concerning the actual knowledge, the matter does not seem to be settled yet. There appears to be two contradicting views: one enlarging the agent's duty of disclosure to include any knowledge known by him acquired in any capacity, whereas the other is constraining it to the knowledge acquired only in his capacity as an agent of the assured.

The authorities in favour of the first view are as old as the judgment of the House of Lords announced in *Blackburn, Low & Co. v Vigors* [217]which was to the effect that the agent to insure is required to disclose what he knows, gained from any source and whether it is known to his principal or not. In *Blackburn, Low & Co. v Haslam* [218], Pollock, B. was also of the opinion that even if the knowledge was given to the agent in confidence, he would still be bound to disclose it if it was material.

This view recently received further approval from the judgment given in the Court of Appeal in two cases, namely *El Ajou v Dollar Land Holdings* and *SAIL v Farex*. In *El Ajou v Dollar Land Holdings*[219], Hoffmann L.J, basing his judgment upon that of Lord Macnaghten in *Blackburn, Low & Co. v Vigors*, pointed out that the agent was bound to *unrestrictedly* disclose what was within his knowledge. He stated that as follows:

"... an insurance policy may be avoided on account of the broker's failure to disclose material facts within his knowledge, even though he did not obtain that knowledge in his capacity as agent for the insured."[220]

In a like manner, in *SAIL v Farex*[221], Hoffmann L.J. and Saville, L.J. shared the same view, which was formerly expressed by Hoffmann L.J in *El Ajou v Dollar Land Holdings* that the duty of disclosure of the agent extends to all knowledge acquired in any capacity. Their judgments were respectively as follows:

"[I]t is true that the knowledge was acquired in a different capacity, namely as agent for Farex to obtain the retrocession cover. But the insured and his agent are under a duty to disclose "every material circumstance" of which they have knowledge, irrespective of the way in which that knowledge was acquired... ."[222] *"The argument here starts with the correct assertion that the duty on the agent is not confined to knowledge acquired from the assured but extends to knowledge otherwise acquired."*[223]

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[216] Vol. 3, at para.630.
[217] (1887) 12 App. Cas. 531, per Lord Watson at p. 541.
[218] (1888) 21 Q.B.D. 144, at p. 153.
[219] [1994] 2 All ER 685.
[220] Ibid., at p. 702.
[221] [1995] LRLR 116.
[222] Ibid., per Hoffmann, L.J. at p. 149.
[223] Ibid., per Saville, L.J. at p. 157.

In addition, Arnould[224], whose point of view was conformably adopted by Clarke[225], depending upon the authority of *Blackburn, Low & Co. v Vigors, Blackburn, Low & Co. v Haslam* and the words used in formulating ss. 19(a), showed his agreement with this view.

Despite of the existence of all the foregoing authorities, the issue is still regarded as unsettled yet. This is because a contrary view was lately declared by Staughton, L.J. in the Court of Appeal in *PCW Syndicates v PCW Reinsurers.*[226] The importance of his speech appears in his careful examination of all of the authorities upon which the first view was based.[227] He came to the conclusion that that the only knowledge that did need to be disclosed by the agent would be nothing save what was known by him in his capacity as an agent of the assured on behalf of whom he was instructed to effect the insurance. He forcefully stated his conclusion as the following:

> *"[I] do not find in the authorities any decision that an agent to insure is required by s. 19 to disclose information which he has received otherwise than in the character of agent for the assured... ."*[228]

Taking both views into deep consideration, the situation is not easy to deal with as it may seem at first sight. Although, that the number of authorities supporting the view extending the capacity of the agent to include all information gained irrespective of its source is incomparable and although, that *PCW Syndicates v PCW Reinsurers* seems to be the only authority to the contrary, the issue cannot be easily taken as decided. This is due first to that the judgment given by Staughton, L.J. in *PCW Syndicates v PCW Reinsurers* was delivered after he, as it was indicated, closely analysed the relevant authorities. Secondly, it ought to be taken into account that his decision seems to be representing the view of the Court of Appeal in this point, for that it was referred to with approval by Rose L.J.[229] On the top of that, is the passive attitude of Saville, L.J who was one of the judges before whom *PCW Syndicates v PCW Reinsurers* came. Although he previously did give supportive judgment to the first view in the Court of Appeal in *SAIL v Farex*[230], in *PCW Syndicates v PCW Reinsurers* he was silent. He did not seem to be neither with, nor against the decision of Staughton, L.J. Would his perspective imply that he has changed his opinion as to this issue? The answer will never be known until the question of in which capacity the agent is required to disclose what is known by him comes again under consideration. Therefore, the better view ought, as

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[224] Vol. 2, at para.637.
[225] 3rd ed., (1997), at para.23-8A2.
[226] [1996] 1 Lloyd's Rep. 241.
[227] Ibid., at p. 256-7.
[228] Ibid., at p. 257.
[229] Ibid., at p. 257, where he stated that *"[F]or the reasons given by Lord Justice Staughton, I agree that ... there is nothing in s. 19 which requires an agent to insure to disclose to a proposed reinsurer information ... received otherwise than as agent for the assured."*
[230] Ibid., at p. 157.

Arnould[231] indicated, to regard this matter as unsettled until it is determined by a decision of the House of Lords.

3.4.2.5. The disclosure of the agent's fraud against or dereliction to his principal

Concerning what has just been discussed, is the agent, as a part of his duty to disclose, required to disclose to the underwriter material circumstances as to his fraud against his principal, of which the latter has no knowledge? In fact, this question arose in connection with the duty of disclosure under ss. 18 and 19, in *PCW Syndicates v PCW Reinsurers.*[232] In this case, it was contended that the fraud committed by the agents of the reassureds against their principals was a material fact the non-disclosure of which would allow the reinsurers to avoid the contracts.

Staughton, L.J. with whose judgment Rose, L.J. was in agreement[233], held that the application of the duty of disclosure contained in ss. 18 and 19 would be subject to *the Hampshire Land* principle in its modern formulation declared by Buckley L.J. in *Belmont Finance Corporation v Williams Furniture*[234]. This principle was to the effect that, as an exception to the general rule of imputation of knowledge, the agent's fraud would not be attributed to his principal.[235] Subsequently, he rejected the contention of the reinsurers and held that that the reassureds would not be affected by the fraud of their agent.[236]

It was further contended before him that since the duty of the agent under s. 19 was held not to be based upon the doctrine of the imputation of knowledge, but upon a duty separately imposed upon him, then *the Hampshire Land* principal had no application at all and an agent to insure was bound according to his duty of disclosure to disclose his own fraud. Staughton, L.J. forcefully rejected this argument and held that the application of *the Hampshire Land* principle would nevertheless extend to cover cases in which the rights of the principal are affected by the non-disclosure of his agent to a third party.[237]

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[231] Vol. 3, at para.630. It should be mentioned that the present editor of Arnould does not seem to be supporting the view expressed by the editors of the 16th ed., nor the opposite one expressed by Staughton, L.J. in *PCW Syndicates v PCW Reinsurers.*

[232] Ibid.

[233] Ibid., at p. 257.

[234] [1979] 1 Ch. 250, [CA], at p. 261-2, where it was stated that *"... it is a well-recognised exception from the general rule that a principal is affected by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal."* It ought to be made clear that this principle was first formed by Vaughan Williams J. in *In re Hampshire Land Company* (1896) 2 Ch. 743.

[235] *The Hampshire Land* principle was many times applied by the Courts in the insurance context, for example see *Newsholme Brothers v Road Transport and General Insurance* [1929] 2 K.B. 356, at p. 374-5; *Regina Fur Company v Bossom* [1957] 2 Ll.L.Rep. 466, [Marine], at p. 483-4 and *SAIL v Farex,* ibid., at p. 143.

[236] Ibid., at p. 254-5.

[237] Ibid., at p. 255-6. Note that Staughton, L.J held that the contention of the reinsurers could alternatively be disposed of upon the ground that the knowledge of the agents of their own fraud would not be deemed as knowledge acquired by the agents in heir capacity as an agent of the reassureds. In giving this decision, Staughton, L.J seems to have been influenced by his view that the agent need not disclose any knowledge not acquired by him in his capacity as an agent of the assured. However, this decision would not stand if the other

The same question arose again in *Group Josi Re v Walbrook Insurance*[238], where Staughton, L.J.[239] and Saville, L.J.[240] held that it offends common sense to suggest that the non-disclosure of the agents' fraud against the reassureds could constitute a defence enabling the reinsurers to avoid the contracts either according to s. 18 or s. 19.

In the same manner, no duty of disclosure will arise either under s. 18 or under s. 19 if the alleged non-disclosure relates to the agent's non-fraudulent dereliction of duty towards his principal. This what was actually held by McNair J. in *Australia & New Zealand Bank v Colonial & Eagle Wharves.*[241] In this case, the underwriters alleged that they were entitled to rescind the contract upon the ground of the non-disclosure of the material fact that the wool stored in the company's warehouse was delivered by their clerk without the authority of the Bank. In fact, this circumstance was not known to the company. But, the argument of the underwriters was, *inter alia*, that since that the undisclosed fact was known to the clerk, then, such knowledge was to be imputed to the company. McNair J. rejected this contention and held that the clerk was not within that class of persons whose knowledge was to be imputed to the company. McNair J. further held that even if the clerk was within such a class, this would not make him under a duty to disclose his own dereliction of duty to his principals and his knowledge, in this case, would not be imputed to the company.[242]

However, it must be noted that the application of *the Hampshire Land* principle as an exception to the general duty of disclosure is only confined to cases where the fraud of the agents is against the assured and does not extend to cases where the fraud is not so.[243] This latter type of information which relates to the previous convictions or acts of dishonesty of the assured's agents has been held to be material to the underwriter to know, for that it affects the business integrity of the assured or as it is now called the *'moral hazard'* and may therefore suggest that the proposed risk for insurance is not to be treated as an ordinary one.[244] The significance of the disclosure of this type of information is apparent from the judgments delivered in many cases. For instance, in *Regina Fur Company v Bossom*[245], Pearson J. held that the underwriter was entitled to avoid the policy upon the ground that the

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view requiring the disclosure of all information acquired by the agent in any capacity whatsoever, was upheld as stating the law in this matter. In addition, note that the above ground was also held by the same judge in *Group Josi Re v Walbrook Insurance* [1996] 1 Lloyd's Rep. 345, to be an alternative route to dispose of the allegation of the non-disclosure of the agents' fraud against their principal besides that of *the Hampshire Land* principle.

[238] Ibid.

[239] Ibid., at p. 361.

[240] Ibid., at p. 365-7.

[241] [1960] 2 Ll.L.Rep. 241.

[242] Ibid., at p. 254-5. In giving such judgment, McNair J. relied upon the authority of *Bell v Lever Brothers* [1932] AC 161, [HL], per Lord Atkin at p. 228 and *Houghton v Nothard, Lowe and Wills* [1928] AC 1, per Viscount Dunedin at p. 14-5.

[243] Arnould, Vol. 2, at para.639. This point was highlighted and reaffirmed by the editor of Arnould's Vol. 3, at para.639.

[244] *Locker and Woolf v Western Australian Insurance* [1936] 1 KB 408, [CA-Fire], per Slesser L.J. at p. 414; *Reynolds v Phoenix Assurance* [1978] 2 Lloyd's Rep. 440, per Forbes J. at p. 460.

insured company failed to disclose the material fact that one of its directors had been convicted of receiving stolen furs.[246] Also, in *March Cabaret Club v The London Assurance*[247], May, J held that the criminal offence committed by one of the owners of the insured premises was vital and ought to have been disclosed to the underwriters because it affected the moral integrity of the assured.[248] He further stated that the duty of the assured, as such, would encompass the disclosure of circumstances relating to his arrest, charge and committal for trial, even if he was in fact innocent.[249] This view was recently adopted and affirmed by Phillips, J. in *the Dora.*[250] In his judgment, he held the policy void because there had been a non-disclosure of the fact that the skipper of the insured yacht had had a criminal record. Such a circumstance, he held, should have been known to the assured and his agent in the ordinary course of business and if it was material, it should have been communicated to the underwriters.[251] His agreement with what was stated by May, J. appeared in his decision that underwriters would not only be influenced by the fact that the offence had actually been committed, but also by any fact raising doubts about the subject-matter of the insurance.[252]

On the other hand, it must be borne in mind that not all convictions or offences will be held to fall within the sphere of the moral hazard and, then, to be fully disclosed. McNair J. in *Roselodge v Castle*[253] held that if the undisclosed conviction had no direct relation to the type of business being insured, it would not be material and there would be no need to disclose it.[254]

3.4.2.6. Which 'agent to insure' is required to disclose to the underwriter

In conformity with the requirement of the duty of disclosure under s. 19, the agent to insure has to disclose to the underwriter, before and up to the conclusion of the contract, all material facts known to him as well as those which in the ordinary course of business ought to be within his knowledge or to be communicated to him. But, in this connection, is s. 19 designated to have a rather general application and, then, to be applicable to all of the

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[245] Ibid.
[246] Ibid., at p. 483-4.
[247] [1975] 1 Lloyd's Rep. 169, [Traders Combined].
[248] Ibid., at p. 176-7.
[249] Ibid., at p. 177.
[250] [1989] 1 Lloyd's Rep. 69.
[251] Ibid., at p. 95.
[252] Ibid., at p. 93. Also, see the contrary view held by Forbes J. in *Reynolds v Phoenix Assurance*, ibid., where he declined, at p. 460, to follow May J. in holding that the duty of disclosure would cover circumstances as to the offences of the assured irrespective of whether they were actually committed or not. His outlook, however, was that the disclosure was to be restricted to cases when the offence had actually been committed. This would, he stated, exclude facts related to allegations of uncommitted offences where no question of disclosure would arise.
[253] [1966] 2 Ll.L.Rep. 113, [Jewellers' Block Policy].
[254] Ibid., at p. 132. In this connection, it should be noted that the duty of disclosure is also subject to the rules of The Rehabilitation of Offenders Act 1974 according to which the assured is not obliged to disclose facts concerning certain past convictions for criminal offences or any circumstances ancillary to them.

assured's agents employed to effect the insurance and involved in any decision leading to the conclusion of the contract or is it, on the contrary, intended to have a limited application so as to strictly apply only to agents who directly deal with the underwriter and effect the insurance in question?

This point was discussed by the Court of Appeal in *PCW Syndicates v PCW Reinsurers*[255], where Saville, L.J. with whose judgment Rose, L.J. was in complete agreement, affirmed the decision of Waller J., sitting as a Judge Arbitrator in the same case, that s. 19 applies only to those agents who directly deal with the underwriter and actually make the insurance.[256] Saville, L.J. delivered his judgment as follows:

> *"[I] agree with the conclusion reached by Mr. Justice Waller. It seems to me, both from a reading of the words used in s. 19, and from an examination of the authorities upon which that section was based, that the "agent to insure" only encompasses those who actually deal with the insurers concerned and make the contract in question.*[257] *... Lord Watson (at p. 541 of the report) expressly limited this class of agent* [agent to insure] *to the person who actually makes the contract on behalf of the assured and I can find nothing in the other speeches which indicates that this class is to be any wider.*[258]"

Accordingly, intermediate agents, when the insurance is effected through more than one agent, fall outside the application of s. 19 and, so, are not required to disclose any information to the underwriter. Their sole duty, as Saville, L.J. further stated, is to pass material facts to other intermediaries in the chain or to those agents directly discussing the contract with the underwriter.

However, there remains an important issue that need be considered as to how would s. 19 protect the underwriter against those intermediaries who have material circumstances, but, nevertheless, they neither pass the information down the chain, nor to agents actually negotiating the cover with the underwriter? In fact, a similar situation arose in *PCW Syndicates v PCW Reinsurers*. The argument in this case was to the effect that that having admitted the validity of the principle that it is only agents to insure who have to disclose, how this principle could be explained in the light of Pollock, B.'s judgment in *Blackburn, Low & Co v Haslam*[259] where the insurance was vitiated through the knowledge of an agent who was not the agent directly dealing with the underwriter; the agent who made the contract was also unaware of the undisclosed fact.

This issue was rightly dealt with by Saville, L.J who stated that there was no contradiction in this matter. He explained the judgment of Pollock, B. as being based upon the fact that that the agent holding the knowledge was clearly forming part of the chain of brokers employed to effect the insurance in question and his undisclosed knowledge was,

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[255] Ibid.
[256] Ibid., per Waller, J., at p. 248, per Rose, L.J., at p. 257 and per Saville, L.J., at p. 258-9.
[257] Ibid., at p. 258.
[258] Ibid., at p. 259.

according to s. 19, within the deemed knowledge of the agent who actually effected the insurance and who ought in the ordinary course of business to have such material circumstances been communicated to him.[260] So, clearly the underwriter will be protected against the non-disclosure of those intermediaries, who have material circumstances, but they neither pass them down the chain, nor to agents actually negotiating the cover with the underwriter, by the notion of the deemed knowledge of the agent to insure.

Finally, in the light of Saville, L.J.'s judgments, it appears as it matters not that a duty of disclosure according to s. 19 is only imposed upon agents who actually deal with the underwriter. This is because in case of any breach of the duty, it can hardly make, as it now seems, any difference whether it is attributed to the agent who actually deals with the underwriter or to any other broker in the chain employed to effect the insurance in question. In all cases, the result will be the same which is that the policy is voidable.[261]

3.4.3. Facts which need not be disclosed

As a general rule, the underwriter is entitled to be fully made aware by the would be assured of all material circumstances as to the subject-matter presented for insurance. In certain circumstances, however, the assured is permitted not to disclose material facts which will otherwise be his duty to do so. These circumstances were best illustrated under the English law by the celebrated judgment of Lord Mansfield in *Carter v Boehm*[262] as follows:

> *"[T]here are many matters, as to which the insured may be innocently silent- he need not mention what the under-writer knows ... what way soever he came to the knowledge ... what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of ... what lessens the ris[k] agreed and understood to be run by the express terms of the policy ... general topics of speculation: as for instance ... every cause which may occasion natural perils as the difficulty of the voyage, the kind of seasons, the probability of lightening, hurricanes, earthquakes, &e ... every cause which may occasion political perils; from the ruptures of States from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the*

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[259] Ibid.

[260] Ibid., at p. 259, where he stated that *"[I]n Haslam (unlike Vigors) the agents who knew formed part of the chain of agents negotiating the insurance in question. As s. 19 now makes clear, the agents to insure deemed to know every circumstance which in the ordinary course of business ought to be communicated to them, and there is no doubt that the agents who knew in Haslam should have communicated that knowledge down the line to the brokers who actually effected the cover. Since they did not do so, the negotiation was indeed tainted in the way described by Baron Pollock."* A similar judgment was subsequently given by the same judge in the Court of Appeal in *Group Josi Re v Walbrook Insurance Co.*, ibid., at p. 366. See also the odd and unrestricted view expressed in Colinvaux's Law of Insurance 7th ed., (1997), at para.5-06, that *"information in the possession of an intermediate agent above is to be disregarded if neither the assured nor the placing broker is aware of it."* It is really astonishing to find that this view is based upon the judgment of Saville L.J. in *PCW Syndicates v PCW Reinsurers* and *Group Josi Re v Walbrook Insurance*. It should be noted, as it appears from the above quotation of Saville L.J.'s judgment, that the non-disclosed knowledge of an intermediate agent will be caught by the deemed knowledge of the agent to insure and the only case in which such knowledge is to be disregarded is, as Saville L.J. himself pointed out in *PCW Syndicates v PCW Reinsurers* at p. 366, when such knowledge is not material and, so, it ought not in the ordinary course of business to be communicated to or be within the knowledge of the agent to insure, nor to be within the actual or presumed knowledge of the assured.

[261] This fact was actually indicated by Saville, L.J. in *PCW Syndicates v PCW Reinsurers*, ibid., at p. 259.

[262] (1766) 3 Burr 1905.

imbecility of the enemy, through the weakness of their counsels, or their want of strength, &e ... ".[263]

This judgment was subsequently embodied in what is now known as ss. 18(3) of the MIA 1906 which reads as follows:

> *"[I]n the absence of inquiry the following circumstances need not be disclosed, namely:*
> *(a) Any circumstance which diminishes the risk;*
> *(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;*
> *(c) Any circumstance as to which information is waived by the insurer;*
> *(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty."*

The Egyptian law, similar to the English law, in principle, seems to have recognised cases where the assured may be relieved from his duty of disclosure. Such cases are not however regulated by the provisions of the MTL 1990, but are to be found in the Egyptian jurisprudence.[264]

In the same manner, the Saudi Arabian law has also admitted the existence of some situations where the assured will be exempted from his duty to make disclosure of certain facts. These situations are actually governed by ss. 330, 331 and 349 of the CCL 1931 which respectively state that

> *"[I]f the insured does not know the name of the vessel carrying the goods and items which he is expecting from a foreign country, he shall be relieved from giving the name of the vessel and the master; however, he shall mention this fact in the document and quote the date of the last letter and the authorised signature on the order in which case the insurance shall be for a certain specified time."*
> *"If the insured does not know the kind of goods and value of the items consigned to him, he may have them insured in their general name, ie. as goods only, without mentioning or otherwise showing such goods and items in the document, but he must state the name of the consignee or person who is to receive the goods, save when there is a condition to the contrary in the policy; such insurance of a general nature may not be made to cover gold and silver coins or ingots, diamonds, pearls, jewellery or military equipment."*
> *"The particulars of perishable items, such as wheat, and soluble items, such as salt, and items that are subject to seepage, such as honey and vinegar, shall be so stated in the bill of lading, failing which the insurer shall not be liable for any loss or damage to such items, save when the person taking out the policy was unaware of the kind of goods shipped at the time of preparing the bill of lading."*

Before examining this issue in detail, two comments ought to be made on the application of ss. 330, 331 and 349 of the CCL 1931. The first is that it is very hard to consider these sections as really setting up exceptions to the duty of disclosure of the assured. This is because, according to them, the assured cannot be relieved from his duty of disclosure unless he is ignorant of the fact in question. Consequently, it is not the materiality or immateriality of a fact to the risk which will exempt the assured from his duty of disclosure, it is rather his ignorance of its existence which will do so. In this sense, it could strongly be

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[263] Ibid., at p. 1910.
[264] Such situations are to be extracted from the views of the jurisprudence and the decided cases.

argued that if knowledge is the yardstick which will activate the application of ss. 330, 331 and 349, then their enactment seems to be superfluous. This would be understandable if it is remembered that it is logically accepted that the assured is only bound to disclose material facts which he knows or should have known and nothing else.

The second comment is that even if the above three sections are accepted as relieving the assured of his duty of disclosure, their scope is very limited. This is because their application is only confined to the disclosure of material facts under goods insurance. It follows that if the insurance is effected on a ship, for instance, the assured will be unable to invoke them.

Therefore, since the MTL 1990 [Egypt] does not have any provisions stating when the assured is exempted from his duty of disclosure and, also, since those of the CCL 1931 [SA] are very limited in scope, the discussion of this issue will follow the comprehensive treatment given to it by ss. 18(3) of the MIA 1906 [UK].

3.4.3.1. Facts tending to lessen the risk proposed for insurance

> Ss. 18(3) of the MIA 1906: *"[I]n the absence of inquiry the following circumstances need not be disclosed, namely: ... (a) Any circumstance which diminishes the risk ... ."*

According to the above sub-section, the assured is under no duty to make the underwriter aware of any circumstance that tends to lessen the risk tendered for insurance. The exclusion of this kind of information from the realm of the general duty of disclosure is plainly based upon the judgment of Lord Mansfield in *Carter v Boehm*[265], where his Lordship stated that the underwriter

> *" ... needs not be told what lessens the [risk] agreed and understood to be run by the express terms of the policy."*[266]

Having laid down this exception, Lord Mansfield, as a way of illustration, further stated that if the insurance was

> *" ... for three years, he needs not be told any circumstance to* [*shew*] *it may be over in two : or if he insures a voyage, with liberty of deviation, he needs not be told what tends to* [*shew*] *there will be no deviation."*[267]

Another example was given by *the Dora*[268], where the underwriters alleged that the plaintiff (the assureds) had not disclosed the fact that the insured yacht was still in the custody of the Lionello yard at the commencement of the risk. Phillips, J. rejected this claim and stated that

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[265] Ibid.
[266] Ibid., at p. 1910.
[267] Ibid., at p. 1911.
[268] Ibid.

"[I]n may judgment the short answer to this point is that the fact that the vessel was still in the custody of the Lionello yard at the commencement of the risk was a circumstance which diminished the risk and was therefore not disclosed by virtue of s. 18(3) (a) of the Marine Insurance Act, 1906."[269]

However, since it is submitted[270] that any circumstance which diminishes the risk is material, because it would affect, by a way or another, the judgment of a prudent underwriter in deciding whether to accept the risk or not and, if yes, upon what rats and conditions, it seems quite difficult to understand why, in the light of the test of materiality[271] contained in ss. 18(2), such a circumstance need not be disclosed.

The position of the Egyptian law seems to harmonise with the English one in this respect. This can undoubtedly be inferred from the wording of ss. 347(1)[272] of the MTL 1990 which states that the contract would be avoided by the underwriter if the undisclosed fact caused him to estimate the risk smaller that it was. This inference could be supported by the fact that although s. 361 imposes a general duty of disclosure without any exceptions, ss. 347(1) would only avoid the contract if the effect of the undisclosed fact made the risk appear smaller than it was. It follows that the remedy contained in ss. 347(1) would not be applicable if the undisclosed fact does not increase the risk insured in the sense that had the underwriter known of it, he would still have accepted to insure on the same terms and at the same premium.[273]

Accordingly, it was held by the Mixed Court of Appeal that the policy would not be voidable if the assured omitted to disclose that his commercial name, which he used to use in good faith, did not exist.[274] This was due to that that such omission would not increase the seriousness of the risk. In addition, it was held by the same Court in a motor insurance that the fact that the assured had weakness in his hearing was not a fact which would affect the estimation of the risk insured.[275]

The position under the Saudi Arabian law appears also to be in complete conformity with the English and Egyptian laws. So, there is no need to disclose facts whose effect is to minimise the gravity of the contemplated risk. This is evident from the wording of s. 342 of

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[269] Ibid., at p. 90.
[270] MacGillivray, para.704.
[271] The issue of materiality is heavily examined in Chapter [5].
[272] *"The insurer may ask for a court ruling which invalidates the insurance deed if it is established that the insured party has submitted incorrect data, however, not in bad faith, or failed to submit the data as related to the insurance thus held, such that the insurer, in both cases has estimated the risk at less than it really is."*
[273] Ta Ha, at para.67, where he was also of the view that if the undisclosed fact did not increase the risk or change its nature, the underwriter would not be allowed to avoid the contract; Yihya, at p. 142, where he stated that it would not be the duty of the assured to disclose facts which tend to lessen the risk conceived, though it might be for his own interest to draw the attention of the underwriter to them so as to get his premium reduced; Ibrahim, at para.340. Also, see Al Sanhuri, Vol. 7/2, at para.614, where he after presenting similar view, stated that if a fact did not increase or change the nature of the risk, there would be no duty to disclose it even if it was asked for by the underwriter.
[274] Mixed Appeal 17/2/1892, Civil Collection, Year No. 4, p. 110, [Goods].
[275] Mixed Appeal 28/12/1933, Civil Collection, Year No. 46, p. 109, [Motor].

the CCL 1931 which considers a fact material if its disclosure will vary the attributes of the anticipated risk or enlarge its seriousness.[276]

However, it is very difficult to conceive how this exception could be applied under the Saudi Arabian law. This is because the assured, according to s. 342, is not bound to make full disclosure and his duty is only limited to the disclosure of those facts contained in the marine insurance policy, s. 325 and those requested by the underwriter. Therefore, how could he be said to be exempted from the disclosure of a fact which he is not bound to disclose?

3.4.3.2. Facts which are within the knowledge of the underwriter

According to ss. 18(3)(b) of the MIA 1906, it is now established under the English law that the assured is relieved from his duty to disclose a material fact if it is already within the actual knowledge of the underwriter or if it is presumed in the ordinary course of business to be as such. As to the test applied to such knowledge, it was submitted[277] that there is a resemblance between the situation under ss. 18(1) and s. (19) and the situation under ss. 18(3)(b), and, therefore, the test, as it was held by Staughton, L.J. in *PCW Syndicates v PCW Reinsurers* [278], is one of actual knowledge. In other words, the knowledge of the underwriter is to be judged according to what is known to the underwriter personally if he is a natural person or what is known to a director or an employee at an appropriate level if it is a company.

As far as the Egyptian[279] and Saudi Arabian[280] laws are concerned, it is also admitted that it is not conceivable that the assured will be liable for the non-disclosure of a fact which

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[276] *"[I]f the insured keeps silent about ... particulars ... he should mention in the insurance policy ... and if the insurer discovers the true nature thereof, regardless of whether the risk is not as grave as that which appears to result from such silence or statement, or the risk, other than supposed risk results, which is a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*

[277] Arnould, Vol. 3, at para.660.

[278] Ibid., at p. 254.

[279] Yihya, at p. 148-9; Al Mahdi, at p. 286-7; Al Badrawi, at para.143; Ta Ha, at para.674(1); Awad, at para.532; Ibrahim, at para.344; Lutfi, at p. 189; Sharaf Al Diyn, at para.221; Shar'an, Mohammed., Al Khatar Fi Aaqd At Ta'myn, (The Risk in The Contract of Insurance – in Arabic), (1984), at p. 48, (hereafter Shar'an).

[280] This principle was stated and emphasised upon in many arbitral decisions. For example, Arbitral award 10/6/1991, [Fire]. In this case, a total loss claim was presented by the insured company in order to be indemnified in respect of the loss of its factory and its contents caused by fire. The insurance company rejected the claim on the ground of the non-disclosure of the fact that the factory did not have any working fire extinguishing system. The case was referred to an arbitral panel which held that since the factory and its contents were examined by the insurance company prior to granting the policy, the undisclosed fact was to be deemed within its knowledge. Also, see Arbitral award 22/12/1986, [House], in which the arbitral panel rejected the contention of the insurance company that there has been a non-disclosure of the real value of the insured carpets and jewellers. This was because, as the panel further stated, the value of the insured items was stated in the documents shown to the insurance company before effecting the insurance; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, where the real character of one of the assureds was held to be known to the insurance company; Arbitral award 3/4/1997, [Fire], in this case an insurance was effected on the assured's store to cover its contents against fire. A fire broke out and the store became a total loss. The assured claimed under the policy, but his claim was rejected on the contention that he had withheld the material fact that some flammable substances, which were prohibited by the terms of the policy, were being kept inside the store. The arbitral panel rejected this contention on the ground that the keeping of these substances in the store were known to the insurance company which viewed the insured place and its contents before initialling the policy.

the underwriter is aware of. This is because an underwriter's judgment is not affected by the withholding of this fact. This exemption seems to be applicable whether the non-disclosure was innocent or intended and regardless of the way through which it came to the knowledge of the underwriter.

3.4.3.2.1. Actual knowledge of the underwriter

> Ss. 18(3) of the MIA 1906: *"[I]n the absence of inquiry the following circumstances need not be disclosed, namely: ... (b) Any circumstance which is known ... to the insurer ... ."*

Undoubtedly, there is no need for the assured under the English law to disclose what is actually known to the underwriter, for the sole reason which is that the underwriter cannot be allowed to assert that his decision to insure or not was affected by the non-disclosure of a fact which he had known. Therefore, if the assured failed to disclose a material fact already known to the underwriter, the latter would not be permitted to avoid the policy upon the basis of non-disclosure.[281] This will be the case irrespective of the way by which such a fact came to his knowledge and regardless of whether the failure to disclose was innocent or even fraudulent, for that, it was submitted[282], such a fact cannot be alleged to have affected the judgment of the underwriter.

The position under the Egyptian and Saudi Arabian laws is similar to the English one where the assured is not accountable for not communicating a fact which is actually known to the underwriter.

3.4.3.2.2. Presumed knowledge of the underwriter

> Ss. 18(3) of the MIA 1906: *"In the absence of inquiry the following circumstances need not be disclosed, namely: ... (b) Any circumstance which is ... presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know ... ."*

It is also open to the assured to justify his failure or non-compliance with the duty of disclosure by proving that although that the undisclosed fact was not actually known to the underwriter, it was a fact that he ought in the ordinary course of business to have known. According to s. 18(3)(b), the scope of such knowledge is stated to include matters which are of common notoriety or knowledge and matters which an underwriter ought in the ordinary course of his business to know.

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[281] *Cater v Boehm* ibid, at p. 1910; *Bates v Hewitt* (1867) L.R. 2 Q.B. 595, at p. 605.
[282] MacGillivray, at para.695.

The above paragraph seems to be also representing the situation under the Egyptian[283] and Saudi Arabian[284] laws, where it would be admissible for the assured to rely on the underwriter's constructive knowledge to prove that the undisclosed fact ought to be known to him.

3.4.3.2.2.1. Matters which ought, in the ordinary course of business, to be known by the underwriter

3.4.3.2.2.1.1. Matters of common notoriety or knowledge

Underwriters are taken to know facts of public knowledge or notoriety which is generally accessible and known to any ordinary person.[285] For example, in *Planche v Fletcher*[286], the underwriter alleged, *inter alia*, that he was not told the fact that war was expected to break out soon between England and France. This allegation was rejected upon the ground that such a fact was of common knowledge and was known by every man in both countries. Also, in *Hales v Reliance Fire and Accident Insurance*[287], the court held that the underwriters ought to have known the fact that fireworks are normally stocked for sale by retail shopkeepers during certain periods of the year. To the same extent, it was held in *Leen v Hall*[288] that the fact that the insured castle was previously used by Crown forces as a prison for Sinn Fein prisoners was a matter of public knowledge and, therefore, ought to have been known by the underwriters.

3.4.3.2.2.1.2. Knowledge of trade matters and customs

In addition, the underwriter is deemed to know facts relating to the general practice of trade and facts relating to the nature and circumstances of the branch of trade he insures in particular[289]. If he did not know it, said by Lord Mansfield in *Noble v Kennoway*[290], he ought

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[283] Ibrahim, at para.344; Al Mahdi, at p. 287; Awad, at para.532; Ta Ha, at para.674(1). However, a contrary view to the effect that the underwriter is to be judged according to his actual knowledge only and not to his constructive knowledge was expressed by Shar'an, at p. 48 and Yihya, at p. 148-9.

[284] Arbitral award 10/6/1991, [Fire]; Arbitral award 22/12/1986, [House]; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*; Arbitral award 3/4/1997, [Fire].

[285] *Cater v Boehm* (*supra*); *Bates v Hewitt* ibid.

[286] (1779) 1 Dougl. 251, [Marine], at p. 253.

[287] [1960] 2 Lloyd's Rep. 391, [Fire].

[288] (1923) 16 Ll.L.Rep. 100, [Fire].

[289] *SAIL v Farex* [1995] LRLR 116, where Saville, L.J. said, at p. 156, that *" ... in the ordinary course of his business an insurer ought to know the state of his retrocession ... ."*

[290] (1780) 2 Dougl. 511, [Marine], at p. 513; *Salvador v Hopkins* (1765) 3 Burr 1707, [Marine], where the practice of the East India Company was held to be within the knowledge of the underwriter; *Planche v Fletcher* ibid., at p. 253, where the underwriter was obliged to have had notice of the nature and usage of trade between England and France at that time; *Ougier v Jennings* (1800) 1 Camp. 505, [Marine]; *Kingston v Knibbs* 1 Camp 508, [Marine]; Park at p. 100; *Stewart v Bell* (1821) 5 B. & Ald. 238, [CA-Marine]; *G. Cohen, Sons v Standard Marine Insurance Company* [1924-5] 30 Com. Cas. 139, [Marine]; *North British Fishing Boat Insurance Company v Starr* (1922) 13 Ll.L.Rep. 206, [Marine].

to inform himself. This was also held by Lord Ellenborough in *Vallance v Dewar*[291] to be his duty although such usage of trade is not uniform as long as it is in fact general and universally known to all involved in the same trade [292]. However, if such usage is exceptional and not established yet or is riskier than it normally is, the underwriter will not be presumed to know it.[293] In connection with this, the underwriter is presumed to know any general rules limiting or restricting the freedom of trade and which may affect the risk under consideration, provided that such rules are not new or not fully established in which case they ought to be made known to him.[294]

Also, the assured is not required to tell the underwriter the normal and usual terms and clauses which are commonly inserted in ordinary commercial contracts, even if the insertion of a particular clause will tend to increase the risk presented for insurance. In conformity with this, it was held in *the Bedouin*[295] that there was no need for the assured to communicate to the underwriter that the contract contained an off-hire clause. To the same effect, it was held in *Asfar v Blundell*[296] that the insertion of a clause for the payment of a lump sum for freight in the charterparty was not unusual clause to have required the assured to disclose it to the underwriters. However, if the material clause is not commonly used in trade and the underwriter cannot be reasonably expected to know it, it will be the duty of the assured to bring it to his attention[297], unless there is a clause exempting him from doing so[298].

3.4.3.2.2.1.3. The content of Lloyd's List

With regard to the content of Lloyd's List, will there also be a presumption that the deemed knowledge of the underwriter extends to information published in Lloyd's List. The available authorities upon the issue seem to be contradicting each other. The principle previously prevailed was that the underwriter was deemed to know what was published in Lloyd's List. This was the view held in *Friere v Woodhouse*[299] and *Foley v Tabor*[300].

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[291] (1808) 1 Camp. 502, [Marine], at p. 508; Park, at p. 100.
[292] *Harrower v Hutchinson* (1870) L.R. 5 Q.B. 584, [Exq. Chamber-Marine].
[293] *Tennant v Henderson* (1813) 1 Dow. 324, where the usage of trade was held not to be established; MacGillivray, at para.699.
[294] *Lever v Fletcher* (1780) 1 Park's Laws of Marine Insurance, at p. 507; *Mayer v Walter* (1782) 3 Dougl. 79, 1 Park's ibid., at p. 431.
[295] (1894) P. 1, [CA-Marine].
[296] (1896) 1 Q.B. 123, [CA-Marine], *Charlesworth v Faber* [1900] 5 Com. Cas. 408, [Marine], where a continuation clause in the original contract was deemed to be known to the reinsurer.
[297] *Scottish Shire Line v London and Provincial Marine* [1912] 3 K.B. 51, [Marine], where it was held that the fact that the insured contract contained a date after which the cargo could not be loaded was material and was not expected to be known by the underwriter.
[298] *Property Insurance Company v National Protector Insurance Company* [1913] 18 Com. Cas. 119, [Marine], where it was held that the following clause: *"Subject without notice to the same clauses and conditions"* had the effect of exempting the reassureds from disclosing any unusual clauses contained in the original policy.
[299] (1817) Holt 572 [Marine], at p. 573. This case was described in Halsbury as being no longer relied on as an authority; *Elton v Larkins* (1831) 5 Car. & P. 86, [Marine], where Bosanquet, J. held, at p. 90, that there was no need to communicate the time of sailing of the ship, since it was contained in the Lloyd's List.
[300] (1861) 2 F. & F. 663, [Marine], at p. 672.

However, this principle was forcefully rejected by the judgment of Bramwell, B in *Morrison v The Universal Marine Insurance Company.*[301] His argument was that the underwriter was only bound to know matters of general knowledge, but not matters as to any particular ship. Imposing, he further added, upon the underwriter a duty to know all that contained in Lloyd's List as to ships he had no interest in, would put upon him a heavy and unnecessary burden. Bramwell, B, in forming his judgment, seems to have been influenced by the judgment given earlier in *Bates v Hewitt*[302], where a matter of general knowledge and notoriety was held not to be within the knowledge of the underwriter on the ground that although he knew it, it was not present to his mind at the time of effecting the insurance.

These two judgments were relied upon by Lord Sterndale in *London General Insurance Company v General Marine Underwriters' Association*[303] as the basis of upholding the decision of the Court of First Instance that the reinsurers who were in possession of Lloyd's casualty slip containing material information as to the ship they subsequently insured were not bound to be acquainted with the slip's knowledge, since at the time they received it they were not interested in the insured ship.

Ultimately, the present principle seems to be that the content of Lloyd's List in respect of any particular ship would only affect the underwriter if he was already interested in it. Taking the above three cases into consideration, their effect, unless it is only limited to the content of Lloyd's List, seems to be considerably limiting if not abolishing the whole concept of the constructive knowledge contained in s. 18(3)(b). In the first place, this is because, according to the above cases, the underwriter would not be presumed to know facts of public notoriety, unless they related to a particular ship in which he had interest. In the second place, because even if such facts related to a particular ship in which the underwriter had interest, he would still not be affected by such knowledge unless it was present to his mind when he took the risk.

In this regard, a reasonable view was recently submitted by Arnould[304] which was to the effect that the situation ought not to be understood as that no presumed knowledge is to be attributed to underwriters if the knowledge was acquired while they were not interested in the risk. Instead, the test to be applied, for the purpose of s. 18(3)(b), as to whether an underwriter is presumed to know a material fact or not, is *"whether the insurer can be expected to recall or apply information already acquired or available to him"* to the risk presented to him for insurance.[305] This point also arose in *Mackintosh v Marshall*[306], where

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[301] (1872) L.R. 8 Ex. 40, [Marine], at p. 54.
[302] Ibid., at p. 605-6.
[303] Ibid., at p. 110-11.
[304] Vol. 3, at para.660.
[305] A similar view was alluded to by MacGillivray at para.698.
[306] (1843) 11 M. & W. 116, [Marine], at p. 127.

Lord Abinger, C.B. affirmed this view upon the condition that no misrepresentation contrary to the content of the list was made by the assured to the underwriter.

As to the position under the Egyptian and Saudi Arabian laws, it is generally accepted that it forms part of the underwriter's constructive knowledge to be aware of matters of common notoriety, trade matters and commercial custom and matters which ought to be known to him because of his business.[307] For example, if the assured disclosed to the underwriter that his insured goods were going to be shipped to a certain country, he would not be bound to tell him that there was war in that country.[308] Also, there is no need to tell the underwriter the names of the intermediate ports of the ship carrying the insured goods as long as such facts are well known to every body involved in the same trade.[309] Moreover, the assured is not bound to disclose to the underwriter the usual terms or clauses of the charterparty which is normally used in the insured type of trade.[310]

Besides that, the underwriter is also presumed to know matters which are within his records. So, if the assured has a policy with the underwriter, he does not have to state, while effecting another one with him, those facts which he has previously disclosed under the first policy.[311]

As to facts contained in the special periodicals[312] which are concerned with the news of marine trade and ships registrations, qualifications, classifications, casualties etc., the position seems to resemble that of the English law. This is to say that the contents of these publications in respect of any particular ship will only affect the underwriter if he is already interested in it.[313] But, this is subject to the qualification that there is no representation contrary to the contents of the said publications is made by the assured to the underwriter. If this is the case, the underwriter will be entitled to rely on the assured's representation and if it afterwards appears to be materially false, the policy will be avoided.[314] This is, it was submitted, because the active attitude of the assured in representing a fact presumed to be within the underwriter's constructive knowledge has prevented the latter from ascertaining its accuracy.[315]

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[307] Yihya, at p. 142; Awad, at para.532; Ta Ha, at para.674(1); Ibrahim, at para.344.
[308] Ta Ha, at para.674(1).
[309] Awad, at para.532.
[310] Ibid.
[311] Ibrahim, at para.344; Yihya, at p. 150.
[312] Under the Egyptian law, these could be like the Egyptian Official Gazette, whereas under the Saudi Arabian law, these could be as the official newspaper *'Aum Al Qura'*.
[313] Awad, at para.532. Also, see Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, where the arbitral panel held the real character of one of the assureds was presumed to be known to the insurance company, for that it was published in Lloyd's records of ships.
[314] Awad, at para.532.
[315] Ibid.

3.4.3.2.2.1.4. The Knowledge of the underwriter's agent

It is also established under the English law that the assured does not need to disclose what is known by the authorised agent of the underwriter, for that the underwriter will be deemed to know the knowledge which his agent knows. Conformably, the underwriter would not be allowed to avoid the policy if the undisclosed circumstance although was not known to him, it was known to his agent. A clear illustration was given by *Pimm v Lewis*[316], where it was held that the insurance company was not entitled to avoid the contract upon the ground of the non-disclosure of the fact that rice chaff which was more inflammable than pollard was used in the mill. This was because such a circumstance was know to the company's agent and, so, ought in the ordinary course of business to have been known to it. In addition, in *Woolcott v Excess Insurance*[317], the underwriters were prevented from avoiding the insurance by the knowledge of their broker of the criminal record of the assured.

This is also the position under the Egyptian[318] and Saudi Arabian laws where the constructive knowledge of the underwriter is accepted to include all facts known to his authorised agents. Accordingly, the underwriter would be disentitled to avoid the policy for the omission of the assured to disclose a material fact if it was known to his authorised agent.

This was in fact held by the Egyptian Court of Appeal which disallowed the contention of the insurance company that it was entitled to avoid the policy of insurance because there had been non-disclosure of a material fact on the part of the assured. The refusal of the Court was based on the ground that the alleged non-disclosed fact although was not known to the insurance company, it was well known to its general agent.[319]

Likewise, this was also the view expressed by a Saudi Arabian arbitral panel in a case of fire insurance. In this case, the insurance company rejected a claim presented by the insured company on the ground of the omission of the insured company to disclose the fact that the insured factory did not have any working fire extinguishing system. The arbitral panel in front of which the case came held that this fact was presumed to be known to the insurance company since it was known to its agent who had examined the insured factory.[320]

3.4.3.2.2.1.5. The test applicable to the deemed knowledge of the underwriter

The test of whose deemed knowledge is to be considered when determining whether a circumstance is presumably known or unknown to the underwriter seems under the English

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[316] (1862) 2 F. & F. 778, [Fire], at p. 780; *Ayrey v British Legal & United Provident Assurance* [1918] 1 K.B. 136, [Life].
[317] [1978] 1 Lloyd's Rep. 633, [Fire], at 638; affirmed in [1979] 1 Lloyd's Rep 231, [CA]; for the retrial see [1979] 2 Lloyd's Rep. 210, at p. 216.
[318] Al Sanhuri, Vol. 7/2, at para.571; Ibrahim, at para.344; Al Mahdi, at p. 288-90; Al Badrawi, at para.144; Arafa, at p. 164-7; Yihya, at p. 148-50; Lutfi, at p. 189; Sharaf Al Diyn, at para.221.
[319] Mixed Appeal 9/12/1926, Civil Collection, Year No. 39, p. 72.
[320] Arbitral award 10/6/1991, [Fire].

law to be an objective one. This is to say that an undisclosed fact will be considered within the deemed knowledge of the actual underwriter in question if it ought in the ordinary course of business to be known by a prudent underwriter.

This is actually apparent from the judgment delivered by Rowlatt J. in *North British Fishing Boat Insurance Company v Starr*[321], where he held that an insurance company ought in the ordinary course of its business to have knowledge of the exceptional increase in the number and amount of fire losses suffered by motor fishing ships reinsured by it. This was proclaimed as follows:

> *" ... what ought an underwriter doing this business to know in the ordinary course of his business with regard to such a matter as is now before me? It seems to me that as this is a marine policy, I must look at the underwriter in this case as a person doing the business of insuring ships and as necessarily conversant with the course of losses affecting particular classes of ships."*

Recently, in the Court of Appeal in *SAIL v Farex*[322], Saville L.J. was of the same opinion and stated that

> *"[A]s can be seen from s. 18(3)(b) the assured is under no obligation to disclose matters which an insurer in the ordinary course of his business, as such, ought to know, since such matters are to be presumed to be known to the insurer. It seems to me that in the ordinary course of his business an insurer ought to know the state of his retrocession... ."*

Affirmatively, it was observed by Arnould[323] that the use of the unqualified word *"an insurer"* in ss. 18(3)(b) might support the view that the test is an objective one.

This objective test seems also to be the test applicable under the Egyptian law. This was clearly declared by Awad where he was of the opinion that the determination of whether a fact ought to be known to the underwriter in question or not was to be answered according to the constructive knowledge of a prudent underwriter and not that of the actual one.[324]

Concerning the Saudi Arabian law, although the situation is not clear and no authority in this issue is available, from the cases establishing the deemed knowledge of the underwriter[325] it could be inferred that the test ought to be objective one as it is under the English and Egyptian laws.

3.4.3.3. Facts the disclosure of which is waived by the underwriter

> Ss. 18(3) of the MIA 1906: *"[I]n the absence of inquiry the following circumstances need not be disclosed, namely: .. (c) Any circumstance as to which information is waived by the insurer... "*

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[321] [1922] Ll.L.Rep. 206, [Marine], at p. 210.
[322] Ibid., at p. 156.
[323] Vol. 3, at paras.639 and 660.
[324] Awad, at para.532.
[325] Arbitral award 10/6/1991, [Fire]; Arbitral award 22/12/1986, [House]; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*; Arbitral award 3/4/1997, [Fire].

The underwriter, as against his entitlement to full disclosure, may expressly exempt the assured from the whole duty of disclosure[326] or from the disclosure of certain type of circumstances. The underwriter can also be deemed to have waived the need for further disclosure if he after being given sufficient description of the risk which should have otherwise put a prudent underwriter upon inquiry, refrained from asking. Having expressly or impliedly waived his right to the disclosure of a particular fact, the underwriter would not be subsequently entitled to repudiate the contract upon the ground of its non-disclosure. A good example was given by the judgment delivered in *Asfar v Blundell*[327], where the allegation of the underwriters that the assureds had failed to disclose the material fact that the charter freight was a lump sum and not a tonnage rate was rejected by Mathew J. upon the ground that the entitlement to such disclosure was waived by them. The ground upon which such a waiver was said to have taken place was given by Mathew J. as follows:

> *"[I]t is a well settled principle of insurance law that underwriters are not entitled to be told what they waive all enquiry about. In this particular case they were told that there was a charter, and if they wanted to learn the contents of that charter, they had only to enquire."*[328]

The case went to the Court of Appeal[329] where the decision of Mathew J. was upheld. In this case, Lord Esher made it very clear that the doctrine of waiver would not be invoked, unless there was sufficient description of the risk to put the underwriter upon inquiry. This was stated as follows:

> *"... it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it."*[330]

This what was also held by the Court of Appeal in *Greenhill v Federal Insurance Company*[331], where the omission of the underwriters to make inquiry as to the previous history of the insured goods which was so exceptional was held not to constitute a wavier on their part, since they had not received sufficient information so as to put them upon enquiry. The relevant part of the judgment was delivered by Sargant L.J. as follows:

> *"... in order that waiver by the insurers should be established, they must at least have received information such as would put an ordinary careful insurer on inquiry, and nevertheless failed to inquire. The mere omission to make inquiry where, as here, there was*

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[326] *Sumitomo Bank v Bangue Bruxelles Lambert* [1997] 1 Lloyd's Rep. 487, [Insurance], at p. 494-5.
[327] (1895) 2 Q.B. 196.
[328] Ibid., at p. 202.
[329] (1896) 1 Q.B. 123. Also, see *Harrower v Hutchinson* ibid., at p. 590.
[330] Ibid., at p. 129. Lord Esher's decision was referred to with approval by Bankes L.J. in the Court of Appeal in *Mann, Mac Neal and Company v General Marine Underwriters* [1920] 26 Com. Cas. 132, [Marine], at p. 138-9. Also, see *Court v Martineau* (1782) 3 Dougl. 161, [Marine]; *Freeland v Glover* (1806) 7 East. 457, [Marine]; *Inman SS Co. v Bischoff* (1882) 7 App. Cas. 670, [Marine]; *The Bedouin* ibid.; *Cantiere Meccanico Brindisino v Janson* [1912] 3 K.B. 452, [CA-Marine]; *G Cohen, Sons, and Co. v Standard Marine Insurance Company* [1924] 25 Com. Cas. 139, at p. 162-3.
[331] [1927] 1 K.B. 65, [CA-Marine].

nothing to suggest the possibility or necessity of doing so, cannot in my view be held to be a waiver within s. 18."[332]

The doctrine of waiver as laid down earlier was recently discussed and affirmed in many cases. In the Court of Appeal in *C.T.I. v Oceanus*[333], Kerr, L.J. examined at some length the application of this doctrine and held that a material fact cannot be presumed to have been waived if there was no fair presentation of the risk.[334] Besides that, he submitted that the question of whether or not there was a fair presentation must necessarily be evaluated before considering the reaction of the underwriter towards such presentation.[335] In addition, he stated that the doctrine of waiver would have no application if the facts said to be waived were unusual or special.[336]

The question of waiver was further looked at by Longmore, J. in *Marc Rich v Portman*[337]. In this case, Longmore, J. held that the undisclosed fact of the loss experience history of the assureds was material and its non-disclosure was not waived by the underwriters. In his judgment, he made the following observation:

> *" ... there seems to be waiver when an insurer, having received a fair presentation of the risk, is on notice of the existence of facts which would raise in the mind of a reasonable insurer a suspicion that there are other circumstances material to the risk, but makes no enquiry about those facts and proceeds to underwrite the risk. The insurer is then said to have waived the requirement of disclosure of those facts.*"[338]

It is also recognised by the Egyptian[339] and Saudi Arabian[340] laws that there could be situations where the underwriter expressly states that he does not need any disclosure at all or only in respect of certain types of information. It follows that it would not be the duty of the assured to make any disclosure regarding them and it also follows that it would not be subsequently open to the underwriter to allege their non-disclosure.

On the other hand, the waiver of the underwriter of the need for further disclosure or the disclosure of certain facts could also be implied from his attitude. This would be the case when the underwriter after being given sufficient description of the risk by the assured was still unable to estimate the exact extent of the risk and nevertheless he abstained from asking

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[332] Ibid., at p. 89-90. See also *Anglo-African Merchants v Bayley* [1969] 1 Lloyd's Rep. 268, where a similar decision was given.

[333] [1984] 1 Lloyd's Rep. 476, see per Parker L.J., at p. 512, where he stated that *" ... it was made clear that there could be no waiver merely because the insurer was aware of the possibility of the existence of other material circumstances. If this were to be permitted the duty of disclosure would be emasculated to the point of extinction and waiver would become an instrument of fraud."*. Also, see *Pan Atlantic v Pine Top* [1992] 1 Lloyd's Rep. 101, [Reinsurance].

[334] Ibid., at p. 497.

[335] Ibid.

[336] Ibid., at p. 498.

[337] [1996] 1 Lloyd's Rep. 430, [Marine].

[338] Ibid., at p. 442. Also, see the decision of Leggatt in the Court of Appeal [1997] 1 Lloyd's Rep. 225, at p. 232-4.

[339] Ta Ha, at para.674(1); Ibrahim, at para.344.

[340] Arbitral award 10/6/1991, [Fire]; Arbitral award 22/12/1986, [House]; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*; Arbitral award 3/4/1997, [Fire].

or making those enquiries which a prudent underwriter would otherwise have made to acquaint himself with the required information.

The application of this exemption under the Saudi Arabian law was well illustrated by the judgment delivered by the arbitral panel in *the Flying Falcon*. In this case, as against the assertion of the insurance company that there had been a non-disclosure of the real character of one of the assureds, it was held that it was not within the scope of the assureds' duty of disclosure to disclose such a fact. If this fact was material to the insurance company, the panel further held, it ought to have asked for it.[341]

Lastly, it ought to be said that it seems very crucial for underwriters insuring under the Saudi Arabian law to make sure that they ask for all the information they think material to the estimation of the risk they are asked to insure. This is, as explained above, because the assured's duty of disclosure is very limited.

3.4.3.4. Facts the disclosure of which is unnecessary by reason of a condition

> Ss. 18(3) of the MIA 1906: *"[I]n the absence of inquiry the following circumstances need not be disclosed, namely: ... (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty."*

The assured is also not bound to disclose to the underwriter any material circumstances if they are covered by a warranty or a condition. The apparent reason behind such exemption is submitted to be that the underwriter is fully protected against the risk of the absence of such disclosure by the existence of the warranty. Accordingly, in *Shoolbred v Nutt*[342], as against an action brought by the assured on a policy for a loss of the insured ship by capture, it was contended by the underwriter that the assured had failed to bring to his attention the fact that he received two letters from the captain of the ship, stating that the insured ship had been very leaky on her way and that the pipes of wine had been half covered with water. The assured managed to prove that the leak had been repaired before embarking upon the insured voyage. It was held by Lord Mansfield that there was no need to disclose information showing that the ship was seaworthy, for that such information was covered by a warranty. This was clearly submitted as follows:

> *"[I]t is true that there should be a representation of everything relating to the risk, which the underwriter has to run, except it be covered by a warranty. But it is a condition, or implied warranty, in every policy, that the ship is seaworthy; and therefore there is no necessity for a representation of that."*[343]

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[341] Arbitral award 12/12/1995, [Marine], at p. 18.

[342] (1782) Marshall, at p. 475, [Marine].

[343] According to s. 39(5) of the MIA 1906, in time policies, there is no warranty of seaworthiness and, therefore, it is the duty of the assured to communicate to the underwriter all material circumstances in respect of the condition of the insured ship. In this connection, see *Russel v Thornton* (1859) 29 L.J. Ex. 9, [Marine]. Also, see the judgment delivered in *Cantiere Meccanico Brindisino v Janson* [1912] 3 K.B. 452, at p. 466, where the voyage policy insuring a floating dock contained the words *"seaworthiness admitted"* and where it was submitted that such words were to the effect that the assured was exempted from his duty to disclose all material

Also, in *the Dora*[344], the underwriters contended that the assureds had failed to disclose the material fact that the insured yacht was to be possibly used for demonstration for commercial purposes. Phillips, J. held that since it was warranted by cl. 7 of the policy that the insured yacht was to be solely used for private pleasure purposes unless especially agreed by underwriters, there was no need for the assureds to disclose the said fact. Phillips, J. clearly asserted that

> *" ... that the express warranty in cl. 7 displaced any obligation to disclose the possibility that Dora would be used for demonstration purposes by virtue of the provisions of s. 18(3)(d) of the Marine Insurance Act, 1906."*[345]

As for the Egyptian and Saudi Arabian laws, the question of whether or not it is the duty of the assured to disclose matters covered by one of the policy's warranties or conditions does not seem to have been discussed before. The unavailability of any authority on this point may suggest that this question has not arisen or come under consideration before. However, it does not seem to be contradicting any established rules to suggest that the English principle that if a circumstance is covered by a term of the marine insurance policy in question, there is no need for the assured to make disclosure in its respect, could also be adopted and applied under the Egyptian and Saudi Arabian laws. Holding otherwise would make the insertion of such a term in the policy merely a matter of superfluity.

3.4.3.5. Other facts which need not be communicated

Apart from what has been discussed above, the English law recognises that there are also other circumstances for the non-disclosure of which the assured is not responsible. So, the assured is not obliged to disclose material circumstances which he neither knows[346], nor ought in the ordinary course of business to know.[347] Needless to say that according to ss. 18(1) of the MIA 1906, what is not material to the risk insured need not be disclosed.[348]

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information with regard to the condition of the floating dock and that it was the duty of the underwriter to make enquiries if he wished to know it.

[344] Ibid.

[345] Ibid., at p. 92.

[346] *Joel v Law Union and Crown Insurance Company* [1908] 2 K.B. 863, at p. 883-5.

[347] *Proudfoot v Montefiore* ibid., at p. 519; *Blackburn, Low & Co. v Vigors* ibid., at p. 537 and p. 540-1.

[348] However, this is subject to the qualification that if the underwriter asks for or shows an interest in immaterial information, it will still be the duty of the assured to disclose such information. This was pointed out by Lord Esher in the Court of Appeal in *the Bedouin* ibid., at p. 12, as follows: *"[H]e [the assured] is bound to tell him [the underwriter], not every fact, but the material facts; and his other obligation is this, that if he is asked a question-whether a material fact or not-by the underwriters, he must answer it truly. If he answers it falsely, with intent to deceive, though it may not be material fact, it will vitiate the policy. The underwriter has his right to have his questions truly answered ... ."*; This duty was also recognised in the Court of Appeal in *C.T.I. v Oceanus* ibid., but was based upon s. 17 instead of s. 18. In this case, Parker, L.J. held, at p. 512, that *" ... it is necessary to mention at this stage that the duty imposed by s. 17 goes, in my judgment, further than merely to require fulfilment of the duties under the succeeding sections. If, for example, the insurer shows interest in circumstances which are not material within s. 18, s. 17 requires the assured to disclose them fully and fairly."*

Also, it was recently approved that the assured is not deemed to know his agents' fraud against him[349], nor is he responsible for the non-disclosure of any material information held by his agent to insure if it is not material to the risk he is asked to insure[350] or if he is not the agent to insure at the time of effecting the insurance in question[351]. Moreover, if a circumstance is a matter of inference and can be gained from sources open to both parties, it is not a circumstance which need be disclosed.[352] Likewise, there is no duty upon the assured to disclose his opinion or that of others as to the insured risk, for that his duty is only to provide the underwriter with all material facts from which such opinions or apprehensions resulted.[353]

Furthermore, the fact that other underwriters have refused to accept the risk does not usually have to be disclosed.[354] This rule was recently approved with the reservation that the basis on which the insurance was refused must not be material to the underwriter to know.[355] Once more, the assured is no longer required, after the enactment of the Rehabilitation of Offenders Act 1974, to disclose facts relating to convictions for criminal offences or other information ancillary to them if they have, according to the terms of the Act, become spent.[356]

It is not also the duty of the assured under the Egyptian[357] and Saudi Arabian laws to disclose any material fact which he does not know and which he cannot be reasonably expected to know. This, of course, is a logical principle where it is impossible to ask the assured to disclose something which he is unaware of and cannot reasonably be deemed so.

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[349] *PCW Syndicates v PCW Reinsurers* ibid., at p. 257; *Group Josi Re v Walbrook Insurance* ibid., at p. 361 and p. 365-7; *SAIL v Farex* ibid., at p. 143. For a full account of this issue, see subsection: '3.4.2.5. The disclosure of the agent's fraud against or dereliction to his principal', above.

[350] *SAIL v Farex* ibid., where it was held by Saville, L.J., at p. 155-6, that the agent employed to effect a reinsurance was not bound to disclose his knowledge as to the invalidity of the retrocession. This was grounded upon the fact that this matter was not material to the reinsured risk or alternatively upon the fact that such knowledge was not held by the agent in his capacity as an agent to reinsure.

[351] *Blackburn, Low & Co. v Vigors* ibid.

[352] *Bates v Hewitt* (1867) L.R. 2 Q.B. 595, at p. 605; *Gandy v The Adelaide Marine Insurance Company* (1871) L.R. 6 Q.B. 746, [Marine], at p. 755.

[353] Ibid. Also see *Carter v Boehm* ibid., at p. 1911; *Cantiere Meccanico Brindisino v Janson* ibid., at p. 372; *Bell v Bell* (1810) 2 Camp. 475, [Marine], at p. 479. See also *The Bedouin* ibid., at p. 12, where it was held that the assured was not required to inform the underwriter what the law was.

[354] *Glasgow Assurance Corporation v William Symondson* (1911) 16 Com. Cas. 109, [Marine], per Scrutton J. at p. 119.

[355] *C.T.I. v Oceanus* ibid., per Kerr, L.J. at p. 502, per Parker, L.J. at p. 522 and per Stephenson, L.J. at p. 530.

[356] *Reynolds v Phoenix Assurance* ibid., where an evidence concerning spent convictions was admitted under ss. 7(3) of the Rehabilitation of Offenders Act 1974, but the conviction was subsequently held not to be material; *the Dora* ibid., where, at p. 80-1, the effect of some provisions of the Act were also discussed. For further information about the effect of the Rehabilitation of Offenders Act 1974 on the duty of good faith, see Eggers & Foss, at paras.6.23-6.26.

[357] Al Sanhuri, Vol. 7/2, at para.615; Al Mahdi, at p. 255-6; Yihya, at p. 145-6; Arafa, at p. 155-6; Al Badrawi, at para.127; Ibrahim, at para.340; Sharaf Al Diyn, at para.220. The exemption of the assured from his duty to disclose material facts because of his ignorance of them was also affirmed under the Egyptian case law by many cases such as Mixed Appeal 24/6/1924, Civil Collection, Year No. 36, p. 458; Mixed Appeal 5/1/1927, Civil Collection, Year No. 39, p. 136; Mixed Appeal 27/2/1929, Civil Collection, Year No. 41, p. 271; Collection of the Court of Cassation's Judgments, 6/5/1946, Case No. 76, Collection of Aumar, Vol. 5, p. 172; Collection of the Court of Cassation's Judgments, 14/4/1949, Case No. 407, Collection of Aumar, Vol. 5, p. 557.

An illustration of this exemption under the Saudi Arabian law was given by the decision of an arbitral panel in a case of buildings insurance.[358] In this case, the insurance company contended that the assured omitted to disclose the fact that there had been some defects in the insured building. The arbitral penal held that there was no need to disclose such defects because they were unknown to the assured.[359] This exemption could also be extracted from the wording of ss. 330, 331 and 349 of the CCL 1931, which are to the effect that if the assured is unaware of the existence of certain circumstances, he will be relieved from his duty to disclose them.[360]

In addition, the assured is not bound to disclose immaterial facts which do not affect the estimation of the risk insured.[361] Likewise, there is no need to inform the underwriter of those circumstances which merely represent the assured's inferences or suspicions or personal opinion.[362]

However, unlike the English law, assureds insuring under the Egyptian law would still be required to disclose the fact that other underwriters had refused to cover their risks.[363] In like manner, since there is no Egyptian law[364] exempting assureds from the duty to disclose their past convictions of criminal offences after the expiry of certain years, it will be their duty to disclose all facts related to this matter.[365]

In regard to the Saudi Arabian law, it is not clear whether this would also be the situation or not, for that there is no authorities available in this concern. However, given that that the assured, according to the CCL 1931, is under a limited duty of disclosure, the determination of whether it would be the duty of the assured to disclose previous refusals or past convictions[366] would in any case depend on the extent of the information required by the insurance policy in question.

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[358] Arbitral award 19/10/1986, [Buildings].

[359] Ibid., at p. 14-5.

[360] For the full quotation of the text of ss. 330, 331 and 349, see 'Subsection: 3.4.3. Facts which need not be disclosed'.

[361] Al Sanhuri, Vol. 7/2, at para.614; Al Mahdi, at p. 250; Yihya, at p. 141-2; Ibrahim, at para.337; Sharaf Al Diyn, at para.217; Awad, at para.532. As to cases establishing the exclusion of the disclosure of immaterial facts from the ambit of the assured's duty of disclosure, see Mixed Appeal 17/2/1892, Civil Collection, Year No. 4, p. 110; Mixed Appeal 28/12/1933, Civil Collection, Year No. 46, p. 109; Mixed Appeal 23/6/1937, Civil Collection, Year No. 49, p. 274.

[362] Awad, at para.535.

[363] Al Sanhuri, Vol. 7/2, at para.614; Al Mahdi, at p. 253-4; Yihya, at p. 143-4; Ibrahim, at para.338; Sharaf Al Diyn, at para.218; Lutfi, at p. 178-9; Arafa, at p. 148-9; Al Badrawi, at para.125. This was actually held by the Mixed Court of Appeal on 7/3/1934, Civil Collection, Year No. 46, p. 205 and Al Qahirah Court of First Instance on 16/2/1953, Al Muhamat, Year 35, p. 545.

[364] This statement is based upon the information available to the researcher and must accordingly be judged.

[365] Al Sanhuri, Vol. 7/2, at para.614; Al Mahdi, at p. 253-4; Yihya, at p. 143-4; Sharaf Al Diyn, at para.218; Lutfi, at p. 178-9; Arafa, at p. 148-9; Al Badrawi, at para.125. Also, note Ibrahim, at para.338, where he stated that the assured would still be bound to disclose his past convictions even if he had already been condoned. Also, see the judgment of the Mixed Court of Appeal on 11/12/1940, Civil Collection, Year No. 53, p. 26, [Motor], where it was held that it was material for the underwriter to know whether the withdrawal of the driving license from the assured was because of his dangerous driving or not.

[366] There does not seem to be any law relieving the assured from his duty o disclose his past convictions under the Saudi Arabian law.

3.4.4. Disclosure in case of inquiry

> Ss. 18(3) of the MIA 1906: *"[I]n the absence of inquiry the following circumstances need not be disclosed ... "*

It is right that the assured is relieved from the duty to disclose certain material matters enumerated by s. 18(3) of the MIA 1906, but such relieve is subject to the condition that no enquiry as to these matters has been made by the underwriter. Therefore, if the underwriter calls for one or all of these or other material circumstances, it will be the duty of the assured to provide him with the right and complete information. It ought to be borne in mind that the exclusion of these matters from the application of the general duty of disclosure does not make them immaterial for that they will need to be disclosed if the underwriter asks for them.

The origin of this doctrine is said[367] to be found in the judgment of Lord Ellenborough in *Haywood v Rodgers.*[368] In this case, his Lordship held that since it was an absolute impossibility for the assured to disclose, prior to any particular enquiry, everything which may influence the judgment of a prudent underwriter in whether to insure or not and, if so, upon what premiums or terms, the assured was under a duty, whenever he was asked by the underwriter, not to withhold any material part of the required information. Failing this, the policy would be vitiated. The application of this doctrine was held by Lord Esher in *the Bedouin*[369] to extend to the disclosure of material and immaterial circumstances. The same was also recognised by Parker, L.J. in *C.T.I. v Oceanus*[370], but was grounded upon s. 17 instead of s. 18.

In the same manner, it also seems to be the duty of the assured under the Saudi Arabian law that if the underwriter asks for a certain fact, it will be the duty of the assured to provide him with the right and complete answer irrespective of whether the required fact is material o not.[371] But, the position under the Egyptian seems to be different. This is because the rule that if an underwriter asks for a fact, the assured must disclose it will only be applied, as stated by Al Sanhuri[372], if the required fact is material. It follows that if the underwriter requires the disclosure of an immaterial fact, it will not be the duty of the assured to answer his enquiry.[373]

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[367] Arnould, Vol. 2, at para.671.
[368] (1804) 4 East, 590, [Marine].
[369] Ibid., at p. 12.
[370] Ibid., at p. 512.
[371] Haberbeck & Galloway, at p. 233-4. Also, see the following cases: Arbitral award 19/10/1986, [Buildings], at p. 14-5; Arbitral award 22/12/1986, [House], at p. 16; Arbitral award 10/6/1991, [Fire], at p. 15; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, at p. 18.
[372] Al Sanhuri, Vol. 7/2, at para.614.
[373] Ibid.

3.4.5. The time at which the duty of disclosure must be performed

> Ss. 18(1) of the MIA 1906: *" ... the assured must disclose to the insurer, before the contract is concluded, every material circumstance ... ."*

As a rule, the duty of the assured to make full and accurate disclosure continues throughout the negotiations and up to the moment at which the contract is concluded. It follows from that that the assured is not bound to communicate to the underwriter any circumstance, irrespective of how material it is to the risk insured, if it comes to his knowledge after the conclusion of the contract. This was clearly expressed by Channell J. in *Re Yarger and Guardian Assurance*[374], where he stated that:

> *" ... the time up to which it must be disclosed is the time when the contract is concluded. Any material fact that comes to his knowledge before the contract he must disclose."*[375]

Therefore, the material time at which the disclosure of a circumstance is judged is the moment at which the contract is concluded. This moment was defined by s. 21 of the MIA 1906 to be:

> *" ... when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract... "*

Accordingly, in *Whitwell v Autocar Fire and Accident Insurance*[376], the assured at the time of making the contract truly stated that no insurance company had refused to insure his life. It subsequently appeared that two days before the conclusion of the contract an insurance company had refused to accept his proposal. Since this fact was unknown to the assured until after the policy was effected, it was held that there was no breach of the duty of disclosure.

However, due to the importance of the determination of the time at which the contract is deemed to be concluded which appears in that it is the moment at which the assured will be relieved of his duty of disclosure, there was an argument about it. It was first argued in *Ionides v Pacific Fire and Marine Insurance*[377] that the contract would not be deemed concluded till the broker succeeded in getting 100 per cent cover for the risk proposed for insurance and also till such cover was accepted by the assured. This argument was based upon the philosophy that the slip prepared by the broker and presented to underwriters was to be considered as an invitation to the risk and the initialing of each underwriter, as such, ought to be taken as an offer to insure to a certain percentage. Therefore, unless, as a condition, 100 per cent cover was obtained, no contract would come into existence. Consequently, the duty

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[374] (1912) 108 L.T. 38; See also *Lishman v The Northern Maritime Insurance* (1875) L.R. 10 C.P. 179, [Marine], at p. 180-2; *Canning v Farquhar* (1886) 16 Q.B.D. 727, [CA-Life], at p. 731-3.
[375] Ibid., at p. 44.
[376] [1927] 27 Ll.L.Rep. 418, [Life]. Also, see Bennett, Howard., The role of the slip in marine insurance law, (1994) LMCLQ 94, at p. 103-7.
[377] (1871) L.R. 6 Q.B. 674, [Marine]; affirmed in (1872) L.R. 7 Q.B. 517, [Marine].

of disclosure will require the assured to continue communicating all material circumstances until a full cover is obtained.

This argument was recently disapproved by the judgment delivered in *General Reinsurers v Forsakringsaktiebolaget Fennia Patria.*[378] In this case, it was held that the presentation of the slip by the broker was an offer and each initialing was to be taken as an acceptance by the underwriter to insure a certain percentage. Accordingly, each initialing would constitute a separate and binding contract between the assured and each underwriter. As a result, a circumstance which became material after the initialing of the policy by the first underwriter would not vitiate the policy if it was not disclosed to him, whereas its non-disclosure would avoid any subsequent initialing.

This latter argument was rightly supported by Park[379] as being in accordance with the wording of s. 21 of the MIA 1906 which is that the contract is considered concluded " ... *when the proposal of the assured is accepted by the insurer* ... . "

Although the application of the duty of disclosure is limited to the time when the slip is initialed by each underwriter, there are cases where such a duty will come into operation after the conclusion of the contract. This will be upon each renewal of the policy in which case it will be the duty of the assured to correct or amend, when it is necessary, any earlier disclosures and to make the underwriter aware of all the new material circumstances which have come out and which may influence his judgment whether to renew the policy or not.[380] The same duty will also be imposed upon the assured if there is an amendment or alteration to the risk originally accepted. In this case, the scope of the duty will vary according to the kind of the sought amendment or alteration. So, if the amendment is so major so as to call for the reassessment of the whole risk, full duty of disclosure will be required, whereas, if the alteration only affects a certain part of the contract, then, only material facts to the named alteration need be disclosed. [381]

Similar to the English law, the duty of disclosure of the assured under the Egyptian law must fully be performed within the time at which the cover is being negotiated and up to the moment of its conclusion. This is distinctly stated by s. 361 of the MTL 1990 which reads as follows

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[378] [1982] 1 Lloyd's Rep. 87, [Reinsurance], at p. 97; affirmed in [1983] 2 Lloyd's Rep. 287, [Reinsurance], at p. 290-1.

[379] Park, Semin., The Duty of Disclosure in Insurance Contract Law, (1996), at p. 62.

[380] *Pim v Reid* (1843) 6 Man. & G. 1, [Fire]; *In re Wilson and Scottish Insurance Corporation* [1920] 2 Ch. 28, [Fire].

[381] *Sawtell v Loudon* (1814) 5 Taunt. 359, [Marine]; *Lishman v The Northern Maritime Insurance* (1875) L.R. 10 Q.B. 179. Ex Ch.; *Commercial Union Assurance Company, v The Niger Company* [1922] 16 Lloyd's Rep. 75, [HL-Marine/Fire]; *Iron Trades v Imperio* [1991] 1 Re.L.R. 213.

> *"[T]he insured ... shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."*[382]

This is also the case under the Saudi Arabian law where it is the duty of the assured to make disclosure of all the required circumstances up to the conclusion of the contract. Although that the time at which this duty must be performed is not evidently stated by s. 342 of the CCL 1931, it could be inferred from its wording that such time is before the policy is being made out. This is actually stated as follows

> *"[I]f the insured keeps silent about ... particulars ... he should mention in the insurance policy ... and if the insurer discovers the true nature thereof ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*[383]

This time was also affirmed by the case law in many cases. In a case concerning a policy of house insurance, the arbitral panel stated, *inter aila*, that

> *" ... the main rules of insurance necessitate that the assured is bound to disclose to the underwriter at the time of the formation of the contract all the information which is important for him to know ... ."*[384]

In addition, similarly to the English law, a full duty of disclosure will become active again whenever the contract is renewed[385] or being subject to a major amendment or alteration under the Egyptian law.[386] However, if the amendment is trifling, it is not clear whether a wider duty of disclosure will still be required or it is a rather limited one concerned with those facts affecting the amendment alone. This also seems to be the position under the CCL 1931 with the exception that the duty will only be applied to those circumstances in respect of which disclosure is required by the policy because of the said amendment or alternation[387]. This, therefore, will exclude from the application of the duty any other circumstances the disclosure of which is not required by the policy and regardless of their materiality to the intended amendment or alteration.[388]

On the other hand, as against the accepted principle[389] that once the underwriter initials the slip, the contract is deemed concluded and, accordingly, the duty of disclosure will cease to be binding, it was argued by Yihya that in certain circumstances this would not

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[382] For other authorities establishing that it is the duty of the assured to make full disclosure before the conclusion of the contract, see Al Sanhuri, Vol. 7/2, at para.612; Al Badrawi, at para.125; Yihya, at p. 152-3; Al Mahdi, at p. 250-1; Sharaf Al Diyn, at para.213; Ibrahim, at para.346; Awad, at para.535; Ta Ha, at paras.670; Zahrah, Mohammed., Ahkam Aaqd At Ta'myn Tabbqann Li Nusus Al Taqniyn Al Madany Wa Ahkam Al Qada, (The Rules of The Insurance Contract According to The Provisions of the Civil Code and The Case Law – in Arabic), (1984-1985), at p. 205; Lutfi, at p. 176.

[383] S. 342 of the CCL 1931.

[384] Arbitral award 22/12/1986, [House], at p. 15. In this regard, also see Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, at p. 18.

[385] Yihya, at p. 152-3; Ibrahim, at para.346.

[386] Yihya, at p. 152-3.

[387] Haberbeck & Galloway, at p. 233-4.

[388] Ibid.

be the case.[390] This, as he further argued, would arise in those situations where the estimation of the risk cannot be made within reasonable time and, so, underwriters do issue a temporary covering note to cover the risk for a short period until they decide whether to accept to insure or not. Therefore, if it happens afterwards that the underwriter decides to accept the risk, his acceptance will constitute a new and distinct contract from that contained in the temporary covering note and, so, all material facts occurring between the issuing of the temporary covering note and the initialing of the final acceptance are to be disclosed.[391]

Finally, if the insurance cover is suspended because the assured has not paid the agreed premium, there will be no duty to supply new material circumstances if the cover is effective once again.[392] Nor, would it arise if the insurance cover was, according to one of the policy's terms, extended beyond its prescribed time.[393]

Although it is now established that the application of the duty of disclosure will cease once the contract is concluded, it may sometimes continue after the conclusion of the contract and up to the time at which a claim for a loss is presented to the underwriter. This continuing feature of the duty is thoroughly discussed and commented upon in chapter seven.

3.5.General comments

Having considered and examined the duty of disclosure of the assured and his agents in the context of marine insurance and in the light of the treatment given to it by the English, Egyptian and Saudi Arabian laws, definitely, an assured insuring under the Saudi Arabian law is under a much lighter duty of disclosure than his counterpart insuring under the English or the Egyptian laws. This is because according to s. 342 of CCL 1931, his sole duty will be to inform the underwriter of facts which are specifically required by s. 325 of the CCL 1931 and by the terms of the insurance policy in question. Having discharged this duty, no further disclosure is required, unless he is directly asked by the underwriter to tender further disclosure.

Undoubtedly, this limited duty, although it is appropriate from the assured's point of view, will expose underwriters, especially those who are not fully aware of the exact application of the CCL 1931 [SA], to the risk of finding themselves insuring risks which they would not have insured had they been protected by a full duty of disclosure as that available under s. 18 of the MIA 1906 [UK] and s. 361 of the MTL 1990 [Egypt].

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[389] Al Sanhuri, Vol. 7/2, at paras.581-3.
[390] Yihya, at p. 152-3.
[391] Ibid. Also, see Al Sanhuri, Vol. 7/2, at para.584, where he expressed a contrary view which was that if the underwriter accepted to insure the risk after issuing a temporary covering note, his acceptance would not constitute a new contract and, therefore, there would be no need for the assured to disclose new material facts.
[392] Yihya, at p. 152-3; Ibrahim, at para.346.
[393] Ibid.

Another problem which may face an underwriter carrying out his insurance business under both the Egyptian and Saudi Arabian laws is the complete absence of any rules specifically regulating the duty of disclosure of the assured's agent if it happens that the policy is effected by him. As far as the Saudi Arabian law is concerned, this lack of enactment will most likely arise when the assured's agent omits to disclose a fact which is known to him, but which is not known to his principal. According to the Shari'a law, no duty to disclose this fact is imposed upon the agent.

However, the graveness of this lack seems to be minimised under the Egyptian law by the application of ss. 104(1) and 104(2) of the CC 1948 which appears to require the agent of the assured to make disclosure of those facts known to him and to his principal.

It ought to be finally mentioned that that unlike the MIA 1906 [UK] and the MTL 1990 [Egypt] where the general rule is that it is the duty of the assured to make full disclosure, unless he is exempted from doing so, it is the general rule according to the CCL 1931 [SA] that the assured is exempted from making full disclosure, unless he is bound to.

Chapter [4]: The Duty of Representation

4.I. Introduction

As it was previously stated, it is the duty of the assured and his agents in conformity with the requirement of the doctrine of utmost good faith to disclose to the underwriter before and up to the moment at which the contract is concluded all material facts to the risk being considered for insurance and which may influence the judgment of a prudent underwriter whether to insure or not and, if so, upon which terms and at what rates. In discharging this duty, the assured is also replaced under an additional obligation imposed by the same doctrine and that is to avoid making any false or misleading representations. Therefore, it the duty of the assured and his agents whenever they negotiate a contract of marine insurance with the underwriter, to make sure that whatever they are bound to disclose is stated correctly.

The relationship between the duty of disclosure and the duty not to make any misrepresentations, which are illustrations or consequences[394] of the doctrine of utmost good faith, is very close. This is apparent from the fact that any misrepresentation of a material circumstance amounts, on the first hand, to a non-disclosure of the true circumstance and the non-disclosure of a material circumstance amounts, on the other, to a misrepresentation that the circumstance does not actually exist. Halsbury illustrated such close connection as follows:

> *"[M]isrepresentation involves non-disclosure. Failure to disclose a material fact may virtually amount to a representation that the fact does not exist, and every misrepresentation clearly involves non-disclosure of the truth. It consequently follows that some cases in which it was held that the policy was avoided by misrepresentation might have been decided also on the ground that there was non-disclosure of a material fact*[395]*, and vice versa."*[396]

Despite this apparent close relationship, there exists a material difference between the duty of disclosure and the duty of representation. Thus, while a non-disclosed fact tends to show the risk greater than it will otherwise seem to be, its misrepresentation tends to make the risk appears smaller than it is in fact.

Apart from that, the scope of the duty of representation is strictly confined to any material representation made by the assured and his agent to the underwriter. It follows that if a representation is not material in the sense that if it was misrepresented, it would not affect the underwriter's judgment, then it does not fall within the sphere of the application of the duty. Therefore, it is the duty of the assured and his agent before and up to the conclusion of

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[394] *Pan Atlantic v Pine Top Insurance* [1995] 1 AC 501, [HL-Reinsurance], per Lord Lloyd at p. 554.

[395] *Fitzherbert v Mather* (1785) 1 T.R. 12; *Tate v Hyslop* (1885) 15 Q.B.D. 368, [CA-Marine]. For the practice of turning misrepresentation cases into non-disclosure cases in insurance law, see Hasson, Reuben., Misrepresentation and non-disclosure in life insurance – Some steps forward, [1975] 38 MLR 89.

the contract to make sure that any material representation they make to the underwriter is true. Any failure to observe this requirement will result in the underwriter being entitled to avoid the contract.

Having mentioned that, the goal of this chapter is to discuss and examine the duty of representation, which is the other aspect of the doctrine of utmost good faith, under the English, Egyptian and Saudi Arabian Marine Insurance Laws. As a matter of convenience, this aim will be carried out through the following headings: definition, distinction between representations and warranties, the legal basis of the duty, the rules regulating the duty and general comments.

4.2. Definition

Like the duty of disclosure, this duty, which is actively called the duty of representation or passively the duty of refraining from making any misrepresentations, was not defined by either the MIA 1906 [UK], nor the MTL 1990 [Egypt], nor the CCL 1931 [SA]. However, there have been some attempts to define the duty in the field of insurance whether as an active duty or as a passive one. For instance, a misrepresentation was defined by the Black's Law Dictionary[397] and subsequently adopted by Salzman to be

> " ... *the statement of something as fact which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk.* "[398]

Clarke was also of the opinion that

> *"[A] misrepresentation is a positive statement of fact, which is made or adopted by a party to the contract and which is untrue.* "[399]

A detailed definition was given by Eldridge who declared that misrepresentation in the field of marine insurance ought to consist of the following elements:

> *"(1) A statement made either verbally or in writing,*
> *(2) During the course of negotiations for the insurance and before the contract is concluded,*
> *(3) As to a matter of fact or as to a matter of expectation and belief*
> *(4) Which is material to the risk, and*
> *(5) Is untrue.* "[400]

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[396] Halsbury, (1978) Vol. 25, at para.243.
[397] 6th ed., (1990), at p. 289.
[398] Salzman, I. Gary., Misrepresentation and Concealment in Insurance, [1970] 8/No. 2 American Business Law Journal 119, at p. 119.
[399] Clarke, Malcom., The Law of Insurance Contracts, 3rd ed., (1997), at p. 563.
[400] Eldridge, H. William., Marine Policies: A Complete Statement of the Law concerning Contracts of Marine Insurance, 3rd ed., (1938), at p. 30.

On the other hand, two similar definitions concentrating upon the active side of the duty were advanced by Arnould and Halsbury. Arnould's view was that a representation would be:

> *"[A] verbal or written statement made by the assured to the underwriter, at or before the time of the making of the contract, as to the existence of some fact or state of facts which is likely to induce an underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it."*[401]

Whereas, Halsbury's was that a representation would be:

> " *... an oral or written statement made by the assured or his agent before or at the time of the making of the contract, and it generally consists of oral communications made, or written instructions shown, by the broker to the insurer."*[402]

Unfortunately, none of the above definitions addressed the principle of misrepresentation from the right angle. They were all trying to explain what is meant either by a representation or a misrepresentation without trying to define the binding nature of the duty which requires all parties to a contract of marine and non-marine insurance, whenever a duty to make disclosure is imposed, to discharge it accurately and to abstain from making any false or misleading representations. Also, as it was the case with the definition of the duty of disclosure, all of the above definitions do not consider the mutual nature of the duty of misrepresentation. Therefore, the duty not to make misrepresentations could be defined as:

> *"a duty requiring all parties to a contract of marine insurance before and up to the time at which the contract is concluded and whenever there is an obligatory or a voluntarily disclosure, to refrain from making misrepresentations and to precisely state all material information needed to estimate the risk under consideration and which, if so stated, would influence the judgment of either party whether to enter into the contract or not and, if so, upon which terms and at what rates, otherwise the aggrieved party will be entitled to avoid the contract."*[403]

Accordingly, a representation, in the field of marine insurance is a material statement made by the assured or his agent employed to effect the policy, to the underwriter in respect of the risk proposed for insurance. Such a representation may take the form of an oral or a written statement[404] and can, sometimes, be implied[405] from the silence of the assured or his

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[401] Arnould., Vol. 2, at para.588.
[402] Halsbury, Vol. 25, at para.232.
[403] It ought to be admitted that this definition is a mere try from the researcher to clarify what is meant by the term misrepresentation as a legal duty imposed upon parties to a contract of marine insurance.
[404] Although nothing as such can be seen from the wording of s. 20, this classification can be derived from the practice of marine insurance business where it is quite common for underwriters to receive the particulars of the risk proposed for insurance either orally or in a written form shown to them by the agents of the assureds.
[405] An implied representation was held to exist in cases when changes rendering earlier representations inaccurate were not communicated to the underwriter who concluded the contract under the mistaken implication that earlier representations were still true. For this point, see *Reid v Harvey* (1816) 4 Dow 97, [Marine] and *Fitzherbert v Mather* (1785) 1 T.R. 12.

broker.[406] Also, it could be made either voluntarily or in conformity with the requirement of the duty of disclose. But, whether the representation is compulsory or voluntarily it is the duty of the assured to make it true. Should any material representations be false, whether intentionally or innocently, the underwriter will be entitled to avoid the contract.

4.3. Distinction between representations and warranties

In this regard, it has to be mentioned that there are several differences between a representation and an express warranty. While, a representation, as it has been stated above, takes the form of an oral or written statement and need not be included in the contract of marine insurance, a warranty must always be in a written form and be included in the policy or incorporated thereto[407]. Also, while it is enough for a representation to be correct if it is substantially complied with[408], a warranty will not be held so unless it is literally complied with[409].

Moreover, the ingredients needed to avoid the policy for misrepresentation is severer than that required in respect of a warranty. This is because to be able to avoid a policy for misrepresentation, an underwriter has to prove, first, that there was a misrepresentation of fact. Secondly, that it was material to the risk insured and, thirdly, that he has been actually induced to effect the insurance because of such a misrepresentation. In contrast, no question of materiality or inducement will arise in respect of a breach of a warranty, since it will be sufficient for the underwriter to only prove the existence of the warranty and that it has not been strictly complied with by the assured.[410]

Another significant difference appears in the effect of their breach. A material misrepresentation, if proved, will make the contract voidable at the option of the underwriter who has to take a positive action to avoid the contract.[411] Yet, a breach of a warranty will automatically discharge the underwriter from any future liabilities without any need for him to take any action at all.[412]

Furthermore, while a breach of a warranty discharges the underwriter from any further liabilities from the date of the breach leaving intact any liabilities incurred by the

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[406] Thomas, R., in his contribution to the book entitled The Modern Law of Marine Insurance, (1996), stated, at p. 41, that although these aspects of a representation are not expressly apparent from the wording of s. 20 of the MIA 1906, they can be derived from the general law.
[407] Ss. 35(2) of the MIA 1906.
[408] Ss. 20(4) of the MIA 1906.
[409] Ss. 33(3) of the MIA 1906.
[410] Ss. 33(3) of the MIA 1906.
[411] Ss. 20(1) of the MIA 1906.
[412] Ss. 33(3) of the MIA 1906. Also, see *Bank of Nova Scotia v Hellenic Mutual War Risks Association (The Good Luck)* [1992] 1 AC 233.

underwriter prior to the date of the breach, a breach of the duty to make accurate representations will entitle the underwriter to avoid the policy *ab initio*.[413]

4.4. The legal basis of the duty

The legal basis of the duty of the assured to make accurate representations under the English marine insurance is the provisions of the MIA 1906, namely ss. 20(1). This subsection states that

> *"[E]very material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.*

Similarly, under the Egyptian and Saudi Arabian marine insurance laws, the duty of the assured to make correct representations is also enforced by the same sections which are enforcing the duty of disclosure. These are s. 361 of the MTL 1990 [Egypt][414] and s. 342 of the CCL 1931 [SA][415].

Section 361 of the MTL 1990 states that

> *"[T]he insured must pay the insurance premium and expenses at the place and time agreed upon. He shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."*

In the same manner, s. 342 of the CCL 1931 states that

> *"[I]f the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof, regardless of whether the risk is not as grave as that which appears to result from such silence or statement, or the risk, other than supposed risk results, which is a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void; such silence, or false statement or difference shall cause the insurance policy to lapse, even though an event occurs to cause the loss and perishing of the insured items."*

4.5. The rules regulating the duty

The rules regulating the duty of representations pending the negotiation of the contract of marine insurance under the MIA 1906 [UK] are codified in s. 20. Their counterparts under the MTL 1990 [Egypt] and the CCL 1931 [SA] are respectively contained in s. 361 and s. 342. As it has earlier been stated, since all the three sections are accepted to

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[413] S. 17 of the MIA 1906. Also, see *Black King Shipping Corporation v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437.

[414] Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at p. para.670, (hereafter Ta Ha).

[415] Haberbeck, Andreas., & Galloway, Mark., Saudi Shipping Law, (1990), at p. 233-5; (hereafter Haberbeck & Galloway); El-Sayed, Hussein. M., Maritime Regulations in the Kingdom of Saudi Arabia, (1987), at p. 192-4, (hereafter El-Sayed).

be applicable to both marine and non-marine insurance contracts[416], the discussion of this duty may embrace the examination of marine and non-marine insurance materials and cases. This will be through the following subsections: the duty of the assured and his agent, types of representations, the interpretation of representations, the duration of the duty, the possibility of amendment or withdrawal of a representation and whether a misrepresentation made to the first underwriter would extend to other underwriters.

4.5.1. The duty of the assured and his agent

Unlike ss. 18(1) of the MIA 1906 which imposes upon the assured an active duty to make full disclosure of material facts to the underwriter, ss. 20(1) imposes a passive duty which aims at preventing him from misstating any circumstances that need to be disclosed. This is quite apparent from ss. 20(1) which reads that

> *"[E]very material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract."*

The foregoing subsection clearly declares that it is the responsibility of the assured to make sure that any material representation made to the underwriter before and up to the conclusion of the contract is true. Should it be untrue, the underwriter would be untitled to avoid the policy irrespective of whether such misrepresentation was made innocently or intentionally. This what was actually held by Willes, J in *Anderson v The Pacific Fire & Marine Insurance Company*[417] where he stated that:

> *"[T]here is no doubt that a material misrepresentation, though perfectly honest at the time, made with intent that it should be acted upon by the insurer, and which has led to the policy being granted, will defeat the policy. The rule as to the good faith which is required to be observed on the effecting a policy of insurance is so strict ... that, if a material fact which is stated to the underwriter turns out to be untrue ... the policy is void, notwithstanding the assured may have acted with perfect good faith and honesty of intention."*[418]

Representations are usually made either spontaneously in order to give the underwriter a more favourable picture of the risk proposed for insurance or as a result of questions put to the assured by the underwriter. In both cases, it is the duty of the assured to make true representations of all material facts which he knows. This would be the case even if the representation has no direct bearing on the particular risk as long as it would affect the judgment of a rational underwriter in considering whether he would insure or not and, if so,

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[416] For a full account of all the authorities establishing the general application of the duty of representation under the English, Egyptian and Saudi Arabian laws see 'Chapter [3]: 3.4. The provisions regulating the application of the duty'.

[417] (1872) L.R. 7 CP 65, [Marine].

[418] Ibid., at p. 68. Also, see *Ionides v The Pacific Fire & Marine Insurance* (1871) L.R. 6 Q.B. 674, [Marine], per Blackburn, J. at p. 683; *Williams v Atlantic Assurance Company* [1933] 1 K.B. 81, [Marine], where Slesser L.J. held, at p. 108, that the underwriter would be allowed to avoid the policy for untrue material representation in respect of the value of the goods insured.

on what rate or terms.[419] It follows that the assured will not be held actionable for the misrepresentation of any fact if it is not of the nature that, if correctly disclosed, it would influence the judgment of underwriter.

However, as an exception to the rule that the assured is only responsible for making any material misrepresentations, there would sometimes be situations where the assured would still be held responsible for the falseness of any immaterial misrepresentations. This would be the case if the accuracy of this type of facts was covered by a term of the insurance policy. In this case, any misrepresentation made by the assured would entitle the underwriter to avoid the contract. This is what Lord Esher held in *the Bedouin*[420], where he stated that the underwriter is entitled to have his questions answered correctly or the contract will be rendered voidable.[421] It ought to be mentioned that the right of the underwriter to avoid the policy in this case is not based upon the assured's breach of his duty not to make material misrepresentations contained in ss. 20(1), for that no material facts have been misrepresented, but it is rather based upon his breach of one of the policy's warranties which is that a certain representation is correct irrespective of its materiality[422].

Although a representation normally takes an oral or a written form, there are cases where it can be implied from the language of the policy. This what was actually held by Lord Eldon in *Reid v Harvey*[423] where he pointed out that the insertion of the words *"to return five per cent. for convoy and arrival"* in the policy implied a representation that the ship was to sail or would sail with convoy. So, the policy was held voidable, for that at the time of the insurance the assured knew that the ship had already sailed without convoy.

Also, the silence of the assured as to changes of circumstances which made his earlier true representations become false before the conclusion of the contract, can, in some cases, draw the inference that the earlier representations were still correct. So, in *Fitzherbert v Mather*[424], when the agent of the assured, who had stated that the insured ship was safe on a certain day, refrained, at a time when he could have done so, from stating that she was lost, his silence was held to have amounted to a representation that the ship was still safe at the time the representation was made and this was so till the conclusion of the contract.[425]

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[419] *Sibbald v Hill* (1814) 2 Dow 263, [HL-Marine]; *Rivaz v Gerussi* (1880) 6 Q.B.D. 222, [CA-Marine]. As to the test of materiality, see Chapter [5].

[420] (1894) P. 1.

[421] Ibid., where he said, at p. 12, that it is the duty of the assured *" ... if he is asked a question-whether a material fact or not-by the underwriter, he must answer it truly. If he answer it falsely, with intent to deceive, though it may not be a material fact, it will vitiate the policy. The underwriter has his right to have his questions truly answered ... ."*

[422] This case is regulated by s. 33(3) of the MIA 1906 which states that *"[A] warranty ... is a condition which must be exactly complied with, whether it be material to the risk or not ... ."*

[423] (1816) 4 Dow 97. Also, see *Fitzherbert v Mather* (1785) 1 T.R. 12.

[424] (1785) 1 T.R. 12.

[425] Ibid., per Lord Mansfield at p. 15. Also, see *Hutchinson v Aberdeen Sea* (1876) 3 R. 682, [Marine], where the change of the flag of the insured ship from British to Belgian was not communicated to the underwriter who had previously insured the same ship as British. The silence of the assured was held to have made the policy voidable for misrepresentation or non-disclosure; *C.T.I. v Oceanus* [1984] 1 Lloyd's Rep. 476, where Kerr, L.J.

A misrepresentation could also, in some cases, be attributed to the assured without the need for the underwriter to prove that the assured has actually said it. This would be so if the assured made to the underwriter several true statements, but which if considered together would amount to a different and misleading representation. Lord Halsbury expressed this view, which deserves to be quoted in full, in the House of Lords in *Aarons Reefs v Twiss*[426]:

> *"[I]t is said there is no specific allegation of fact which is proved to be false. Again I protest, I have said, against that being true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed, by what trick or device or ambiguous language: all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If, by a number of statements, you intentionally give, a false impression, and induce a person to act upon it, it is not the less false, although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue."*[427]

In like manner, an incomplete, but true representation made by the assured may also be held false and, so, empowers the underwriter to repudiate liability under the contract. This is because although what was disclosed was correct in itself, the assured's omission to make full disclosure of other relevant and material facts would constitute a material misrepresentation influencing the underwriter to belief that he was given the complete picture of the risk insured. For instance, when an applicant for life insurance, who had been attended within the same year by two medical doctors for a serious illness, only stated that two years ago he was attended for a disordered stomach, such an incomplete answer would be considered misleading and would make the policy voidable.[428]

Apart from that, it must be borne in mind that it is the duty of the assured to make his representations reasonably clear and understandable. Failing that would allow the underwriter, if it could be shown that he reasonably and honestly understood them in a misleading sense, to avoid the contract.[429] On the other hand, if the representation was obviously ambiguous or incomplete[430] or drew doubt about its true meaning[431] or referred to other sources of information[432] and the underwriter, nevertheless, refrained from asking the assured for clarification or further information, he would be precluded from seeking to avoid the policy upon the ground of misrepresentation.

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pointed out, at p.501, that the dependence of the assured upon the Lloyd's rates formerly applied to the risk in his present representation to the underwriter obviously implied that such rates had been negotiated fairly and without any misrepresentation or non-disclosure.

[426] [1896] A.C. 273, [HL].

[427] Ibid., at p. 281.

[428] *Cazenove v British Equitable* (1859) 6 C. B. (N.S.) 437, [Life]; *London Assurance v Mansel* (1879) 11 Ch. D. 363, [Life]; *Scottish Provident Institution v Boddam* (1893) 9 T.L.R. 385, [Life].

[429] *Ireland v Livingston* (1871) L.R. 5 H.L. 395, [HL], per Lord Chelmsford, at p. 416-17; *Woodhouse A. C. Israel Cocoa v Nigerian Produce Marketing* [1972] AC 741, [HL], per *Cross of Chelsea*, at p.768.

[430] *Roberts v Avon* [1956] 2 Lloyd's Rep. 240, [burglary].

[431] *Brine v Featherstone* (1813) 4 Taunt. 869, [Marine]; *Barber v Fletcher* (1779) 1 Dougl. 305, [Marine].

[432] *Freeland v Glover* (1806) 7 East, 457.

As far as the agent of the assured is concerned, it is also his duty to avoid making material misrepresentations to the underwriter. This is apparent from ss. 20(1) which states that *"[E]very material representation made by the assured or his agent to the insurer ... must be true"*. [433] Thus, whenever the contract is effected through an agent whose duty is to communicate information to the underwriter, it is his obligation to avoid making any misrepresentations. The consequence of any material misrepresentation made by the agent would be the entitlement of the underwriter to avoid the contract as if such misrepresentation was the act of the assured himself. This would also be the case even if the agent did not in fact effect the policy himself if his misrepresentation was relied on by his principal and was in due course disclosed to the underwriter. This was actually the view expressed by Lord Mansfield, Ch.J. in *Fitzherbert v Mather*[434], where he stated that

> *"[T]his policy was effected by misrepresentation : and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void."*[435]

This result was held by Ashhurst, J. and Buller, J. to follow because of the responsibility of the assured for the acts of his agent. Their judgments were respectively delivered as follows

> *"[O]n general principle of policy, the act of the agent ought to bind principal; because it must be taken for granted, that the principal knows whatever the agent knows. ... Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer."*[436]

As far as the Egyptian law is concerned, it is also the duty of the assured while performing his duty of disclosure to refrain from making material misrepresentations. This duty is enforced, as mentioned above, by s. 361 of the MTL. Accordingly, it was held by the Court of Civil Cassation that if the assured under a life insurance was asked whether he suffered from any illnesses in his kidneys and he falsely replied that he had not suffered from any, his answer would constitute a material misrepresentation because it caused the insurance company to estimate the risk insured smaller than it was and would, therefore, enable it to avoid the insurance.[437]

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[433] Ivamy, E. R., Marine Insurance, 4th ed., (1985) at p. 71. For cases about the responsibility of the assured for his agents' acts in the field of marine insurance, see also *Stewart v Dunlop* (1785) 4 Brown. 483, [Marine]; *Gladstone v King* (1813) 1 M. & S. 34; *Proudfoot v Montefiore* (1867) L.R. 2 Q.B. 511; *Stribley v The Imperial Marine Insurance Company* (1876) 1 Q.B.D. 507, [Marine]; *Blackburn v Vigors* (1887) 12 App. Cas. 531.

[434] Ibid.

[435] Ibid., at p. 15.

[436] Ibid., at p. 16. To the same effect, also see *Proudfoot v Montefiore* ibid., per Cockburn, C.J. at p. 518-21.

[437] Collection of the Court of Cassation's Judgments, 30/11/1967, Case No. 269, Judicial Year 18, p. 1773, [Life], at p. 1778. Also, see Mixed Appeal 28/5/1919, Civil Collection, Year No. 31, p. 316, [Casualty], where the policy was avoided because the assured stated that he lived on the profit of the investment of his own assets while he was in fact working as a seaman; Mixed Appeal 9/6/1937, Gazette 28, No. 114, p. 128, [Life], where the assured, who was a pharmacist and was working with explosive substances, informed the insurance company that his job did not involve working with dangerous materials; Mixed Appeal 4/6/1903, Civil

Also, in a burglary policy, it was held by the Court of Civil Cassation that if the representations made by the assured that he was recording the activities of his business in a special book and that he was keeping a detailed list of all of his insured goods were all false, the insurance policy would be voidable on the ground of misrepresentations.[438]

As to the position of the agent of the assured under the Egyptian law, evidently no direct duty to make accurate representations is imposed on him by the provisions of the MTL 1990. However, this lack of enactment does not mean that the assured would escape the liability of being responsible for any material misrepresentations made by his agent if it happened that the insurance was effected by him. This is because, as explained earlier in respect of the duty of disclosure[439], the agent of the assured will be subject to the application of the rules of the law of agency[440] under the general law.

By applying the general rules of agency, an agent insuring on behalf of his principal under the Egyptian law will be required, as if the insurance is effected by the principal himself, to make sure that all representations made to the underwriter are accurate. Failing that will entitle the underwriter to avoid the contract as if the misrepresentation was made by his principal.[441]

The position under the Saudi Arabian law in this matter resembles that under the English and Egyptian laws in that it is the duty of the assured to ensure that all material representations made to the underwriter are correct. This duty is enforced by s. 342 of the CCL 1931 which states that

> *"[I]f the insured ... gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*

Collection, Year No. 15, p. 340, [Life], where the assured misrepresented the cause of his mother's death which was phthisic and not enteric fever as he stated; Mixed Appeal 7/3/1934, Civil Collection, Year No. 46, p. 205, [Life], where the assured falsely stated that no underwriter refused to insure him and that he was not insured before; Mixed Appeal 17/5/1939, Civil Collection, Year No. 51, p. 330, [Life] and Mixed Appeal 21/6/1944, Civil Collection, Year No. 56, p. 197, [Life], where the assured misrepresented his real age; Mixed Appeal 26/11/1930, Civil Collection, Year No. 43, p. 44, [Life], where the assured misrepresented material information about his state of health; Mixed Appeal 2/3/1938, Civil Collection, Year No. 50, p. 154, [Life], where the assured misrepresented material information about his health and brought another person to attend the pre-insurance medical examination instead of him.

[438] Collection of the Court of Cassation's Judgments, 14/4/1949, Case No. 407, Collection of Aumar, V. 5, p. 755. Also, see Collection of the Court of Cassation's Judgments, 25/5/1981, Case No. 286, Judicial Year 47, p. 1583, [Burglary], where the assured falsely told the underwriter that there were guards where the goods insured were stored and that he was keeping accurate and regular accounts of his business; Collection of the Court of Cassation's Judgments, 26/5/1991, Case No. 188, Judicial Year 56, p. 1205, [Life], where the assured stated that his health was good and that he neither was seen by any doctor, nor was suffering from any disease, while, in fact, he was suffering from burns of the second and third degree and was seen by a doctor for that purpose.

[439] For a full account of the authorities and cases in respect of the duty of the agent to make correct representations under the Egyptian law see: 'Chapter [3]: 3.4.2. The duty of the agent to insure'.

[440] Ss. 104(1) and 104(2) of the CC 1948.

[441] S. 105 of the CC 1948.

Accordingly, in *the Flying Falcon*[442], the insurance company rejected the claim of the insured company for the constructive total loss of its insured ship. One of the ground on which the rejection was based was that the insured company falsely stated that the chairman of its board was a certain person, whereas he was another person who, according to the Lloyd's Confidential Record of Ships, had presented nine claims for the total loss of his ships. It was further contended that if this fact had not been misrepresented, the insurance company would not have accepted to insure his ship under any terms. However, the insurance company failed to prove the materiality of the alleged misrepresentation and, so, was not entitled to avoid the policy.[443]

Also, in a life insurance case[444], it was held that the assured's representations that she was not suffering from leukemia or attended by any doctors for some sepicific illnesses were materially untrue because she was, in fact, suffering from leukemia for a long time and was finally the cause of her death. This led the arbitral panel to hold that the insurance company was entitled to avoid the policy on the gorund of misrepresentations.[445]

On the other hand, if insurance is effected on goods, an additional duty that all particulars of the goods represented and inserted in the policy conform to those contained in the bill of lading is imposed by s. 342 of the CCL 1931. So, it is the duty of the cargo owner to ensure that all the particulars of his goods inserted in the marine insurance policy are in full conformity with those inserted in the bill of lading, for that any discrepancies between what is represented by the assured in the policy and what is in fact in the bill of lading will constitute a case of misrepresentation and, so, will entitle the underwriter to avoid the policy. In this regard, similar to the breach of the duty of disclosure, it matters not whether the misrepresentation was made fraudulently, negligently, or innocently, for that in all cases the underwriter would be entitled to avoid the policy.[446]

As far as the duty of the assured's agent is consered, like the MTL 1990 [Egypt], the CCL 1931 [SA] has also omitted to obligate him to ensure that all representations made to the underwriter are correct if the insurance is effected by him. This lack of legislation makes it necessary, as it was the case with the duty of disclosure of the assured's agent, to apply the

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[442] Arbitral award 12/12/1995, [Marine].

[443] Ibid., at p. 18. In this regard, also see Arbitral award 5/3/1988, [Burglary], at p. 13-4, in which the assured effected burglary insurance on his valuable carpets. The insured carpets were stolen while they were being shipped from one country to another. The assured claimed his loss, but the insurance company rejected his claim on the ground of a misrepresentation of the real value of the insured carpets. The arbitral panel held that there was no misrepresentation as such and gave judgment for the assured. The importance of its judgment appeared in that it stated that, according to the doctrine of utmost good faith, it was the duty of both parties to make correct representations; Arbitral award 18/5/1993, [Fire], at p. 14, where the arbitral panel stated that in insurance contracts it is the duty of the assured to observe utmost good faith and accordingly to make accurate representations of matters required by the contract in question.

[444] Arbitral award 11/12/1995, [Life].

[445] Ibid., at p. 18-9.

[446] S. 342 of the CCL 1931. Also, see Haberbeck & Galloway, at p. 232-3.

rules regulating agents under the general law of Saudi Arabia, namely the Shari'a law.[447] By applying the rules of the Shari'a law to the agent of the assured, the position seems to be that if an insurance is effected by him, all representations made to the underwriter must be correct. If he falsely misrepresented any material fact, the underwriter would be entitled to avoid the contract as if such a misrepresentation was made by his principal.

To conclude, undoutdely all of the three legal systems seem to have recognised that it is the duty of the assured whenever he effects a contract of marine insurance to avoid making material misrepresentations. This also seems so in respect of the duty of the agent of the assured with the exception that it is only the English law which subjects him to a direct and expressed obligation enforced by ss. 20(1) of the MIA 1906.

4.5.2. Types of representations

> Ss. 20(3) of the MIA 1906: *"[A] representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief."*

From the wording of ss. 20(3), it is apparent that the MIA 1906 classifies representations, which are governed by the application of the duty, into two types. That is a representation as to a matter of fact or a representation as to a matter of expectation or belief. Another classification was also submitted by Templeman[448] who was of the opinion that representations fall into three categories, namely a representation of a material fact, a representation of a fact and a representation of expectation or belief[449].

In a similar manner, a third type of representations has also been submitted to exist by Arnould[450] and Halsbury[451]. That is a representation as to circumstances received by the assured from others and which he merely submits to the underwriter as he received them without guarantying their correctness and leaving him to determine their relevance to the risk. The only obligation upon the assured in this respect, Arnould[452] suggested, is to prove that what he presented is in accordance with what he, in reality, received. It follows that if the information turns up to be untrue, the underwriter will not be able to avoid the contract. But,

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[447] Al Sanhuri, Abdur Razzaq., Masadir Al Haq Fi Al Figh Al Islami, (Sources of Obligation in the Islamic Jurisprudence – in Arabic), Vol. 5, (1953-54), at p. 260-1; Hassanuzzaman, S. M., The liability of Partners in Islamic Shirkah (1971) 10 Islamic Studies 319, at p. 321.

[448] Templeman on Marine Insurance, 16th ed., (1986), (hereafter referred to as Templeman).

[449] Ibid., at p. 34. The existence of a third type of representations, namely a representation of a fact, was recently doubted by Hodges, S., in her book: Law of Marine Insurance, (1996), at p. 93-4. In fact, she categorised representations into a representation of a material fact and a representation of expectation or belief. But, she did not consider a representation of a fact as being a third kind of representations, for that, as she submitted, what is not material will not affect the judgment of the underwriter whether to insure or not and, if so, upon which terms and at what rates. She further argued that the objective of ss. 20(4) is not to specify a new type of representation, but rather to determine what is meant by the term 'true' set out in ss. 20(1) when the question of materiality of a fact comes under consideration.

[450] Vol. 2, at para.588.

[451] 4th ed., (1994), Vol. 25, at para.236.

[452] Vol. 2, at para.607.

as it has been further submitted by Halsbury[453], if the assured received such circumstances from his agent whose duty was to supply his principal with accurate information and if these circumstances were subsequently proved to be incorrect, the underwriter would be entitled to avoid the contract upon the ground of misrepresentation.[454] The exclusion of this last type from the scope of ss. 20(3) was submitted to be justified upon the ground that such a representation must be considered to fall within one of the other tow classes stated in ss. 20(3).[455]

However, no similar classification is recognised by the Egyptian law or the Saudi Arabian law. Unlike the English law, neither the MTL 1990 [Egypt], nor the CCL 1931 [SA] appears to have classified representations made by the assured or his agent to be more than one type. All that which is provided by both laws is a strict duty not to make misrepresentations. Under the Saudi Arabian legal system, this lack of legislation is to be completed by reference to the rules of the Shari'a law, whereas under the Egyptian legal system, this is usually supplemented by reference to the provisions of the CC 1948 which constitute its general law. But, since the CC 1948 also has no distinct provisions about classification of representations, according to ss. 1(2) of the same code, which deals with those cases which are not regulated by the code or by the custom, reference must be made to the rules of the Shari'a law. Therefore, the discussion of this issue under the Egyptian and Saudi Arabian laws will be based on the rules of the Shari'a law.

4.5.2.1. A representation as to a matter of fact

> Ss. 20(4) of the MIA 1906: *"[A] representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer."*

The expression *'a representation of fact'* is submitted to apply to any statements relating to a present or a past fact made by the assured or his agent to the underwriter.[456] This, therefore, will exclude a promissory statement, a representation of law or of opinion or belief from the sphere of this type as not being statements of facts.

Like ss. 20(1) of the MIA 1906, the Shari'a law also differentiates between whether an alleged misrepresentation is a statement of fact or not. This distinction is very important, for that a contracting party, who was induced to enter a contract because of a misrepresentation, would not be allowed to avoid it unless such a misrepresentation was a misrepresentation of fact. Thus, in the view of the Shari'a law, besides a representation of

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[453] Ibid.
[454] *Fitzherbert v Mather* (1785) 1 T. R. 12.
[455] Ivamy, E., Chalmers' Marine Insurance Act 1906, 9th ed., (1983), at p. 34; Dover, V., A Handbook to Marine Insurance, 5th ed., (1957), at p.329; Arnould, Vol. 2, at para.588.
[456] Clarke, at para.22-2B; MacGillivray, at para.581.

fact, representations are also classified into the following categories: a representation of promise or of opinion or of law.

4.5.2.2. A promissory representation

In the English general law of contract, a statement that something shall or shall not be fulfilled in the future will not have any legal effect[457] unless it is binding as a term of the contract or as a collateral promissory warranty.[458] This rule was justified upon the ground that a promissory representation does not constitute a statement of fact, which is capable of being true or false, when it is actually made.[459]

With regard to marine insurance, the old rule, which existed before the enactment of the MIA 1906, was to the effect that a statement that something would be performed in the future would amount to a representation of a material fact and if it was not fulfilled, the policy would be voidable upon the ground of misrepresentation irrespective of whether fraud was involved or not. This what was actually held in *Pawson v Watson*[460]and in the House of Lords in *Dennistoun v Lillie*.[461] This rule was not followed by subsequent cases and was not adopted by the MIA 1906 which, as a matter of fact, was in favour of the general rule laid down in *Jorden v Money* and *Beattie v Ebury*.[462] This is apparent from ss. 20(3) which limits the scope of the duty not to make misrepresentations to representations of facts and representations of expectation or belief.

Accordingly, if the assured represented to the underwriter that the insured ship intended to navigate from a place to another and such a representation was never fulfilled, the underwriter would not be able to avoid the contract unless the said representation amounted to a warranty.[463] In addition, a representation that the finance committee would examine the accounts of the secretary every fortnight was held not to be a representation of a fact, but to be no more than a declaration of the course intended to be pursued when the contract was effected.[464]

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[457] *Jorden v Money* (1854) 5 H.L.C. 185.
[458] *Yorkshire Insurance v Craine* [1922] 2 AC 541, [Fire], at p. 553.
[459] *Beattie v Lord Ebury* (1872) 7 Ch. App. 777, where Mellish L.J. stated, at p. 804, that *"[T]here is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise."* For a detailed discussion of the issue of promissory representations, see Arnould, Vol. 2, at paras.598-604. In this regard, also see Halsbury, Vol. 25, at para.235; MacGillivray at paras.612-15; Clarke at para.22-2B1.
[460] (1778) 2 Cowp. 786, [Marine].
[461] (1821) 3 Bligh 202, [Marine].
[462] Arnould, Vol. 2, at para.603 and Vol. 3, at para.603; Halsbury, Vol. 25, at para.235; MacGillivray at para.612.
[463] *Grant v Aetna Insurance Company* (1862) 15 Moore, 516, [CA-Fire].
[464] *Benham v United Guarantie & Life Assurance* (1852) 7 Exch. 744, [Fidelity].

However, a representation of a future fact can be seen as a representation of intention and, therefore, if it is false, entitles the underwriter to rescind the contract as if it is a representation of a present fact. This is said to be on the ground that although the assured is making a statement as regards the future, he, at the same time, is also representing his actual state of mind. Thus, if what he stated did not represent his intention at the time the policy was effected, he would be liable for making a misrepresentation of a fact which was that that what he actually represented was not the real state of his mind.[465]

Therefore, it is submitted, it does not really seem important to make a distinction whether a statement is a promissory representation or a representation of a fact. This is because the former will avoid the contract, as the latter will, if it is viewed as reflecting the actual and false intention of the assured at the time.[466]

However, under the Shari'a law a promissory representation does not constitute a representation of fact. This is because it is seen as a mere expression of a future intention which is not capable of being true or false in the present. Therefore, if a statement of promise turned up to be false because the representor could not perform it, the representee would not be entitled to rely on it to avoid the contract induced by it on the grounds of misrepresentation. The only exception to this rule where a promissory representation will, nevertheless, be treated as a statement of fact is when such a statement, when made, was seriously intended. In such a case, it will be viewed as a representation of fact and if it is false, it will be relied on by the representee to avoid the contract.[467]

By applying these principles into the field of marine insurance law, it seems that the English, Egyptian and Saudi Arabian laws will not consider a promissory representation as a representation of fact unless it is actually expressing the real intention of the assured or his agent. Otherwise, it will not be a representation of fact and its falseness will not make the effected policy voidable.

4.5.2.3. A representation of opinion or belief

> Ss. 20(5) of the MIA 1906: "*[A] representation as to a matter of expectation or belief is true if it be made in good faith.*"

In the same manner, a representation of opinion is also distinguished from a representation of a fact in the sense that the latter will avoid the contract if it is false, whereas

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[465] *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, where Bowen, L.J. held that the false intention of the directors of the company that the objects of the issuance of debentures were to complete alterations in the buildings of the company, to purchase horses and vans and to improve the business of the company was a material misstatement of fact. This was stated, at p. 483, as follows: "*... the state of a man's mind is as much a fact as the state of his digestion. ... A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.*"; *Smith v Price* (1862) 2 F. & F. 748, [Marine], at p. 752-53; *Kettlewell v Refuge Assurance Company* [1908] 1 K.B. 545, [CA-Life], at p. 550-51; *The Dora* [1989] 1 Lloyd's Rep. 69.

[466] Arnould, Vol. 2, at para.604; MacGillivray, at para.615.

the falsity of the former will not have the same effect if it is made in good faith.[468] So, when the assured's agent showed to that of the underwriter a letter received by his principal from the captain of the insured ship inaccurately stating that the ship was in a good, safe and well sheltered anchorage, it was held that the policy would not be voidable. Although the said anchorage was not safe at that time of the year, the policy was not held void, for that such a representation was one of honest opinion and not of a fact.[469] It follows from that that as long as a representation of opinion is made in good faith, it matters not that it appears afterwards to be inaccurate.[470]

In addition, in some cases, statements of facts made by the assured would, nevertheless, be construed as representations of opinion. This is so when it is very clear that the assured has no sufficient information to guarantee the ground of his representations. Therefore, he will be considered to be stating no more than his own opinion or expectation. This would be the case when the assured, for example, makes representations as to his or others' state of health.[471] Likewise, the representation of the owner of the goods or the broker about the sail time of the ship will be considered representations of expectation.[472] This is, it is submitted [473], because it is so obvious that he assured, in this case, is expressing no more than his opinion about matters the control of which is out of his hands.[474] Thus, if the underwriter was keen of ascertaining the accuracy of the representation he should have asked.[475]

However, it seems now recognised that a representation of expectation or belief implies another representation that the assured has objectively reasonable grounds to base his belief on. Therefore, it is no longer enough for a representation of expectation or belief, in order to be held true, to be made in good faith, but there need be a further requirement which is that the assured has, in fact, reasonable grounds to base his belief upon. This is very clear

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[467] Abdur Rahim, M. A., Muhammadan Jurisprudence, (1911), at p. 238, (hereafter Abdur Rahim).
[468] Ss. 20(5) of the MIA 1906.
[469] *Anderson v The Pacific Fire & Marine Insurance* (1872) L.R. 7 C.P. 65.
[470] Ibid.; *Irish National Insurance v Oman Insurance* [1983] 2 Lloyd's Rep. 453, [Reinsurance], where it was stated by Leggatt, J., at p. 462, that *" ... the statement was one of opinion and that if, contrary to my finding, it had been untrue it would not have been actionable either as a breach of warranty or as a misrepresentation."*
[471] *Pawson v Watson* (1778) 2 Cowp. 786, [Marine], at p. 788; *Life Association of Scotland v Jane Foster* (1873) 11 Session Cas. 3rd Ser. 351; *Joel v Law Union & Crown* [1908] 2 K.B. 863.
[472] *Brine v Featherstone* (1813) 4 Taunt. 869; *Barber v Fletcher* (1779) 1 Dougl. 305.
[473] Arnould, Vol. 2, at para.605; Clarke, at para.22-2B2.
[474] *Bowden v Vaughan* (1809) 10 East 415, [Marine]; *Hubbard v Glover* (1812) 3 Camp. 313, [Marine]; *Barber v Fletcher* ibid.; *Brine v Featherstone* ibid. Also, see *Macdowall v Fraser* (1779) 1 Dougl. 260, where the false representation of the broker of the assured that the insured ship was seen safe on certain day was held to be a representation of a fact and not one of expectation. This distinction was said by Gibbs J., in *Brine v Featherstone* ibid., at p. 874, to have been due to the assertion of the broker that the ship was seen safe which naturally induced the underwriter to consider that the broker was informed of that as a fact, not as a mere inference which he formed.
[475] *Pawson v Watson* ibid., at p. 788; *Brine v Featherstone* ibid.; *Bridges v Hunter* (1813) 1 M. & S. 15, [Marine].

from the judgment of Saville, J. in *Bank Leumi Le Israel BM v British National Insurance*[476], where he expressed this requirement as follows:

> *"[A] statement as to a future state of affairs can in itself be neither true nor false at the time it is made, since the future cannot be foretold. However, such a statement can and often does carry with it a representation that the person making the statement has an honest belief or expectation, based on reasonable grounds, that events will turn out to be as stated or forecast."*[477]

But this presumption was recently challenged by a contrary view expressed by the Court of Appeal in *Economides v Commercial Assurance.*[478] In this case, which was about a household contents insurance, the insurance company alleged that the assured had misrepresented in the proposal form the value of the valuables in his flat. A verdict was entered for the insurance company by the Court of First Instance holding that the statements of the assured were of fact and, so, they were not true. The assured appealed and the case came to be tried before the Court of Appeal. Simon Brown L.J., who gave the main judgment in the case and with whom judgment Peter Gibson L.J. [479]concurred, held that since the statements of the assured were, to the best of his knowledge and belief, true and complete, they were to be considered as statements of belief and not of fact. Therefore, they would be true if they were made according to ss. 20(5) in good faith. While admitting that in some cases there must be some basis for a representation of belief before it could be said to be made in good faith, Simon Brown L.J. rejected the contention of the insurance company that according to ss. 20(5) a representation of belief always implied that there must be objectively reasonable grounds for it. No such implication could be found in the wording of ss. 20(5), he further added, and, therefore, the sole duty with which the assured had to comply was that of honesty. Being satisfied that the assured was honest in making his statements, he allowed the appeal.

It is very important to note that before giving his judgment in this case, Simon Brown L.J. had distinguished all the cases[480] holding that ss. 20(5) implies that there must have been objectively reasonable grounds for a representation of belief before it could be held to have been made in good faith. His view was pronounced as follows:

> *"[C]an one in insurance context, consistently with section 20(5) of the Act of 1906, find in a representation of belief an implied representation that there are reasonable grounds for that belief? In my judgment not. ... In my judgment, the requirement is rather, as section 20(5)*

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[476] [1988] 1 Lloyd's Rep. 71, [Contingency].

[477] Ibid., at p. 75; Also, see *Smith v Land & House Property Corporation* (1884) 28 Ch.D. 7, per Bowen L.J. at p.15; *Ionides v Pacific Fire & Marine* (1871) L.R. 6 Q.B. 674, [Marine], at p. 683-84.; *Brown v Raphael* [1958] Ch. 636, per Lord Evershed at p. 644; *Irish National Insurance v Oman Insurance* ibid., per Leggatt, J. at p. 462; *Highlands Insurance v Continental Insurance* [1987] 1 Lloyd's Rep. 109, at p. 112-13; *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd's Rep. 200, per Longmore J. at p. 216.

[478] [1997] 3 WLR 1066.

[479] Ibid., at p. 1082-3.

[480] *Ionides v Pacific Fire & Marine* ibid.; *Smith v Land & House Property Corporation* ibid., per Bowen L.J. at p.15; *Brown v Raphael* ibid.; *Irish National Insurance v Oman Insurance* ibid.; *Highlands Insurance v Continental Insurance* ibid.; *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department* ibid.

states, solely one of honesty. ... I would hold, therefore, that the sole obligation upon the plaintiff when he represented to the defendants on renewal ... was that of honesty."[481]

In principle, the decision of *Economides v Commercial Assurance,* which is the only case in issue, has been exposed to some criticism[482] in that it contradicts the established principle in insurance law and in the general law that a representation of belief must be based upon reasonable grounds to be said to be made in good faith. The case has also been criticised for that although it rejected the implication of reasonable grounds, it failed to draw a clear test determining when the assured can be said to have acted honestly or dishonestly in representing his belief.[483]

Apart from that, it ought further to be mentioned that according to the decision of Steyn, J. in *Highlands Insurance v Continental Insurance*, there will be a presumption that any representation of information made by the broker of the assured to the underwriter will be considered as representation of facts unless there is *"qualifying language or the context indicates that a particular statement falls in a different category"*.[484] In fact, this presumption accords with the common practice prevailing in the field of marine insurance where policies are normally effected through brokers. But, nothing appears from Steyn, J.'s decision to suggest that such a presumption will also be applicable to representations made by the assured himself if insurance happens to be effected by him.

According to the Shari'a law, a representation of opinion or advice is not deemed in principle a representation of fact. Accordingly, a representation of opinion or advice made in good faith would not make the representor responsible if it appeared afterwards to be untrue. An example of this type of representation was given by the Islamic jurists to be when a person honestly gives to another an advice that travelling through A road is safer and shorter than travelling through B road. So, if the advised person had an accident on the A road, the person who advised him would not be liable on the grounds of misrepresentation.[485] Another example could be seen in the case when a man is asked by his friend to give his opinion of a woman to which the friend is intending to marry. If the man honestly stated that she is a free woman, but she is in fact a slave, he will not be held accountable for his untrue opinion.[486]

However, as an exception to this general rule, if a representation of opinion or of advice was not only made in good faith, but it was also accompanied by an assertion of the representor that it was correct, the Shari'a law would treat it as a representation of fact and,

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[481] *Economides v Commercial Assurance* ibid., at p. 1075-6.
[482] Bartlett, A., and Egan, M., Utmost good faith: misrepresentation and non-disclosure (1997) 141 Sol. J. 952; Hird, N., How to make a drama out of a crisis [1998] JBL 279; Clarke, M., Misrepresentation of value-Honest belief (1998) CLJ 24 and Mitchell, C., English insurance decisions 1997 (1998) LMCLQ 411, at p. 416.
[483] Ibid.
[484] *Highlands Insurance v Continental Insurance* ibid., at p. 112.
[485] Al Atasi, Sharh Al Majallah, Vol. 3, (1983), at p. 78, (hereafter Al Atasi, Vol. 3).
[486] Ibid., at p. 78.

therefore, if it was incorrect, it would make the representor responsible for the consequences of his misrepresentation.[487]

In this sense, it seems that the effect given by the Shari'a law to a representation of opinion or advice resembles that given to a promissory representation in that both of them will not be considered representations of facts unless they are seriously and intentionally made.

By applying these principles into the field of marine insurance law, generally a representation of opinion or advice is not considered a representation of fact under the Egyptian and Saudi Arabian laws. It follows that if it is made in good faith, its falseness will not be relied on by the underwriter as a ground to avoid the policy. This will however be subject to the exception that that its correctness must not be confirmed by the assured, otherwise it will be treated as a representation of fact and if it is discovered to be false, it will make the policy voidable on the grounds of a misrepresentation of fact.

In the light of the treatment given to a representation of opinion under the Egyptian and Saudi Arabian laws, it could be deduced that the reason why an asserted representation is viewed as a representation of fact and, so, if it is not true it will avoid the insurance policy seems to be due to the fact that when an assured asserts that his representation is true, he is in fact asserting the existence of a fact which is that he also has reasonable grounds to found his representation on. Therefore, if it is discovered that his representation is untrue and that it is not based on reasonable grounds, it will be a misrepresentation of fact.

Clearly, apart from the contrary decision of the Court of Appeal in *Economides v Commercial Assurance*, it appears that the English, Egyptian and Saudi Arabian laws all share the same view in respect of a representation of opinion. This is that an assured representing his opinion to an underwriter in respect of a risk proposed for insurance would need to satisfy two conditions in order for his representation to be deemed true. These are that the representation must first be made in good faith and, secondly, that he must have reasonable grounds justifying his opinion.

4.5.2.4. A representation of law

The line distinguishing between statements of law and statements of facts is not normally easy to draw[488], but generally a misrepresentation of a matter of law is not a misrepresentation of a matter of fact.[489] Therefore, it will not give the underwriter the right to

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[487] Ibid., at p. 80.
[488] Chitty, 27th ed., (1994), at para.6-007.
[489] In this connection, see Arnould, Vol. 2, at para.609 and Vol. 3, at para.609; Clarke, at para.22-2B3; MacGillivray, at paras.584-5; Treitel, G., The Law of Contract, 8th ed., (1991), at p. 298-300; Chitty, 27th ed., (1994), at para.6-007.

avoid the contract, unless it is fraudulently stated.[490] This was said to be founded upon the maxim that ignorance of the law does not excuse. Accordingly, everybody is taken to know the law of the land and, therefore, it is unimaginable for a contracting party to claim that he has been misled by a misrepresentation of law of which he is deemed to have knowledge.[491] Alternatively, it was submitted[492] that since statements of law involve matters the legal effect of which is still debatable or could lead to different interpretations, they ought to be considered statements of opinion or belief, which would only entitle the underwriter to avoid the contract if they were made fraudulently[493].

Therefore, for instance, a representation as regards the meaning of a clause in a policy, without reference to its effect upon the assured, was held to be a representation of law.[494] On the other hand, if the underwriter or his broker misrepresented the consequent effect of the policy upon the position of the assured[495], this would be a misrepresentation of a matter of fact, and the assured would, therefore, be entitled to rescind the policy and claim his premium back.[496] In addition, representations in respect of the validity of the policy[497] or the legitimacy of an enterprise[498] were held to be representations of facts and not of law. Further, a misleading statement of foreign law was treated as a misrepresentation of fact.[499]

Contrary to the English law, the Shari'a law considers all representations of law as representations of fact. Accordingly, if a contracting party represented to the other contracting party that the law in respect of a certain matter is so and so, such representation is deemed a representation of fact. It follows that if it turned out to be false, the aggrieved party would be entitled to rescind the contract or claim damages.[500]

However, as an exception to this general rule, representations of matters relating to the basic law are not representation of fact. This is because, in Islam, it is a basic obligation that all Muslims have to be acquainted with matters concerning the basic law. These will include, for example, circumstances related to killing, adultery, robbery, bribery etc. Consequently, a man who entered into a contract breaching a rule of the basic law cannot

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[490] *Rashdall v Ford* (1866) L.R. 2 Eq.750, where it was stated, at p. 754, that *" ... the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law ... ."*; *Beattie v Lord Ebury* (1872) 7 Ch. App. 777, where Mellish, L.J. said, at p. 802, that *" ... the rule in this Court is that a person cannot be made liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law."*

[491] *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360, [CA], per Bowen, L.J. at p. 362.

[492] MacGillivray, at para.584.

[493] *West London Commercial Bank v Kitson* ibid., at p.362-3.

[494] *Re Hooley Hik Rubber & Chemical v Royal Insurance* [1920] 1 K.B. 257, [Fire].

[495] *West London Commercial Bank v Kitson* ibid, at p.362-3; *Kettlewell v Refuge Assurance Company* [1908] 1 K.B. 545, at p. 549-51.

[496] Ibid.

[497] *British Workman's & General Insurance v Cunliffe* (1902) 18 T.L.R. 425, [CA-Life]; *Harse v Pear Life Ass.* [1904] 1 K.B. 558, [CA-Life].

[498] *Burrows v Rhodes* [1899] 1 Q.B. 816.

[499] *Andre & Cie S.A. v Ets. Michel Blance & Fils* [1979] 2 Lloyd's Rep. 427, [CA], at p. 430-31; *Furness Withy (Australia) Pty v Metal Distributors (The Amazonia)* [1990] 1 Lloyd's Rep. 236.

plead that he did not know the law and was induced by the other party's representation that that effecting the said contract would not be contrary to the law. This is owing, as it was earlier said, to the fact that ignorance of a matter of the basic law is not excused and, therefore, a representation as such is not considered a representation of fact.[501]

Accordingly, the position under the Egyptian and Saudi Arabian laws will be that a misrepresentation of law is a misrepresentation of fact unless it is about a basic law which is the duty of the underwriter to know. In this case, it will not avoid the policy provided that it is made in good faith.

Having discussed that, no doubt that the application of the above view within the field of marine insurance would not be an easy task. This is because what is a basic law within the Shari'a law is different from what is a basic law within the marine insurance law. So, until there is a clear criteria determining what is meant by basic law in marine insurance's context, both parties to a contract of marine insurance are advised to exercise caution when making a representation as to a matter of law.

In this sense, the position of the Egyptian and Saudi Arabian laws where it is the general rule that a representation of law is a representation of fact, unless it falls within the scope of the basic law is totally opposite to the English one which does not consider a representation of law to be one of fact, unless it concerns the effect of the law on the position of the assured.

Having stated that, it should now be clear that under the English law a representation of fact is clearly distinguished from other types of representations, namely a representation of future events, of opinion or expectation and of law. The significance of drawing this distinction appears in the consequences following a breach of the duty not to make misrepresentations. According to ss. 20(5) of the MIA, when a representation is one of expectation or belief, it suffices it to be true if it is made in good faith. So, having it been made in good faith, a representation would still be held true even if it subsequently turned out to be false.[502] Nevertheless, if it was not made in good faith, it would not be true and the underwriter, having established its materiality[503], would be entitled to rescind the contract. Whereas, a representation as regards a matter of fact will not, as stated in ss. 20(4) of the MIA. 1906, avoid the contract, unless it is untrue in the sense that the difference between the actual state of the fact and the represented one is deemed material in the sight of a prudent underwriter.

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[500] Abdur Rahim, at p. 239.
[501] Ibid.
[502] Brown, R. H., Marine Insurance, Vol. 1, The Principles, 4th ed., (1978), where he, at p. 67, affirmatively pointed out that *"[T]here are occasions when the assured, or broker, thinks he is telling the true but it turns out later that, in fact, the statement was untrue. Provided the assured, or broker, acts in good faith, whatever he believes to be true is deemed to be true even if it subsequently proves not to be true."*
[503] The issue of materiality will be dealt with separately in Chapter [5].

Accordingly, when it was represented that the insured ship would sail with the force of twelve guns and twenty men, whereas, in fact, she had on board only nine carriage-guns, six swivels, sixteen men, and nine boys, it was held that the representation was true. The ground upon which this judgment was based, said Lord Mansfield, was that it would be enough for a representation to be true if was substantially performed and it was shown by evidence that her actual force exceeded the force previously represented.[504] Also, the representation of the assured that the insured ship was metalled in 1867 was held to be substantially complied with and, therefore, true when, in fact, only her metal sheathing was completely overhauled and thoroughly repaired, and replaced with new when required.[505] Moreover, when the buildings insured against fire were represented as being roofed with slate, while, on the contrary, part of the roof was of inflammable material, the representation was held to have been substantially complied with.[506]

It should also be clear that any material misrepresentation of fact on the part of the assured or his agent, whether it is made innocently or with intent to deceive, would avoid the contract.

It ought finally to be said that although the Egyptian and Saudi Arabian laws resemble the English law in recognising that here is a difference between a representation of promise or opinion and a representation of fact, they, unlike the English law, generally consider a representation of law as one of fact. Another difference amongst the three legal systems appears in that while the English system states that a representation of fact is true if it is substantially correct, under the Egyptian and Saudi Arabian systems it seems that a representation need to be literally correct if it is to be deemed true.

4.5.3. The interpretation of representations

In the interpretation of a representation and whether it is true or not under the English law, the words of the representation must be given their natural and plain meaning which could reasonably be inferred to have or should have been understood by the underwriter. Therefore, for example, when the broker of the assured represented that two ships of the assured had been insured at Lloyd's and that the assured was willing to insure them with the underwriters at eight guineas per cent. as the highest premium he had given, it was held that the underwriters were justified when, in fair and obvious construction, they took the

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[504] *Pawson v Watson* (1778) 2 Cowp. 786.
[505] *Alexander v Campbell* (1872) 41 L.J.R. Ch. 478, [Marine], at p. 483-84.
[506] *Re Universal Non-Tariff Fire Insurance* (1875) L.R. 19 Eq. 485, [Fire], where it was declared by Malins V. C., at p. 496, that *" ... if the description of the property be substantially correct and a more accurate statement would not have varied the premium, the error is not material."*

representation as meaning that an insurance had been effected at Lloyd's on the very same voyage at eight guineas per cent.[507]

Also, the representation must, when it is judged, be looked at as a complete statement and must not be literally or partly construed.[508] So, if the assured was asked to state all information about any medical men consulted, it was held that some limits must have been intended, for it would not be expected that the question should include the assured's early childhood.[509] Moreover, the negative answer of the assured who was asked whether he has had any other illnesses, local diseases or personal injuries or not, was not held false, although he suffered a partial fracture of the skull about twelve years ago. This was, as declared by the court, because

> *"[The underwriters] could not reasonably expect a man of mature age to recollect and disclose every illness, however slight, or every personal injury ... It is manifest that this question must be read with some limitation and qualification to render it reasonable ... ."*[510]

Further, the mercantile usage prevailing in the business at question ought to be taken into account when interpreting a representation[511] as well as the context in which it was originally intended to be applied. Therefore, when it was asked in a proposal form whether the property was insured before, the negative answer was held to have only related to the property mentioned in the proposal.[512] As to the same, it was also pointed out by Lord Watson in the House of Lords in *Thomson v Weems*[513] that

> *"[I]n judging of a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account ... ."*

Furthermore, a representation must be considered at the time it was made and before the conclusion of contract, for the policy would not be held voidable if, after the conclusion of the contract, it turned out to be false.[514]

As to the position of the Egyptian and Saudi Arabian laws, it appears that there are no special principles to be followed by the judge while interpreting the legal effect of a representation in the field of marine or none-marine insurance. Nor could such principles be found within the provisions of the CC 1948 [Egypt] or the rules of the Shari'a law.

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[507] *Sibbald v Hill* (1814) 2 Dow 263.
[508] *De Hahn v Hartley* (1786) 1 T.L. 343, [Marine], at p. 346.
[509] *Joel v Law Union & Crown Insurance* [1908] 2 K.B. 863, at p. 874; *Thomson v Weems* (1884) 9 App. Cas. 671, [Life]; *Yorke v Yorkshire Insurance Company* [1918] 1 K.B. 662, [Life], at p. 667-68.
[510] *Connecticut Mutual Life Insurance Co. of Hartford v Moore* (1881) 6 App. Cas. 644, [Life], at p. 648.
[511] *Ratcliffe v Shoolbred* (1780) 1 Park, Ins. 423, [Marine]; *Kirby v Smith* (1818) 1 B. & Ald. 672, at p. 675; *Chaurand v Angerstein* (1791) Peake N. P. 61, [Marine].
[512] *Golding v Royal London Auxilliary Insurance* (1914) 30 T.L.R. 350, [Life]; *Anderson v Pacific Fire & Marine Ins.* (1869) 21 L.T. 408, [Marine], at p. 410; *Thomson v Weems* ibid., at p. 696; *Yorke v Yorkshire Insurance Company* ibid., at p. 666.
[513] Ibid., at p. 696.
[514] *Hair v Prudential Assurance* [1983] 2 Lloyd's Rep. 667, [Houseowners], at p. 672.

It seems that this lack could nevertheless be smoothly overcome by applying the principles used by the courts under both systems to interpret the ambiguous terms of a concluded contract in order to determine its legal effect in case there is a dispute in this respect. This is because these principles have general nature enabling them to be used as guidelines while the court is in the process of determining the legal effect which ought to be assigned to a representation in marine insurance context as if it was doing the same in respect of a term of a contract under the general law.

Therefore, by applying the principles used to interpret the legal consequences of a contract regulated by the CC 1948[515] to the field of marine insurance, it appears that a representation ought to be given its natural and normal meaning[516], unless there is clear evidence to suggest that the words used do not support the apparent and plane meaning[517]. In this case, two conditions must first be met before the court will be able to divert from the plain meaning. The first is that the court must first try to give the representation its natural meaning. If this is proved to be inappropriate, then secondly the court must explain and designate the reasons justifying the interpretation it intends to ascribe to the representation.[518]

In addition, in the interpretation of whether a representation is true or false, the court should take account of the nature of the contract in question and the circumstances surrounding the time within which the representation was made.[519] So, if the representation refers to more than one meaning, the court taking into account the nature and the circumstances of the kind of the insurance in question should choose the most suitable one.[520]

Moreover, a representation should always be interpreted by reference to the contract under which it was made[521] and also by paying careful attention to the established mercantile custom of the risk insured[522]. For instance, if one of the policy's terms limits the scope of the representations required by an earlier term, the assured will not be liable if he omits to represent part of the circumstances which have become unnecessary because of the latter term.[523]

Furthermore, when the meaning of a question contained in a proposal form is ambiguous and could refer to more than one meaning and if the assured reasonably answered

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[515] These principles are contained in ss. 150(1) & (2) and ss. 151(1) & (2).
[516] Ss. 150(1).
[517] Ss. 150(2).
[518] Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), (1964), Vol. 1, at para.391, (hereafter Al Sanhuri, Vol. 1).
[519] Ss. 150(2). Also, see Al Sanhuri, Vol. 1, at para.395; Yihya, Abdul Wadood., Al Mujaz Fi Aaqd At Ta'myn, (The Concise in the Contract of Insurance – in Arabic), (undated), at p. 169-70, (hereafter Yihya).
[520] Al Sanhuri, Vol. 1, at para.396; Yihya, at p. 169-70; Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), 2nd ed., (1990), Vol. 7, (Part 2), at para.592, (hereafter Al Sanhuri, Vol. 7/2).
[521] Al Sanhuri, Vol. 1, at para.396; Yihya, at p. 169-70.
[522] Al Sanhuri, Vol. 1, at para.397.
[523] Al Sanhuri, Vol. 1, at para.396; Yihya, at p. 169-70; Al Sanhuri, Vol. 7/2, at para.592.

it according to one of the possible meanings, he would not be held actionable for making misrepresentation if it afterwards appeared that the meaning he adopted was not the one the underwriter intended.[524] This is because, it is submitted[525], it is the duty of the underwriter to make sure that his questions are clear and understandable, otherwise he will not be heard saying that the meaning which the assured reasonably adopted is untrue.[526]

In the same manner, when applying the principles of interpretation regulated by the Shari'a law into marine insurance context, it appears that in interpreting a representation and determining whether it is true or not, its words must be given their natural and plane meaning.[527] Also, if a representation was made according to specific usage of trade, its correctness ought to be judged according to the same usage.[528] Moreover, the assured's representation ought to be construed in the light of the limits set out by the other terms of the policy. Further, a representation made by the assured in answer to a vague question would not be held false if it could reasonably be held true according to the meaning of the question which was understood by the assured.[529]

In conclusion, it seems that all the three legal systems have almost similar rules or principles which a court should apply when determining whether a representation is correct or false or when determining whether a certain interpretation is to be assigned to an unclear representation or not.

4.5.4. The duration of the duty[530]

> Ss. 20(1) of MIA 1906: *"[E]very material representation made by the assured or his agent to the insurer during the negotiations for the contract and before the contract is concluded, must be true."*

According to ss. 20(1), and as it is the case with the duty of disclosure, in order for a material representation to have any effect upon the policy, and, so, to entitle the underwriter to avoid the contract if it turns out to be false, it must be made during the negotiation leading to and before the conclusion of the contract. It follows that any material misrepresentation made after the conclusion of the policy would not have any legal effect upon its validity.[531] So, it is the time at which a contract is deemed concluded which is taken into account when

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[524] Ss. 150(1) and (2).
[525] Al Sanhuri, Vol. 1, at paras.398-9; Yihya, at p. 169-70.
[526] Al Sanhuri, Vol. 7/2, at para.592.
[527] Al Sanhuri, Abdur Razzaq., Masadir Al Haq Fi Al Figh Al Islami, (Sources of Obligation in the Islamic Jurisprudence – in Arabic), Vol. 6, (1953-54), at p. 30-2, (hereafter Al Sanhuri, Vol. 6).
[528] Ibid., at p. 30-1.
[529] Ibid., at p. 41-2.
[530] This point is fully discussed in 'Chapter [3]: 3.4.5. The time at which the duty of disclosure must be performed'.
[531] *Ionides v The Pacific & Marine Insurance Company* (1871) L.R. 6 Q.B. 674.

determining the effect of a material representation. This moment is defined by s. 21 of the MIA 1906 to be

> *" ... when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract... "*

According to that, when the representation of the assured was true at the time of the conclusion of the contract, he would not be accountable if, after its conclusion, it turned out to be false. This what actually happened in *Whitwell v Autocar Fire and Accident Insurance*[532], where at the time of making the contract the assured truly stated that no insurance company had refused to insure his life. It appeared that two days before the conclusion of the contract another insurance company had refused to accept his proposal. The assured was not nevertheless liable for misrepresentation, since this fact was not known to him until after the policy was effected.

In this regard, it would seem to be compatible with s. 21 of the MIA 1906[533] to hold that the moment at which a contract of marine insurance is said to be concluded is the moment at which the slip presented by the broker of the assured is initialed by the underwriter irrespective of whether the broker will, then, succeed in getting 100 per cent. cover or not. According to this view, each initialing would be deemed as making a separate and binding contract between the assured and each underwriter.[534]

The duty will also arise with each renewal of the policy in which case it will be the duty of the assured to make sure that all his old and new representations are correct.[535] Moreover, if there is an amendment or an alteration to all or part of the risk originally accepted, the duty will also apply to all representations made in that regard.[536]

Like the English law, the duty of the assured to make correct representations under the Egyptian law must entirely be performed before and up to the conclusion of the contract. This is precisely stated by s. 361 of the MTL 1990 which reads as follows:

> *"[T]he insured ... shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."*[537]

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[532] [1927] 27 Ll.L. Rep. 418, [Life].

[533] *" ... when the proposal of the assured is accepted by the insurer ... ."*

[534] For a full account of this view and the contrary one, see the examination of this issue in 'Chapter [3]: 3.4.5. The time at which the duty of disclosure must be performed'.

[535] *Pim v Reid* (1843) 6 Man. & G. 1; *In re Wilson and Scottish Insurance Corporation* [1920] 2 Ch. 28.

[536] *Sawtell v Loudon* (1814) 5 Taunt. 359; *Lishman v The Northern Maritime Insurance* (1875) L.R. 10 Q.B. 179. Ex Ch.; *Commercial Union Assurance Company, v The Niger Company* [1922] 16 Lloyd's Rep. 75; *Iron Trades v Imperio* [1991] 1 Re.L.R. 213.

[537] For other authorities establishing that it is the duty of the assured to make correct representations before the conclusion of the contract, see Al Sanhuri, Vol. 7/2, at para.612; Al Badrawi, Abdul Mun'am., At Ta'myn (The Insurance – in Arabic), (1981), at para.125, (hereafter Al Badrawi); Yihya, at p. 152-3; Al Mahdi, Nazih. Mohammed Al Sadiq., Aaqd At Ta'myn, (The Insurance Contract – in Arabic), (undated), at p. 250-1, (hereafter Al Mahdi); Sharaf Al Diyn, Ahmed., Ahkam At Ta'myn, (Insurance Rules – in Arabic), 3rd ed., (1991), at para.213, (hereafter Sharaf Al Diyn); Ibrahim, Jalal. Mohammed., At Ta'myn: Dirash Muqaranh (Insurance: A Comparative Study – in Arabic), (1989), at para.346, (hereafter Ibrahim); Awad, Ali. Jamal Al Diyan., Al

This is also the case under the Saudi Arabian law where it is the duty of the assured to make correct representations of all the required circumstances up to the conclusion of the contract. Although that the time within which this duty must be discharged is not evidently stated by s. 342 of the CCL 1931, it could be inferred from its wording that such time has to be before and up to the period at which the policy is being made out. This is actually stated as follows

> *"[I]f the insured ... gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*[538]

In addition, similarly to the English law, a duty to refrain from making misrepresentation will also arise under the Egyptian law whenever the contract is renewed[539] or is subject to amendments or alterations.[540] This also seems to be the position under the CCL 1931 where the duty will also be applied to those representations made in respect of the policy because of its renewal, designated amendment or alternation.[541]

On the other hand, it was argued by Yihya that in some situations the duty to make accurate representations would not cease to be active once the underwriter initials the slip.[542] Such situations, as he further argued, would occur when the estimation of the risk cannot be made within reasonable time and, so, instead of hastening to issue a final covering note, underwriters tend to issue a temporary one to cover the risk for a short period until they decide whether to accept to underwrite or not. Therefore, if the underwriter accepts to grant the required cover, his acceptance will be considered as constituting a new and distinct contract from that contained in the temporary covering note and, so, the application of the duty will extend to all material representations made between the issuing of the temporary covering note and the initialing of the final acceptance.[543]

Further, if it happens that the insurance cover is suspended because the assured has not paid the agreed premium, there will be no duty to make accurate representations if the

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Qanun Al Bahry, (The Maritime Law – in Arabic), (1987), at para.535, (hereafter Awad); Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at paras.670, (hereafter Ta Ha); Zahrah, Mohammed., Ahkam Aaqd At Ta'myn Tabbqann Li Nusus Al Taqniyn Al Madany Wa Ahkam Al Qada, (The Rules of The Insurance Contract According to The Provisions of the Civil Code and The Case Law – in Arabic), (1984-1985), at p. 205, (hereafter Zahrah).

[538] S. 342 of the CCL 1931. This time was also affirmed by the case law in many cases, for example Arbitral award 22/12/1986, [House], at p. 15; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, at p. 18.

[539] Yihya, at p. 152-3; Ibrahim, at para.346.

[540] Yihya, at p. 152-3.

[541] Haberbeck & Galloway, at p. 232.

[542] Yihya, at p. 152-3.

[543] Ibid. Also, see Al Sanhuri, Vol. 7/2, at para.584, where he expressed a contrary view which was that if the underwriter accepted to insure the risk after issuing a temporary covering note, his acceptance would not constitute a new contract.

cover is effective once again.[544] Nor, would there be such a duty if the insurance cover was extended beyond its prescribed time pursuance to one of the terms of the policy.[545]

Finally, although, it is now established that the application of the duty not to make misrepresentations will cease once the contract is concluded, it may sometimes continue after the conclusion of the contract and up to the time at which a claim for a loss is presented to the underwriter. This continuing feature of the duty is thoroughly discussed and commented upon in chapter seven.

4.5.5. The possibility of amendment to or withdrawal of a representation

> Ss. 20(6) of the MIA 1906: *"[A] representation may be withdrawn or corrected before the contract is concluded."*

According to ss. 20(6) of the MIA 1906, it is always open to the assured before and up to the time at which the contract is deemed concluded to amend or withdraw any representations previously made. However, if such withdrawal or amendment happened after the conclusion of the contract, the right of the underwriter to avoid the policy would not be affected and he would still be entitled to the right of avoidance. This would be his right even if the withdrawal or the amendment took place after the initialling of the slip or even if he executed the policy without protest after he knew of such breach.[546] This was held to be based upon the practice of the underwriters that once a slip is initialed, an underwriter is bound in honour to execute it and, then, deliver it to the assured.[547]

It must be borne in mind that ss. 20(6) does not impose any duty upon the assured to withdraw or correct any representation which appears to be false or misleading after it was made, but before the conclusion of the contract. However, if the assured discovered the falsity of a representation at a time within which he could correct or withdraw it and, nevertheless, refrained from doing so, he would run the risk of having his policy subsequently rescinded by the underwriter for misrepresentation or non-disclosure.[548]

Concerning the situation under the Egyptian and the Saudi Arabian laws, neither the MTL 1990 [Egypt], nor the CCL 1931 [SA] has a similar principle to that contained in ss. 20(6) of the MIA 1906 [UK]. However, this does not mean that an assured who once makes a representation will not be able to amend it or withdraw it, especially if this action is taken before the conclusion of the contract. This what was actually advanced by Shar'an[549] who

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[544] Yihya, at p. 152-3; Ibrahim, at para.346.
[545] Ibid.
[546] For the time of the conclusion of the contract of marine insurance, see s. 21 of the MIA 1906. Also, see Bennett, Howard. N., The role of the slip in marine insurance law, (1994) LMCLQ 94, at p. 103-7.
[547] *Morrison v Universal Marine Insurance Company* (1973) L.R. 8 Ex. 197.
[548] *Fitzherbert v Mather* (1785) 1 T. R. 12.
[549] Shar'an, Mohammed., Al Khatar Fi Aaqd At Ta'myn, (The Risk in The Contract of Insurance – in Arabic), (1984), at para.31, (hereafter Shar'an).

stated that it is open to the assured, as long as his insurance proposal is not accepted yet by the underwriter, to amend it or even withdraw it.

Besides that, holding so would also seem to be in accordance with s. 361 of the MTL 1990 [Egypt][550] and s. 342 of the CCL 1931 [SA] which precisely state that the moment at which the accuracy of a representation is judged is when the contract is concluded. This would reasonably imply that the assured would be free to make, amend or even withdraw any representation previously made if the contract is still not concluded. This implication is in fact in full conformity with the requirement of the doctrine of utmost good faith which obliges the assured not to make material misrepresentation to induce the underwriter to effect a contract. This implication could further be seen as an extra protection for the underwriter for the benefit of whom the duty not to make misrepresentation is primarily imposed.

4.5.6. Whether a misrepresentation made to the first underwriter would extend to other underwriters[551]

In Britain, it is the common practice at Lloyd's for an agent seeking to effect an insurance to reach a leading underwriter and negotiate with him the required cover. It is also the common practice at Lloyd's for subsequent underwriters to initial the same policy without asking for more details about the risk, but merely relying upon the skill and judgment of the first underwriter who had apparently agreed to subscribe the policy after considering all the circumstances material to the risk. It follows that any misrepresentation made to the leading underwriter would entitle him to avoid the contract. But, does it follow that subsequent underwriters will also be entitled to rely on the same misrepresentation to avoid the contract to the same degree as if such a misrepresentation was actually made to them?

Although the provisions of the MIA 1906 as to this crucial and difficult question are completely silent, the original and previaling rule in the case law was to the effect that any material representation made to a leading underwriter would extend to all other subscribing underwriters. This means that any right to avoid the contract for misrepresentation available to the leading underwriter would also become available to the other underwriters. This rule was submitted to rest upon the presumption that the following underwriters usually initial the policy in reliance upon the skill and judgment of the leading underwriter who was presumed

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[550] Although the possibility of a representation being amended or withdrawn by the assured before the conclusion of the contract has not been discussed under the Egyptian law, the possibility of it being amended or withdrawn after the conclusion of the contract and before the occurrence of a loss has been discussed by many authorities. For instance, Al Sanhuri, Vol. 7/2, at para.627., Footnote No. 1; Yihya, at p. 152, Footnote No. 1; Al Mahdi, at p. 332-3; Zahrah, at p. 249; Sharaf Al Diyn, at para.270; Lutfi, Mohammed. Husam. Mahmud., Al Ahkam Al 'amah L Aaqd At Ta'myn, (The General Rules of The Insurance Contract – in Arabic), 2nd ed., (1991), at paras.222-3.

[551] For an excellent examination of this topic, see Arnould, Vol. 2, at para.623; Bennett, Howard., The role of the slip in marine insurance law, (1994) LMCLQ 94, at p. 115-17; Thomas, D. R., in his contribution to the book entitled The Modern Law of Marine Insurance, (1996), at p. 44-6.

to have subscribed only after considering all circumstances material to the risk. This rule, which was followed by some cases[552], was first declared in *Pawson v Watson*[553], where Lord Mansfield stated that

> *" ... a misrepresentation made to the first underwriter, ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy."*

However, this rule was not generally approved and many doubts were expressed about its soundness. For example, the decisions delivered by Lord Ellenborough C.J. in *Bell v Carstairs* and in *Forresters v Pigou*, where he respectively declared that

> *"[I]t is difficult to see on what principle of law a representation to the first underwriter is considered as made to all those who afterwards underwrite the policy."*[554] *"[W]henever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification. It may depend upon the time and circumstances under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication made to him was virtually made to all the subsequent underwriters."*[555]

Similar doubts were also expressed by Arthur Cohen in his article entitled 'The Marine Insurance Bill' which was published before the enactment of the MIA 1906.[556] In his article he stated that

> *"[I]t has been held in several cases, and it is the opinion of Duer J., that such a representation should be deemed to be a representation to the succeeding underwriters on the policy. But the correctness of this view has been much doubted by Lord Ellenborough and other judges of great eminence, and the framers of the Bill have, in my opinion, acted wisely in not attempting to fix the law on this subject, and in leaving it open for further consideration by the Court of Appeal or the House of Lords."*[557]

Further contrary judgments were recently delivered by Mustill, L.J. in the Court of Appeal in *the Zephyr*[558] and Saville J. in *Bank Leumi Le Israel v British National Insurance*[559].

Consequently, the present rule[560] seems to be that a material misrepresentation made to the leading underwriter would not extend to any of the following underwriters, unless each

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[552] *Barber v Fletcher* (1779) 1 Dougl. 305, at p. 306; *Marsden v Reid* (1803) 3 East, 572, [Marine], at p. 572-74; *Feise v Parkinson* (1812) 4 Taunt. 640, [Marine], at p. 640. Also, see *Bell v Carstairs* (1810) 2 Camp. 543, [Marine], at p. 544., where the rule was reluctantly followed by Lord Ellenborough C.J.

[553] (1778) 2 Cowp. 786, at p. 786.

[554] *Bell v Carstairs* Ibid., at p. 544.

[555] *Forresters v Pigou* (1813) 1 M. & S. 9, [Marine], at p. 13. Also, see *Robertson v Marjoribanks* (1819) 2 Stark. 573, [Marine], at p. 575-76.

[556] (1903) LXXVI LQR 367.

[557] Ibid., at p. 375. He further expressed his doubts in another article published after the enactment of the MIA 1906: 'Notes on Marine Insurance Law' (1914) CXVII LQR 29, at p. 31.

[558] *General Accident Fire & Life Assurance Corporation v Peter William Tanter* [1985] 2 Lloyd's Rep. 529, [CA-Reinsurance], where, at p. 539, he said: *"[I] doubt whether this rule is still good law, if indeed it ever was."*

[559] [1988] 1 Lloyd's Rep. 71, [Contingency], at p. 76-8.

[560] Arnould, Vol. 3, when after referring to the judgments of Mustill, L.J. and Saville J. it was stated, at paras.623-624, that the rule is no longer considered a good law in the modern law.

of them could prove that such a misrepresentation was also made personally to him, or, alternatively, unless, as Saville, J. further stated, the old rule

> *" ... could perhaps be supported by proving a custom or usage in the particular market, or by importing an implied term into the contracts of the following underwriters, or even perhaps by treating the rule as resting upon some implied representation made to following underwriters that all material circumstances have been accurately provided to the leading underwriter."*[561]

It remains to be mentioned that the application of the old rule with its presumption of reliance is confined, if it is still considered a good law, to material representations made by the assured or his broker to the leading underwriters. Therefore, whatever passed between the assured or his agent and any intermediate underwriter falls outside the realm of the rule.[562]

The question whether a misrepresentation made to the first underwriter would also extend to subsequent underwriters insuring the same risk and so entitle them to seek the avoidance of the contract as the first underwriter would do, does not appear to have been dealt with before under the Egyptian and Saudi Arabian laws. However, should a question as such arise, the rule that a subsequent underwriter would also be entitled to escape his liability on the grounds of a misrepresentation which was not made to him, but to the first underwriter ought not to be upheld to be the general rule. This is because, unless there is any term or custom to the contrary, it appears unreasonable to hold a subsequent underwriter be entitled to avoid a policy the formation of which was not induced by any misrepresentation only because the judgment of somebody's else who happened to have been the first underwriter was affected by a misrepresentation which the same assured had earlier made to him. Having presented that, it would be hoped that the Egyptian and Saudi Arabian laws would support and adopt the view expressed under the English law by Mustill, L.J.[563] and Saville J.[564] which was that a misrepresentation made to the first underwriter ought not to be extended to subsequent underwriters, unless there was an express or implied term to that effect.

4.6. General comments

Apparently, all the three laws have general understanding that it is part of the assured's duty when he negotiates a contract of marine insurance with the underwriter to ensure that all his material representations are accurate and true. This understanding is shown by the imposition of a clear and distinct duty on the assured in this respect. Although there is also equal understanding that the same duty applies to the agent of the assured in the same manner, apart from ss. 20(1) of the MIA 1906 [UK], neither the MTL 1990 [Egypt], nor the

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[561] *Bank Leumi Le Israel BM v British National Insurance* Ibid., at p. 76.
[562] *Bell v Carstairs* ibid., where it was ascertained, at p. 544, that *"[W]hat passed between the broker and the intermediate underwriters, is to be considered merely res inter alios acta."*. Also, see *Brine v Featherstone* (1813) 4 Taunt. 869.
[563] *The Zephyr* ibid.
[564] *Bank Leumi Le Israel BM v British National Insurance* ibid.

CCL 1931 [SA] have reflected it in their provisions. The duty of the agent under both laws is enforced by the rules of the general law.

Another difference, which exists between the English law on one hand and the Saudi Arabian and Egyptian on the other, is in respect of the classification of representation. While the MIA 1906 [UK] divides representations into more than one type and allocates the appropriate remedy for the misrepresentation of each one, the provisions of the MTL 1990 [Egypt] and the CCL 1931 [SA] do not recognise any similar classification and naturally designate only one remedy for all misrepresentations. However, this deficiency could be cured by having resort to the rules of the Shari'a law which in fact have similar divisions for representations as those existing under the English law. Also, in terms of remedy, the Shari'a law, like the English, will entitle the underwriter to avoid a policy upon the ground of material misrepresentation if it is one of fact. Nevertheless, if it is one of opinion or expectation, no right of avoidance is available to the underwriter unless it is given in bad faith and accompanied by assertion that it is true. Moreover, while the Shari'a law considers a representation of law as a representation of fact, the English law views it as one of opinion.

Finally, although there are apparent deficiencies in the application of the duty of representation under the Saudi Arabian law and although some of which, as explained above, can be overcome by referring to the rules of the Shari'a law, the duty is still one of those areas which is highly recommended to be reformed.

Chapter [5]: The Concepts of Materiality and Actual Inducement

5.1. Introduction

As it has been discussed earlier, it is the duty of the assured, according to the requirements of the doctrine of utmost good faith, to disclose to the underwriter all circumstances bearing upon the risk proposed for insurance. It is also his duty to abstain from making any misrepresentations as to the same. Nevertheless, does the assured's duty of disclosure mean that he is under an unqualified obligation to communicate to the underwrite every fact or circumstance regardless of whether it relates to the risk in question or not? In the same manner, does the assured's duty not to make misrepresentations apply to all facts which he represents to the underwriter irrespective of their materiality to the risk insured? Or there is any sort of limitations which confines the application of both duties to a specific type of information?

No doubt that to require the assured to communicate to the underwriter endless circumstances without any clear criteria differentiating between what is really important to the contract in question and what is merely a matter of general knowledge known or accessible by everybody, would be very impractical and would put him under a cumbersome obligation which would certainly lead to the creation of an imbalance relationship between the assured and the underwriter. This hardship was recognised by Blackburn, J. in *Ionides v Pender*[565] where he stated that

> *"[W]e agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required."*[566]

The answers of the above questions could simply be sought under the English law in ss. 18(1) and 20(1) of the MIA 1906 [UK][567], which state that not all circumstances which are known to the assured are to be fully and accurately disclosed to the underwriter, it is only those material once amongst them which need be correctly and completely disclosed. Therefore, it appears from ss. 18(1) and 20(1) that the application of the duties is confined to the disclosure of material facts only.

This is also the same under the Egyptian and Saudi Arabian laws, where it is not the duty of the assured according to s. 361 of the MTL 1990 [Egypt][568] and s. 342 of the CCL

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[565] (1874) L.R. 9 Q.B. 531.

[566] Ibid., at p. 539.

[567] Ss. 18(1) " ... *the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured ... .*" 20(1) *"Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true."*

[568] *"The insured ... shall give correct data ... which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."*

1931 [SA][569] to make the underwriter aware of those circumstances which are not considered important to the estimation of the risk proposed for insurance.

So, it is materiality which distinguishes circumstances which are important and relevant to the decision of the underwriter from the general body of all circumstances. This qualification seems reasonably fair for the benefit of both the assured and the underwriter. On one hand, it relieves the assured from the burden of disclosing to the underwriter a great deal of circumstances, since his obligation will be restricted to the disclosure of material facts only. On the other hand, it relieves the underwriter from wasting his valuable time examining and considering a whole host of information, only some of which are relevant and, therefore, material, whereas a lot of which are irrelevant and of no importance to his decision.

In this sense, the importance of the concept of materiality, which is one of the most essential ingredient of the doctrine of utmost good faith, springs from being used as a legal device to differentiate between what is material to be fully and correctly disclosed and what is not and, also, from being used as a guideline specifying when the underwriter is or is not allowed to avoid the contract[570] for any allegation of a non-disclosure or misrepresentation.

The operation of the concept of materiality has caused considerable concern amongst those involved in the insurance business. This concern was about how does the assured know what type of circumstances is material and what type is not?, what form should the test of materiality take? and according to what criteria the materiality of a circumstance is assessed? The answers of all of these questions and other relevant issues will be deeply considered and clearly addressed in this chapter. But, due to the comparative nature of this thesis and as a matter of ease, its structure will take the following form: definition, the rules regulating materiality and inducement and general comments.

5.2. Definition

Under the English law, the question of the materiality[571] of a fact used to be formerly determined with reference to the rate of premium chargeable to the underwriter. Thus, if a fact was of the nature that, if disclosed, it caused or might have caused the underwriter to charge a higher premium than that which he would otherwise have charged, had the fact not

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[569] *"If the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."* Also, see Haberbeck, Andreas., & Galloway, Mark., Saudi Shipping Law, (1990), at p. 232-3, (hereafter Haberbeck & Galloway); El-Sayed, Hussein. M., Maritime Regulations in the Kingdom of Saudi Arabia, (1987), at p. 192-3, (hereafter El-Sayed).

[570] The right of avoidance is now subject to the satisfaction of the additional requirement of inducement recently introduced by the House of Lords in *Pan Atlantic v Pine Top* [1994] 2 Lloyd's Rep. 427.

[571] In this regard, see the examination of the development of the definition of the concept of materiality in Park., S., The Duty of Disclosure in Insurance Contract Law, (1996), at p. 69-72. (hereafter Park)

been non-disclosed or misrepresented, the fact would be material and its non-disclosure or misrepresentation would make the contract voidable.[572]

However, in the ensuing period, Lord Tenterden C.J., in *Rickards v Murdock*[573], was of the opinion that a fact was material, if it would influence the judgment of the underwriter in respect of the risk to be insured and the premium payable thereunder.[574] In *Elton v Larkins*[575], Tindal, C. J. gave a similar definition, but he placed great emphasis upon the effect of a fact, if communicated, upon the mind of the actual underwriter. So, a fact was material if it would only induce the actual underwriter either to reject to insure altogether or to demand a higher premium than he would normally do.[576]

The adoption of such subjective attitude[577] towards materiality concentrating upon the effect of the fact upon the judgment of the actual underwriter rather than its effect upon the magnitude of the risk as the keystone determining the materiality of a fact caused Duer[578] to express his concern about the ambit of what might constitute a material fact and whether this could lead to the imposition of unjust obligation upon the assured. Having such concern in mind and having the idea that a material fact should be a matter affecting the magnitude of the risk insured, he expressed, as being the most reasonable opinion, the view that material facts would be those, which increased or tended to increase the risk in question and which would be proper to consider by a prudent and experienced underwriter.[579] He further admitted, as an exception to his definition of materiality, that a knowingly fraudulent representation of a matter, however extraneous to the risk, would be material and, then, could avoid the contract, if it would influence the judgment of the underwriter.[580]

On the other hand, Parson[581], who had similar concern about the scope of the duty of disclosure, but who seemed to have looked at the issue from a different angle, advanced a rather different definition for materiality. In his view the term *'material'* ought to be a description of all which would affect the judgment of a rational underwriter governing himself by the common principles and calculations on which underwriters do in practice act.[582] This meant that the materiality of a fact would be determined by its relevance to or effect upon the decision of a rational underwriter rather than the risk insured.

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[572] *Willes v Glover* (1804) 1 Bos. P.N.R. 14, [Marine], at p. 16; *Durrell v Bederley* (1816) Holt 283, [Marine], at p. 286; *Foley v Tabor* (1861) 2 F. & F. 663, [Marine], at p. 672.
[573] (1830) 10 B. & C. 527, [Marine].
[574] Ibid., at p. 540-1.
[575] (1832) 5 Car. & P. 385, [Marine].
[576] Ibid., at p. 392.
[577] The decision of Tindal, C. J in *Elton v Larkins* was subsequently adopted by Arnould, Vol. 2, at para.627, as representing the right definition of materiality.
[578] The Law & Practice of Marine Insurance (1846) Vol. II, at p. 388-91.
[579] Ibid.
[580] Ibid.
[581] A Treatise on the Law of Marine Insurance & General Average (1848), Vol. I, at p. 495-6.
[582] Ibid.

In 1874, the concept of materiality was deeply discussed in *Ionides v Pender*[583], where the question of what should be determining the materiality of a fact was reviewed. After considering both of the above two approaches, the Court was in favour of that advanced by Parsons and described it as being a sound rule. The judgment of the Court, which was delivered by Blackburn, J., declared that materiality ought to be

> *"all ... which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act ... ."*[584]

The decision of *Ionides v Pender* was subsequently upheld by the judgment of the Court of Appeal in *Rivaz v Gerussi*[585], in which Brett, L.J. described the view of Parsons as giving the right rule[586]. After five years, Brett, L.J. had another opportunity in the Court of Appeal to reaffirm his full disagreement with the narrow approach to materiality presented by Duer. This was in *Tate v Hyslop*[587], where he stated that

> *"[T]he authorities shew that the materiality is not as to the risk, but as to whether it would influence the underwriters in entering upon the insurance or the terms on which they would insure."*[588]

The later definition of materiality based upon the prudent underwriter approach was consequently incorporated into the MIA 1906 and is now embodied in ss. 18(2) and 20(2). According to the Act's definition, 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".* [589]

Therefore, according to the MIA 1906, a fact cannot be deemed material, unless it has the nature of causing some sort of effect[590] upon the decision of a prudent underwriter in respect of the rate of the premium asked by him or upon his willingness to enter into the contract.

In the same manner, a material fact is also defined under the Egyptian law by s. 361 of the MTL 1990 [Egypt] as being any circumstance which would *"enable the insurer to estimate the risks as covered with insurance."* It follows that if a circumstance is not of the nature that if disclosed, it would affect the judgment of the factual underwriter as to the

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[583] (1874) L.R. 9 Q.B. 531.
[584] Ibid., at p. 539.
[585] (1880) 6 Q. B. D. 222.
[586] Ibid., at p. 229.
[587] (1885) 15 Q.B.D. 368.
[588] Ibid., at p. 376.
[589] A similar definition was also declared by Trakman., E. L., in his article: Mysteries Surrounding Material Disclosure in Insurance Law, (1984) 34 University of Toronto Law Journal 421, at p. 421. He stated that materiality can be defined *"as a contingency, state of affairs, or event which has a 'fundamental' effect upon the insurance risk. More specifically, a material misrepresentation or concealment is conceived of as a contingency which has so fundamental an effect upon the risk that it undermines the willingness of the insurer to provide insurance cover either in toto or at the premium originally stipulated".*
[590] The degree of effect required will be discussed underneath.

assessment of the extent of the risk under consideration, then it will not be deemed material and there is no need for its disclosure and no responsibility for its non-disclosure or misrepresentation.[591]

Accordingly, it was held by the Mixed Court of Appeal that the non-disclosure of the fact that the assured's commercial name, which he used to use in good faith, did not exist, did not affect the estimation of the risk insured and, so, would not avoid the policy.[592] In like manner, it was held by the same Court that the fact that the assured omitted in a motor insurance to disclose that he had weakness in his hearing was not material because it did not affect the assessment of the risk proposed for insurance.[593]

Also, in a life case, it was held by the Court of Civil Cassation that the non-disclosure of the assured of the fact that he was seen by a doctor and was suffering from burns of the second and third degree before the conclusion of the contract was material because it affected the estimation of the risk made by the insurance company.[594]

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[591] Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), 2nd ed., (1990), Vol. 7 (Part 2), at para.614, (hereafter Al Sanhuri, Vol. 7/2); Sharaf Al Diyn, Ahmed., Ahkam At Ta'myn, (Insurance Rules – in Arabic), 3rd ed., (1991), at para.218, (hereafter Sharaf Al Diyn); Ibrahim, Jalal. Mohammed., At Ta'myn: Dirash Muqaranh (Insurance: A Comparative Study – in Arabic), (1989), at paras.336-7, (hreafter Ibrahim); Lutfi, Mohammed. Husam. Mahmud., Al Ahkam Al 'amah L Aaqd At Ta'myn, (The General Rules of The Insurance Contract – in Arabic), 2nd ed., (1991), at p. 176-7, (hereafter Lutfi); Shar'an, Mohammed., Al Khatar Fi Aaqd At Ta'myn, (The Risk in The Contract of Insurance – in Arabic), (1984), at paras.26-7, (hereafter Shar'an); Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at para.675, (hereafter Ta Ha); Awad, Ali. Jamal Al Diyan., Al Qanun Al Bahry, (The Maritime Law – in Arabic), (1987), at para.535, (hereafter Awad); Al Mahdi, Nazih. Mohammed Al Sadiq., Aaqd At Ta'myn, (The Insurance Contract – in Arabic), (undated), at p. 251, (hereafter Al Mahdi); Al Badrawi, Abdul Mun'am., At Ta'myn (The Insurance – in Arabic), (1981), at p. 168-70, (hereafter Al Badrawi); Yihya, Abdul Wadood., Al Mujaz Fi Aaqd At Ta'myn, (The Concise in the Contract of Insurance – in Arabic), (undated), at p. 141-44, (hereafter Yihya); Zahrah, Mohammed., Ahkam Aaqd At Ta'myn Tabbqann Li Nusus Al Taqniyn Al Madany Wa Ahkam Al Qada, (The Rules of The Insurance Contract According to The Provisions of the Civil Code and The Case Law – in Arabic), (1984-1985), at p. 196, (hereafter Zahrah); Mursi, Mohammed. Kamil., Al Aaqud Al Madanyah Al Saghirah, Aaqd At Ta'myn, (The Small Civil Contracts, The Contract of Insurance – in Arabic), 3rd ed., (1942), at para.652, (hereafter Mursi, The Small Civil Contracts). It ought to be mentioned that the discussion of the test of materiality contained in s. 361 of the MTL1990 [Egypt] is presented in detail underneath.

[592] Mixed Appeal 17/2/1892, Civil Collection, Year No. 4, p. 110, [Goods].

[593] Mixed Appeal 28/12/1933, Civil Collection, Year No. 46, p. 109, [Motor]. Also, see Mixed Appeal 23/6/1937, Civil Collection, Year No. 49, p. 274, [Fire], where it was held that if the assured declared that the risk to be insured was all types of cloths, the fact that some of the cloths were second hand would not constitute a material non-disclosure entitling the underwriter to avoid the contract, for that its non-disclosure did not affect his judgment.

[594] Collection of the Court of Cassation's Judgments, 26/5/1991, Case No. 188, Judicial Year 56, p. 1205, [Life]. Also, see Collection of the Court of Cassation's Judgments, 25/5/1981, Case No. 286, Judicial Year 47, p. 1583, [Burglary], where the false statements of the assured that there were guards where the goods insured were being stored and that he was keeping accurate and regular accounts of his business were held material, for that they affected the judgment of insurance company as to the risk insured; Collection of the Court of Cassation's Judgments, 14/4/1949, Case No. 407, Collection of Aumar, Vol. 5, p. 755, where the misrepresentations of the assured that he used to record his sales and purchases in a special record and that he used to keep a full list of his goods were held to be material, since they influenced the calculation of the risk in question; Collection of the Court of Cassation's Judgments, 30/11/1967, Case No. 269, Judicial Year 18, p. 1773, [Life], where it was held that the non-disclosure and misrepresentation of some illnesses in the assured's kidneys made the risk appear smaller than it was; Mixed Appeal 5/2/1930, Gazette 20, No. 82, p. 79, [Fire], where it was held that the insurance company would be able to escape its liability for the loss of the insured building because the assured did not disclose the material fact that his former partner had threatened him in front of witnesses to fire his insured building.

The position under the Saudi Arabian law resembles that under the MIA 1906 [UK] and the MTL 1990 [Egypt] in that s. 342 of the CCL 1931 [SA] defines a material fact as that one which its non-disclosure or misrepresentation would influence the judgment of the underwriter and make him deem the risk as *"a risk nullifying the policy or which would have resulted in the policy being made on different terms"*. Therefore, it follows that if the non-disclosed or misrepresented fact did not affect the factual underwriter's decision as to the evaluation of the object to be insured, then it would not be deemed material.[595]

The requirement of materiality as an essential factor specifying the ambit of the duty of the assured to tender full and accurate disclosure to the underwriter was also stressed on by many cases. For example, in a case about buildings insurance[596], the arbitral panel, while giving judgment for the insured company in respect of the loss of its insured buildings and printing machine caused by fire, declared that it was the duty of the assured in a contract of insurance to observe utmost good faith and not to withhold any circumstances affecting the insurance contract in question[597]. Also, in a case of burglary insurance[598], it was stated by the arbitral panel, as being one of the main principles of insurance, that

> *"the assured is required to disclose to the underwriter at the time the contract is being concluded all information which the latter is concerned with to enable him to estimate the risks he is asked to cover, to calculate the premium payable to him by the assured and to decide whether to accept to insure or not."* [599]

Having mentioned that, although the treatment given to the concept of materiality under the English, Egyptian and Saudi Arabian laws may differ from one law to another, in general, the standard defined by all of them to determine whether a non-disclosed or misrepresented fact is material or not is the same, namely its effect upon the judgment of the underwriter.

5.3. The rules governing materiality and inducement

The rules regulating the concept of materiality under the MIA 1906 [UK] are laid down in ss. 18(2) and 20(2), which respectively provide that

> *"[E]very circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." "A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

Although that ss. 18(2) is concerned with the duty of disclosure, whereas ss. 20(2) is concerned with the duty of representation, the words of the two sub-sections are identical and

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[595] The full consideration of the test of materiality embodied in s. 342 of the CCL 1931 [SA] is given below.
[596] Arbitral award 18/5/1993, [Fire].
[597] Ibid., at p. 14.
[598] Arbitral award 22/12/1986, [House].

it is now established that they have the same meaning and application.[600] Correspondingly, the test used to determine the materiality of a fact is the same irrespective of whether the fact is alleged to have been misrepresented or non-disclosed. Also, the above two subsections are now established to be stating the law as to materiality in marine and non-marine insurance contracts. This generality of application was admitted in many cases, where it was held that the provisions of the MIA 1906 in respect of non-disclosure and misrepresentation were no more than a codification of the common law of all insurance law and, therefore, common sense should rebel against the view that there should be a difference between marine and non-marine insurance in this respect.[601] This fact has recently been reaffirmed in the House of Lords by the judgment of Lord Mustill in *Pan Atlantic Insurance v Pine Top Insurance*.[602]

On the other hand, the rules regulating the concept of materiality under the MTL 1990 [Egypt] are contained in s. 361 which reads that

> *"[T]he insured ... shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance ... ."*

Whereas, such rules under the CCL 1931 [SA] are embodied in s. 342 which declares that

> *"[I]f the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof, regardless of whether the risk is not as grave as that which appears to result from such silence or statement, or the risk, other than supposed risk results, which is a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void ... "*

Similar to ss. 18(2) and 20(2) of the MIA 1906 [UK], s. 361 of the MTL 1990 [Egypt] and s. 342 of the CCL 1931 [SA] have also general application and appear to be stating the law regulating the concept of materiality in both marine and non-marine insurance context.[603]

Having mentioned that, the discussion of the application of the concept of materiality and inducement under the MIA 1906 [UK], the MTL 1990 [Egypt] and the CCL 1931 [SA] will be made through the examination of the following issues: the test applied to determine

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[599] Ibid., at p. 15. For other cases holding the same see Arbitral award 5/3/1988, [Burglary], at p. 13; Arbitral award 11/12/1995, [Life], at p. 15; Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, at p. 18.

[600] *Highlands Insurance v Continental Insurance* [1987] 1 Lloyd's Rep. 109, at p. 113-4.

[601] See, for example, *Joel v Law Union & Crown Insurance* [1908] 2 K.B. 863, at p. 883; *Godfrey v Britannic Assurance* [1963] 2 Lloyd's Rep. 515, at p. 528; *Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep. 485, at p. 487 and p. 493; *Highlands Insurance v Continental Insurance*, ibid., at p. 113-4.

[602] [1994] 2 Lloyd's Rep. 427, at p. 447.

[603] For further information about this point see 'Chapter [3]: 3.4. The provisions regulating the application of the duty'.

the materiality of a circumstance[604] and the question of actual inducement, the time at which materiality is judged, materiality is a question of fact and general comments.

5.3.1 The test determining the materiality of a circumstance and the question of actual inducement

5.3.1.1. The position under the English law

Before the enactment of the MIA 1906, there was a considerable diversity of opinions amongst the English Courts concerning the appropriate test to be applied to determine whether a fact was material or not. The general feeling was that the materiality of a circumstance was a matter of judgment, but the core of the diversity was that according to whose judgment the question of materiality should be answered? Is it that of the underwriter or the assured or is it somebody else's judgment, which should be taken into account when deciding whether a fact is material or not?

Traditionally, there were four possible tests[605], based upon the judgments of either the assured or the underwriter, to answer this question. These were the reasonable man test[606], the actual assured test[607], the actual underwriter test[608] and the prudent underwriter test[609].

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[604] The words "*circumstances*" or "*circumstance*" and "*facts*" or "*fact*" are here used interchangeably.

[605] *Lambert v Co-operative Insurance Society* ibid., per MacKenna, J. at p. 487.

[606] This test, it is submitted, made its first appearance in the decision given by Lord President Inglis in *Life Association of Scotland v Foster* (1873) 11 Session Cas. 3rd Ser. 351, at p. 359-60, where it was held that a circumstance would be held material if a reasonable man considered it to be so. This test was subsequently adopted and applied by many cases. For example, *Joel v Law Union and Crown Insurance Company* [1908] 2 K. B. 863, per Fletcher Moulton L.J. at p. 883-5; *Horne v Poland* [1922] 2 K.B. 364, [Life], per Lush J. at p. 366-7; *Becker v Marshall* [1922] 11 Ll.L.Rep. 114, [Burglary], per Salter J. at p. 118, (the case went to the Court of Appeal, (1923) 12 Ll.L.Rep. 413, where the judgment of Lord Sterndale, at p. 414, was also to the same effect whereas, the judgment of Scrutton L.J. was supporting the test of a prudent underwriter contained in the MIA 1906). See also *Godfrey v Britannic Assurance Company* [1963] 2 Lloyd's Rep. 515, per Roskill J. at p. 532; *Roselodge v Castle* [1966] 2 Lloyd's Rep. 113, per McNair, J. at p. 129-31; *Anglo-African Merchants v Bayley* [1970] 1 Q.B. 311, per Megaw J. at p. 319. This test was also adopted by the report of the Law Reform Committee 1957 (Command Paper 62 of 1957), as a recommendation to change the existing law with regard to the issue of materiality. However, the test of a reasonable man was finally rejected by the judgment of Mackenna J. and Cairns L.J. in *Lambert v Co-operative Insurance Society* [1975] 2 Ll.L.Rep. 485, at p. 490 and at p. 493.

[607] It does not appear that there was any case in favour of the proposition that a fact was material if it would be deemed so by the actual assured. In fact, this test was forcibly rejected by some cases, for instance, *Lindenau v Desborough* (1828) 8 B. & C. 586, per Bayley J. at p. 592; *Bates v Hewitt* (1867) L.R. 2 Q.B. 595, per Mellor J. at p. 608; *London Assurance v Mansel* (1879) 11 Ch. D. 363, at p. 368; *Brownlie v Campbell* (1880) 5 App. Cas. 925, at p. 954; *Joel v Law Union and Crown Insurance Company* ibid., at p. 884; *Godfrey v Britannic Assurance Company* ibid., at p. 529.

[608] The first indication in favour of the actual underwriter test seems to have been found in the judgment of Lord Sterndale and Scrutton L.J. in *Visscherij v The Scottish Metropolitan Assurance* [1921] 27 Com. Cas. 198, [CA-Marine], at p. 212 and p. 216. Although that this decision was approved and adopted by Kerr, J. in *Berger v Pollock* [1973] 2 Lloyd's Rep. 442, [Marine], at p. 463 and by Lloyd, J. in *C.T.I. v Oceanus* [1982] 2 Lloyd's Rep. 178, at p. 189, it was eventually overruled by the decision of Parker, L.J. in the Court of Appeal in *C.T.I. v Oceanus* [1984] 1 Lloyd's Rep. 476, at p. 511. Even Kerr, L.J. himself, at p. 495, whose decision in *Berger v Pollock,* ibid., was strongly in favour of the actual underwriter test, rejected it and stated that his judgment in favour of the actual underwriter test was wrong. This conclusion was afterwards upheld by the judgment of Waller, J. in *Pan Atlantic v Pine Top* [1992] 1 Lloyd's Rep. 101, at p. 103.

[609] This test is thoroughly discussed below.

However, as it has been mentioned above, it was only the prudent underwriter test which was subsequently chosen by the draftsman of the MIA 1906 as being the appropriate yardstick according to which the question of the materiality of a fact should be resolved under the English law.

5.3.1.1.1. The prudent underwriter test

> Ss. 18(2) of the MIA 1906: *"Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."* Ss. 20(2) of the MIA 1906: *"A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

It is now clear that it is the judgment of the prudent underwriter, and nobody else's, that a fact needs to affect before it can be said it is material. In accordance with that, it does not suffice a fact to be material to have the nature of influencing the judgment of the actual underwriter, nor that of a reasonable man, nor that of the particular assured. It is only, as ss. 18(2) and 20(2) state, the judgment of the prudent underwriter which has to be affected.

When examining the test of materiality contained in ss. 18(2) and 20(2), it appears that it consists of three important parts which are: *'a prudent insurer'*, circumstances material to *'fixing the premium, or determining whether he will take the risk'* and *'would influence the judgment'*. Since, none of the three parts was defined by the draftsman of the Act, it would be very crucial, in order to understand the application of the test, to have all of them considered and commented upon in turn.

5.3.1.1.1.1. The character of the prudent underwriter

The MIA 1906, as it has been pointed out earlier, does not state who is that person who can be classified as the prudent underwriter or what his features, which distinguish him from the whole group of underwriters, are? All that mentioned by the Act is that a circumstance is material if it would influence the judgment of *'a prudent underwriter'*. Evidently, the use of the unrestricted and plain expression *'a prudent underwriter'* by the draftsman of the Act alludes to the fact that the judgment according to which a circumstance is judged ought to be of an abstract hypothetical underwriter who, in the ordinary course of business, governs himself by the principles and calculations on which underwriters do in practice act. This, in fact, is what was held by the judgment delivered by Blackburn, J. in *Ionides v Pender*[610] which constitutes, it is submitted[611], the bases of ss. 18(2) and 20(2).

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[610] Ibid., at p. 539.
[611] Park., at p. 70.

This characteristic would not be imputed neither to the actual underwriter nor to any other underwriters, but to a hypothetical prudent underwriter as it was held by Rowlatt, J. in *North British Fishing Boat Insurance v Starr*[612], where he pointed out that

> *" ... when I say prudent underwriter, I mean a prudent underwriter in the abstract without reference to the personal equation of the particular underwriter. "*[613]

This is also evident from the judgment given in some other cases which defined the expression *"a prudent underwriter"* as being a *"more experienced and intelligent insurers"*[614], *"rational underwriters of ordinary care and skill"*[615], *"prudent and experienced underwriter"*[616] and *"normal, prudent underwriter"*[617].

This meaning was further upheld by the judgment of Kerr, L.J. in the Court of Appeal in *C.T.I. v Oceanus*[618], where he indicated that ss. 18(2) is

> *" ... directed to what would have been the impact of the disclosure on the judgment of the risk formed by a hypothetical prudent insurer in the ordinary course of business ... . "*[619]

Therefore, it should be very indisputable that when the Act attributes the answer of the question of materiality to the judgment of a prudent underwriter, it does not mean that it intends to ascribe the answer to the judgment of any particular underwriter as being the prudent underwriter, but it actually intends such a question to be answered in relation to the practice of prudent underwriters in general. This is also very explicit from the judgment declared by Parker, L.J. in *C.T.I. v Oceanus*[620], where he said that the Court cannot

> *" ... choose one prudent underwriter rather than another. The very choice of a prudent underwriter as the yardstick in my view indicates that the test intended was one which could sensibly be answered in relation to prudent underwriters in general. It is possible to say that prudent underwriters in general would consider a particular circumstance as bearing on the risk and exercising an influence on their judgment towards declining the risk or loading the premium."*

Consequently, it would not be the duty of the particular court, in relation to any inquiry concerning the test of materiality and what would be the value of the evidence given thereunder, to assess either the particular underwriter or one of the expert witnesses as being a prudent underwriter and acts upon his evidence. Nor would the duty of the court be to seek to know what expert underwriters themselves would do. This is because its real function is to listen and evaluate evidence given by expert witnesses, this could include the particular underwriter, to assist itself in deciding what a prudent underwriter would or would not do in a

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[612] [1922] LI.L Rep. 206, [Marine], at p. 210.
[613] Ibid., at p. 210.
[614] *Girdlestone v North British* (1970) L.R. 11 Eq. 197, *Babatsikos v Car Owners Mutual Insurance* [1970] E.R. 297, at p. 307.
[615] *Rivaz v Gerussi,* ibid, at p. 228.
[616] *Tate v Hyslop,* ibid, at p. 376 & p. 380.
[617] *Anglo-African Merchants v Bayley* [1970] 1 Q. B. 311, at p. 319.
[618] [1984] 1 Lloyd's Rep. 476.
[619] Ibid., at p. 492.
[620] Ibid., at p. 511.

similar situation. The evidence given by expert witnesses, as such, should be as to what, in their opinion, in the general practice of underwriters, a prudent underwriter would do.

In fact, all of this was dealt with by Forbes, J. in his decision in *Reynolds & Anderson v Phoenix Assurance*[621] He clearly explained how evidence of materiality ought to be adduced and what merit the Court should assign to it. This was expressed as follows:

> *"[I]n the first place the evidence of insurers called in this way is expert evidence in the sense that such witnesses are assisting the Court in deciding what a reasonable and prudent underwriter would or would not do. They are not to give evidence of what they themselves would do, because their evidence is expert, that is opinion evidence and not factual. They are to give evidence of what, in their opinion, having regard to the general practice of underwriters, a reasonable underwriter would do."*[622]

In connection with that, it is also the duty of the court, when applying the test of a prudent underwriter and assessing the value of the evidence given, not to ascribe to such underwriters a higher degree of intelligence or prudence than that which is normally expected and, in fact, shown by them in the ordinary course of business. This is apparent from the judgment of Atkin J. in *Associated Oil Carriers v Union Insurance Society of Canton*[623], where he rejected the contention of the counsel of the defendants that a prudent underwriter should be acquainted with higher standard of knowledge. Having rejected the above contention, Atkin J. proclaimed the standard of prudence which is normally expected of a prudent underwriter as follows:

> *"[K]nowing so much, he would clearly have been influenced. I think that this standard of prudence indicates an insurer much too bright and good for human nature's daily food. There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurers carrying on business in that market at that time. The evidence satisfies me that if the standard of prudence is the ideal one contended for by Mr. Mackinnon, there were in July, 1914, no prudent insurers in London, or if there were they were not to be found in the usual places where one would seek for them."*[624]

As to the scope of the application of the test, it was argued[625] that the test should take into account the nature of the type of insurance it applies to, for that each branch of insurance has its own circumstances. For instance, in the field of non-marine insurance, the non-disclosure of the fact that the application of the assured for insurance was formerly rejected by other underwriters would unequivocally constitutes a breach of the duty of good faith.[626] Whereas, the non-disclosure of such a fact in the field of marine insurance would not have the same effect, for such a circumstance was held to be immaterial.[627] In conformity with the above argument, it was suggested that the words *'in that type of insurance'* ought to be added

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[621] [1978] 2 Lloyd's Rep. 440.
[622] Ibid., at p. 457-8.
[623] [1917] 2 K.B. 184, [Marine].
[624] Ibid., at p. 192.
[625] MacGillivray & Parkington, 8th ed., (1988), at para.658.
[626] *Locker & Woolf v Western Australian Insurance* [1936] 1 K.B. 408, [CA-Fire], at p. 415.
[627] *Glasgow Assurance v Symondson* (1911) 16 Com. Cas. 109, per Scrutton J. at p. 119; *North British Fishing Boat Insurance v Starr*, ibid., at p. 210.

to the wording of ss. 18(2) and 20(2) of the MIA 1906 after the expression of *'a prudent insurer'*.[628]

5.3.1.1.1.2. Circumstances material to *'fixing the premium, or determining whether he will take the risk'*

Prior to the enactment of the MIA 1906, as it has been discussed above, there was a debate amongst courts and commentators upon the question of what type of circumstances ought to be considered material. In that time, there were two views. The first was that of Dure and was to the effect that the type of circumstances described as material would be those affecting the insured risk itself in the sense that they increased the risk or were likely to do so and which would be appropriate in the view of a prudent and experienced underwriter to consider. Whereas, the other one adopted by Parson was that material circumstances should be those which would have an impact upon the judgment of a rational underwriter acting in conformity with the principles and calculations on which underwriters do in practice act.

The view of Parson, rather than that of Duer, was consequently admitted and approved in a series of cases, namely *Ionides v Pender*[629], *Rivaz v Gerussi*[630] and *Tate v Hyslop*[631]. This approach was eventually incorporated into the MIA 1906 and appears as ss. 18(2) and 20(2). Therefore, according to the Act's definition, 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".*

It follows, therefore, that a fact cannot be deemed material, unless it has the nature of causing some sort of effect upon the decision of a prudent underwriter in respect of the rate of the premium asked by him or upon his willingness to enter into the contract. Apparently, this means that the application of the test is restricted to two situations in which circumstances, if they influence the judgment of a prudent underwriter, will be deemed material. The first is when circumstances influence the judgment of a prudent underwriter in calculating the rate of the premium, whereas the second situation is when circumstances have an influence upon his judgment in determining whether he will take the risk or not.

5.3.1.1.1.2.1. *'In fixing the premium'*

Although the words *'in fixing the premium'* contained in ss. 18(2) and 20(2) appear to have a narrow application confined to circumstances which would affect the judgment of a prudent underwriter as to his estimation of the required premium, such literal interpretation was recently rejected. Their right application was held to be wider than that and to extend to

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[628] In this connection, see also Park, at p. 77.
[629] (1874) L.R. 9 Q.B. 531.
[630] (1880) 6 Q.B.D. 222.
[631] (1885) 15 Q.B.D. 368.

any other related matters required for placing the desired cover, for instance, terms or clauses, etc., which would also influence the judgment of a prudent underwriter in fixing the premium. This broad meaning was adduced by Kerr, L.J. in his judgment in the Court of Appeal in *C.T.I. v Oceanus*[632], where he said that the words *'in fixing the premium'*

> *" ... must comprise any terms, and not only the level of premium, which an insurer might require in the wording of the cover, e.g. warranties, franchises, deductions, exceptions, etc. "*[633]

5.3.1.1.1.2.2. *'In determining whether he will take the risk'*

In the second situation, which should be subject to the interpretation recently given to the term *'influence the judgment of a prudent underwriter'*[634], a circumstance will be material if it leads the judgment of a prudent underwriter with reference to his decision whether to insure or not. It follows from that if a circumstance does not affect the mind of a prudent insurer to accept the risk or refuse it, it will be immaterial.

5.3.1.1.1.2.3. *'Would influence the judgment'*

It is fairly clear that ss. 18(2) and 20(2) express that a circumstance is material if it will influence the judgment of a prudent underwriter in estimating the rate of the premium or deciding whether to enter into the contract or not. But, what it is not, however, clear is what the two sub-sections meant by the words *'would influence the judgment of a prudent underwriter'*. The difficulty encountered in interpreting them appears in the fact that materiality is a question of degree and, accordingly, the impact of an undisclosed or misrepresented fact upon the judgment of a prudent underwriter, if it was correctly made known, could vary depending upon the circumstances of each case. In one case, the influence could be that a prudent underwriter would have refused to insure altogether had he known the truth. In another, such effect would be that had he been told the correct circumstance, he would still, nevertheless, have underwritten the risk but on different terms or at a higher premium or both. One additional possibility would be that had the circumstance been communicated to a prudent underwriter, he would still have accepted the risk on the same terms and at the same premium as those upon which he would have made the original policy had the circumstance not been communicated to him.[635]

Affirmatively, the determination of what is the right construction the law ascribes to the expression *'would influence the judgment of a prudent underwriter'* is very consequential. On the first hand, this would make it easier to identify those circumstances

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[632] [1984] 1 Lloyd's Rep. 476.
[633] Ibid., at p. 492 and per Stephenson, L.J. at p. 529.
[634] This issue is greatly discussed in the succeeding sub-section.

which influence the judgment of a prudent underwriter and which, accordingly, be the duty of the assured to correctly disclose. On the other, this is also because the identification of the degree of influence required upon the judgment of a prudent underwriter would ascertain the situations in which the actual underwriter is allowed to avoid the policy for the non-disclosure or misrepresentation of a material fact.[636] Such importance would apparently excuse presenting a rather detailed examination of the development of the construction attributed to the terms *'would influence the judgment of a prudent underwriter'* by the English insurance law, which is believed to be an essential element without which the test of materiality would not be completely understood.

5.3.1.1.1.2.3.1. The decisive influence test

At the outset, it was submitted that the test contained in ss. 18(2) should be constructed to mean that the underwriter would only succeed on a defence of non-disclosure or misrepresentation if he could satisfy the court by evidence that had a prudent underwriter known of the concealed or misrepresented fact, he would have declined the risk altogether or charged a higher premium. This meant that it would not be enough for the underwriter in order to avoid the contract to show that the said fact was of a nature that, if disclosed, a prudent underwriter would take into account when reaching his decision whether or not to accept that risk and, if yes, what premium to charge.

Although this test, which was subsequently known as the decisive influence test, was actually declared in many cases[637], it was distinctly announced in clear and conclusive words by Tindal, C.J. in *Elton v Larkins*[638], where he expressed that

> *"[A] material concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium."*[639]

However, it was in 1925 when this test came, for the first time, under real and direct consideration in a Canadian case called *Mutual Life Insurance v Ontario Metal Products*[640]

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[635] In this regard, see Clarke, Failure to Disclose and Failure to legislate: Is it material? –II [1988] JBL 298, at p. 299; Clarke, M. A., The Law of Insurance Contracts, 1st ed., (1989), at para.23-7A (thereafter Clarke); Clarke, M., Insurance Contracts and Non-Disclosure - *Pan Atlantic v Pine Top*, (1993) LMCLQ 297, at p. 297-8.

[636] This, of course, is subject to the requirement of inducement announced by the House of Lords in *Pan Atlantic v Pine Top*.

[637] *Stribley v Imperial Marine Insurance* (1876) 1 Q.B.D. 507, at p. 512; *Blackburn, Low v Vigors* (1886) 17 Q.B.D. 553, [Marine], a contrary view was expressed by Lord Esher at p. 562, affirmed by the House of Lords in (1887) 12 App. Cas. 531; *Laing v Union Marine* (1895) 1 Com. Cas. 11, [Marine], at p. 17-8; *Cantiere Meccanico Brindisino v Janson* [1912] 3 K.B. 452, [Marine], at p. 467; *London General Omnibus v Holloway* [1912] 2 K.B. 72, at p. 77.

[638] (1832) 5 Car. & P. 385.

[639] Ibid., at p. 392.

[640] [1925] AC 334, [Life], [Canadian Case].

5.3.1.1.1.2.3.1.1. *Mutual Life Insurance v Ontario Metal Products*

5.3.1.1.1.2.3.1.1.1. The facts of the case

The case was about a policy of life insurance on applying for which the assured had to fill in an application form according to which he was asked to give the name of every physician or practitioner consulted by him in the past five years. Innocently, he had not mentioned the name of one of the doctors, namely Dr. Fierheller. The case came before the Privy Council and the contract was governed by the Law of Ontario, which stated that the inaccuracy of any circumstance in the application form would not avoid the contract unless it was material, which was a question for the court to determine.

5.3.1.1.1.2.3.1.1.2. The judgment

Since the Law of Ontario did not provide any definition for materiality, the Privy Council had to decide what was the right test to apply. The Privy Council rejected the argument of the insurance company that by asking this question they showed that it was material to them to know the answer. The insurance company suggested an alternative test which was that a concealed fact would be material if its disclosure led the underwriter to act differently, either by rejecting the insurance at the same premium or delaying its acceptance. The Privy Council rejected the latter effect, but accepted that the right test of materiality was that which would lead a prudent underwriter to refuse the risk or ask for a higher premium. Subsequently, the concealed fact was not found material and a verdict was found for the assured. The test of materiality applied by the Privy Council was unmistakably laid down by the judgment given by Lord Salvasen who stated that

> " *... the appellants' counsel frankly conceded that materiality must always be a question of degree, and therefore to be determined by the Court, and suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted Dr. Fierheller. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium... .*"[641]

A while later, the decisive test announced in *Mutual Life Insurance v Ontario Metal Products* was approved and incorporated into the English law by the judgment of Lord Greene in *Zurich General Accident v Morrison.*[642] In this case, which was about a policy of

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[641] Ibid., at p. 350-1.
[642] [1942] 2 K.B. 53.

motor insurance made under the Road Traffic Act 1934[643] entitling an injured third party to recover against motorist underwriters provided that the latter will not obtain a declaration from the court to avoid the policy upon the ground of non-disclosure of a material fact[644], Lord Greene affirming the judgment of the lower court pointed out that

> *"[T]he question then arise whether this admitted non-disclosure was non-disclosure of a material fact within the definition of the word "material" in sub-section 5 and whether on the facts the policy was "obtained" by it. In answering these questions Mr. Justice Atkinson adopted the test laid down by the privy Council in Mutual Life Insurance Co. of New York v Ontario Metal Products Co. Ltd., namely: " It is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium." In my opinion, Mr. Justice Atkinson was right in thinking that the same test is to be applied under the language of the present section."*[645]

Depending upon the decisions of *Mutual Life Insurance v Ontario Metal Products* and *Zurich General Accident v Morrison*, the test was also adopted and applied to the field of marine insurance by the judgment of Lloyd, J. in *C.T.I. v Oceanus*.[646]

5.3.1.1.1.2.3.1.2. *C. T. I. v Oceanus* [1982]

5.3.1.1.1.2.3.1.2.1. The facts of the case

In this case, *C.T.I.* (the assureds) was in the business of hiring out containers for use in ocean transport. At the beginning, they placed their cover with an American company and, thereafter, with Lloyd's. Both of them were unhappy with the claims experience of *C.T.I.* and sought to change the terms of the cover and to charge higher premium. *C.T.I.* refused such measures and managed to place another cover with *Oceanus* based upon a summary of past claims experience which was incomplete and inaccurate. Subsequently, *Oceanus* sought to avoid the insurance upon the basis of non-disclosure and misrepresentation on the part of *C.T.I.*

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[643] This Act was repealed in 1972 by the Road Traffic Act 1972, which was repealed in 1989 when the Road Traffic Act 1988 came into force. For further information about the effect of the Road Traffic Act on the duty of good faith, see Eggers & Foss, at paras.6.11-6.17.

[644] In the same way as ss. 18(2) of the MIA 1906, materiality was defined by ss. 10(5) of the Road Traffic Act 1934 to be " *... of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk and, if so, at what premium and on what conditions.*" In this regard, note that ss. 10(5) of the Road Traffic Act 1934 was repealed and it is now reproduced as ss. 152(2) of the Road Traffic Act 1988.

[645] *Zurich General Accident and Liability Insurance v Morrison* [1942] 2 K.B. 53, [Motor], at p. 58. It should also be noted that Mackinnon, L.J., at p. 60, in accordance with ss. 18(2) of the MIA 1906 [UK], expressed a different view when he said *"[U]nder the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the assured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium."*

[646] [1982] 2 Lloyd's Rep. 178.

5.3.1.1.1.2.3.1.2.2. The judgment

In interpreting the test of materiality contained in ss. 18(2) and 20(2), Lloyd J. stated that

> *"[I]n general I would say that underwriters ought only to succeed on a defence of non-disclosure if they can satisfy the Court by evidence or otherwise that a prudent insurer, if he had known the fact in question, would have declined the risk altogether or charged a higher premium. ... the defendant must prove that the judgment of the prudent insurer would in fact have been affected, not that it might have been affected. It can never be enough for the prudent insurer to say "Yes, I would have liked to know this or that fact, so that I could have made up my mind what to do about it". ... some "difference of action" is required in order to establish materiality. The mind of the reasonable insurer must have been influenced so as to induce him to refuse the risk or alter the premium."*[647]

Having delivered that, Lloyd, J. gave judgment for *C.T.I.* upon the ground that the alleged non-disclosures and misrepresentations were not material in the sense that had they been fully disclosed or correctly represented, they would not have led *Oceanus* to refuse to insure or to ask for a higher premium.

The following year, Lloyd, J. had another chance to affirm his construction for ss. 18(2) and 20(2) of the MIA 1906 given in *C.T.I. v Oceanus*. This was in *Commonwealth Insurance v Group Sprinks*[648], in which he stated that

> *"[I] have no desire to add to what I said in Container Transport International Inc. v Oceanus Mutual Underwriting association (Bermuda) Ltd., [1982] 2 Lloyd's Rep. 178, as to the true construction of s. 18 (2) of the Act."*[649]

5.3.1.1.1.2.3.2. The indecisive influence test[650]

Despite the fact that the decisive influence test was supported by some cases, particularly and mainly the judgment of the Court of first instance given by Lloyd, J. in *C.T.I. v Oceanus*, its authority as reflecting the correct construction of the test of materiality had always been in doubt.[651] This doubt was finally and strongly expressed by the decision of the Court of Appeal in *C.T.I. v Oceanus.*

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[647] Ibid., at p. 187-8.

[648] [1983] 1 Lloyd's Rep. 67, [Reinsurance].

[649] Ibid., at p. 78.

[650] This test has also been called many names, for example, *"anti-decisive influence test"* by Park, at p. 95; *"the want to know test"* by Arnould, Vol. 3, at para.610; *"the mere influence test"* by Schoenbaum, T. J., The duty of Utmost Good Faith in Marine Insurance Law: A comparative Analysis of American and English Law, (1998) 29 JMLC 1, at p. 20; *"the would be of interest test"* by Colinvaux's Law of Insurance, 7th ed., (1997), at p. 131, (hereafter Colinvaux); *"the would want to know test"* by Bennett, H., The Law of Marine Insurance, (1996), at p. 51, (hereafter Bennett); *"the impact on the mind of the prudent underwriter test"* by Hodges, S., Law of Marine Insurance, (1996), at p. 90, (hereafter Hodges); *"the awareness test"* by Clarke, M., Insurance Contracts and Non-Disclosure - *Pan Atlantic v Pine Top*, (1993) LMCLQ 297, at p. 298.

[651] *Zurich General Accident and Liability Insurance v Morrison*, ibid., Where Mackinnon, L.J., at p. 60, in accordance with ss. 18(2) of the MIA 1906 and contrary to the decisive influence test declared by Lord Greene in the same case, expressed the view that *"[U]nder the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the assured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium."*; *Marence knitting Mills v Greater Pacific General Insurance* [1976] 2 Lloyd's Rep. 631, [Fire], where the Privy Council accepted as being correct the test that *"a fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions."*

5.3.1.1.1.2.3.2.1. *C.T.I. v Oceanus* [CA-1984][652]

The case went to the Court of Appeal where the test of decisive influence adopted by Lloyd, J. was unanimously[653] overruled. Kerr L.J. in the leading judgment rejected the decisive influence test and, concerning Lloyd, J.'s judgment, stated that

> *"[I]n my respectful view his conclusion distorts and erodes the scope of the duty of disclosure and misconstrues these provisions both in principle and on the basis of the authorities whose effect was consolidated in the 1906 Act."*[654]

Having refused the above test, Kerr L.J. reaffirmed the authority of the indecisive influence test as being the correct test before[655] and after the enactment of the MIA 1906.[656] He expressed this as follows:

> *"[T]o prove the materiality of an undisclosed circumstance, the insurer must satisfy the Court on a balance of probability - by evidence or from the nature of the undisclosed circumstance itself - that the judgment, in this sense, of a prudent insurer would have been influenced if the circumstance in question had been disclosed. The word "influence" means that the disclosure is one which would have had an impact on the formation of his opinion and on his decision making process in relation to the matters covered by s. 18(2)."*[657]

The decision of the Court of Appeal in *C.T.I. v Oceanus* continued to be relied on as an authority representing the correct interpretation of the test of materiality contained in ss. 18(2) and 20(2) by many cases in both marine[658] and non-marine insurance context[659]. For instance, in *Highlands Insurance v Continental Insurance*[660], a non-marine insurance case, Steyn, J. concerning the right of the reinsurers to avoid the contract, stated that

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[652] [1984] 1 Lloyd's Rep. 476.

[653] The case was tried before Kerr L.J., Parker L.J. and Stephenson L.J.

[654] Ibid., at p. 490. He further, at p. 491-2, explained the main difference between him and Lloyd, J. in the interpretation of *"judgment"*, *"[T]he point at issue turns mainly on the meaning of "judgment" in the phrase "would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk". The Judge in effect equates "judgment" with "final decision", as though the wording of these provisions had been "would induce a prudent underwriter to fix a different premium or to decline the risk". ... "This interpretation differs crucially from what I have always understood to be the law... ."* Moreover, Parker, L.J., at p. 510, said that *"[I]t was contended that, unless an undisclosed circumstance would have led a prudent insurer to decline the risk when he would otherwise have accepted it or charge a higher premium than he would otherwise have done, the circumstance cannot be said to be one which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. The sub-section certainly does not in clear words so provide and had the result been intended it would have been easy to say so. The contrary intention is however in my view clear."*

[655] This principle was firmly established by the decision of Blackburn J. in *Ionides v Pender*, ibid., at p. 537, where he stated that *"all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act."* This case was also affirmed and followed by *Ruvaz v Gerussi*, ibid., per Lord Esher, at p. 229, and *Tate v Hyslop*, ibid., per Bowen L.J. at p. 379.

[656] Ss. 18(2) and 20(2) of the MIA 1906 which state that material circumstances are those which *"would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

[657] Ibid., at p. 492. In this connection, also see Stephenson, L.J. who stated, at p. 529, that *"[I] conclude from the language of the sub-section in their context and from the authorities that everything is material to which a prudent insurer, if he were in the proposed insurer's place would wish to direct his mind in the course of considering the proposed insurance with a view to deciding whether to take it up and on what terms, including premium."*

[658] For instance, *Johns v Kelly* [1986] 1 Lloyd's Rep. 468; *Kansa General Insurance Company v Bishopsgate Insurance* [1988] 1 Lloyd's Rep. 503; *The Dora* [1989] 1 Lloyd's Rep. 69.

[659] For example, *Highlands Insurance v Continental Insurance* [1987] 1 Lloyd's Rep. 109; *La Banque Financiere de la Cite S. A. v Westgate Insurance* [1988] 2 Lloyd's Rep. 513, [CA-Credit]; *Pan Atlantic v Pine Top* [1992] 1 Lloyd's Rep. 101.

[660] [1987] 1 Lloyd's Rep. 109.

> *"[I]n the landmark decision in C.T.I. v Oceanus... the Court of Appeal ruled that the test applicable to non-disclosure and misrepresentation in a marine insurance context is whether a circumstance was undisclosed or misrepresented which a prudent insurer would take into account when reaching his decision whether or not to accept that risk or what premium to charge. ... In my judgment I ought to apply the law as laid down in the CTI case in relation to this non-marine insurance dispute."*[661]

Five years later, the decision of the Court of Appeal in *C.T.I. v Oceanus* was still considered as representing the correct law concerning the test of materiality. This what was ascertained by Waller, J. in *Pan Atlantic v Pine Top*[662].

5.3.1.1.1.2.3.2.2. *Pan Atlantic v Pine Top*

5.3.1.1.1.2.3.2.2.1. The facts of the case

In this case, the reinsurers under a *Casualty Account Excess of Loss* reinsurance contract contended that there had been non-disclosure and misrepresentation by the reassureds of the previous loss records.

5.3.1.1.1.2.3.2.2.2. The judgment

In clarifying what was the right test of materiality to be applied to the case in question, Waller, J. stated that

> *"[I]t is accepted that I must take the law as laid down in C.T.I v Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1984] 1 Lloyd's Rep. 476. That case made clear that in considering ss. 18, 19 and 20 of the Marine Insurance Act, 1906, any circumstance is material, i.e. is one which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk, if it is a circumstance which: ... would have had an impact on the formation of his opinion and on his decision making process. That is to say "judgment" was equal to "formation of opinion" rather than the "final decision".*[663]

Consequently, Waller, J held that the reinsurers were entitled to avoid the contract, since there had been material non-disclosure and misrepresentation. However, the judgment of *C.T.I.* has caused considerable concern and has been exposed to many criticisms, for example, the test is too hard for the assured and contrary to the established authorities.[664] In addition, given the fact that avoidance for non-disclosure or misrepresentation is justified

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[661] Ibid., at p. 113-4.
[662] [1992] 1 Lloyd's Rep. 101.
[663] Ibid., at p. 103.
[664] Generally, see Brroke, H., (Q.C.), Materiality in Insurance Contracts, (1984) 4 LMCLQ 437; Diamond, A., (Q.C.), The Law of Marine Insurance – Has it a Future?, (1986) 1 LMCLQ 25; Clarke, M., Failure to Disclose and Failure to Legislate: Is it Material?-II, [1988] JBL 298; Ying, Y. H., Common Law Materiality-An Australian Alternative, [1989] JBL 97; Kelly, D. S. L., Recent Developments in Relation to inducement in Non-Disclosure and Misrepresentation, (1988) I Ins.L.J. 30; Griggs, Coverage, Warranties, Concealment, Disclosure, Exclusions, Misrepresentation and Bad Faith, (1991) 66 Tul.L.R. 423; Clarke, The Law of Insurance Contracts (1989), at 452-6; Insurance Contracts and Non-Disclosure - *Pan Atlantic v Pine Top*, (1993) LMCLQ 297; Clarke, M., Insurers – Influenced But Yet Not Induced - *Pan Atlantic v Pine Top*, (1994) LMCLQ 473; *Pan Atlantic v Pine Top* [1993] 1 Lloyd's Rep. 496, [CA], per Steyn, L.J. at p. 504-6, and [1994] 2 Lloyd's Rep. 427, [HL], per Lord Mustill at p. 438-40.

upon the ground that they vitiate the consent, it was asked how could the underwriter contend that his consent was vitiated when, according to the indecisive influence test, had he known the non-disclosed or misrepresented fact, he would still have underwritten the risk upon the same terms and at the same premium. So, in order to meet these criticisms, the increased risk test, which was that a fact would be deemed material if a prudent underwriter treated it as tending to increase the insured risk, was introduced.

5.3.1.1.1.2.3.3. The increased risk test

5.3.1.1.1.2.3.3.1. *Pan Atlantic v Pine Top* [CA-1993][665]

The plaintiffs appealed against the judgment of Waller, J. and, so, the case went to the Court of Appeal before Steyn, L.J. who upheld the decision of the Court of first instance. In his judgment, Steyn, L.J.[666] criticised the test of materiality of *C.T.I v Oceanus* and described it as being unpopular decision in both the legal profession and the insurance markets.[667] Under the influence of such criticisms, he held that a concealed fact would be considered material if a prudent underwriter regarded it as tending to increase the accepted risk. To justify his departure from *C.T.I. v Oceanus*, he stated that his judgment was not dealing with whether the non-disclosure of a fact had a decisive influence or not. Instead, he further argued, he was concerned with the possibility of the existence of two additional and alternative constructions in the judgment of the Court of Appeal in *C.T.I. v Oceanus*.[668] The first was that a material fact would be that which a prudent underwriter would wish to take into account in reaching his judgment. Whereas, the second was that a circumstance would be material if a prudent underwriter calculated it as tending to increase the risk in question. He, therefore, declared that since the Court of Appeal in *C.T.I. v Oceanus* expressed no clear preference to either constructions, he was free to choose between them and was finally in favour of the second one. He expressed his view as follows:

> *"[I]n my view we are free to choose between the two solutions. As between the two alternative solutions, I unhesitatingly choose the second solution. In other words, I would rule that, as the law now stands, the question is whether the prudent insurer would view the undisclosed material as probably tending to increase the risk. That dose not mean that it is necessary to prove that the underwriter would have taken a different decision about the acceptance of the*

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[665] [1993] 1 Lloyd's Rep. 496.

[666] Steyn, L.J., at p. 505, admitted in his judgment in this case that in his judgment in *Highlands Insurance v Continental Insurance* [1987] 1 Lloyd's Rep. 109, he adopted the indecisive influence test declared in *C.T.I. v Oceanus* because he was under the impression that there was only one viable construction for the test which was that a fact was material if a prudent underwriter would want to know it before making his decision.

[667] Ibid., at p. 504.

[668] Ibid., at p. 506, where Steyn, L.J. said that *"[T]he judgments, concentrated on the issue whether the non-disclosure had a decisive influence and never addressed the choice between the two feasible alternative solutions. The judgments leave unclear what choice the members of the Court would have made between the two alternative solutions if they had been called upon to confront this issue."*

risk. After all, there may be many commercial reasons for still writing the risk on the same terms."[669]

Basically, what Steyn, L.J. did was no more than adopting the same test as that laid down by the Court of Appeal in *C.T.I. v Oceanus*, but with the exception that before being able to avoid the contract, the actual underwriter ought to prove that the concealed or misrepresented fact was one which a prudent underwriter would consider as tending to increase the risk insured. The increased risk test was afterwards followed by Potter J. in his judgment in *St. Paul Fire v McConnell* as reflecting the newest construction of the indecisive influence test of materiality.

5.3.1.1.1.2.3.3.2. *St. Paul Fire v McConnell*[670]

5.3.1.1.1.2.3.3.2.1. The facts of the case

In this case, the underwriters contended that the risk presented to them by the brokers of the assureds was to insure the construction of a building on piled foundations, but, in fact, by the time the contract was concluded it was already decided that spread foundations would be used instead. Accordingly, they sought to avoid the contract upon the ground of non-disclosure.

5.3.1.1.1.2.3.3.2.2. The judgment

The case was tried by Potter J. who held that the failure of the assureds to disclose this change to the underwriters amounted to a material non-disclosure, since a prudent underwriter would regard it as tending to increase the original risk. This was clearly laid down as follows:

"I do not doubt that a prudent underwriter, apprised of the intended change in foundations design proposed, would have regarded such change as tending to increase the risk he was being called upon to insure. That is all that necessary for the plaintiffs to succeed on the grounds of non-disclosure."[671]

5.3.1.1.1.2.3.4. The indecisive influence and actual inducement test

In fact, the increased risk test was not the end of the story, for that the materiality test came once more under consideration by the House of Lords in the *Pan Atlantic v Pine Top* case. In this case, the House had the opportunity of reviewing all the previous tests, exploring the relevant common law cases and authorities and considering all the criticisms to which the previous tests were exposed. Having done so, the House laid down a new test combining the

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[669] Ibid., at p. 506.
[670] [1993] 2 Lloyd's Rep. 503, [All Risks].
[671] Ibid., at p. 516.

indecisive influence test as declared by the Court of Appeal in *C.T.I. v Oceanus* with the additional requirement of the inducement of the actual underwriter.

5.3.1.1.1.2.3.4.1. *Pan Atlantic v Pine Top* [HL-1994][672]

5.3.1.1.1.2.3.4.1.1. The judgment

The plaintiffs appealed again against the decision of the Court of Appeal dismissing their appeal from the judgment of Waller, J. which was in favour of the reinsurers. In their case, the plaintiffs relying on the judgment of Lloyd J. in the Court of first instance in *C.T.I. v Oceanus*, pleaded that the underwriters should only be allowed to avoid the contract if they can satisfy the court on the balance of probabilities that the non-disclosed fact is material and that is to say that if its disclosure would have led a prudent underwriter either to decline the risk altogether or to demand a higher premium than that he would usually do. They further contended, as an additional requirement to that of materiality, that the underwriters also have to satisfy the court that they themselves were personally induced by such non-disclosure to underwrite the proposed risk.

The defendants, on the other hand, argued that it was sufficient for the underwriter, as it was held by the Court of Appeal in *C.T.I. v Oceanus*, in order to avoid the contract to merely prove that the undisclosed fact was material in the sense that it was one which a prudent underwriter would wish to know or consider when forming his underwriting decision whether to accept to insure or not and, if yes, on what terms and at what premium. They also claimed that there was no need for the prudent underwriter to take any decisive action, for materiality would be established even if had a full and accurate disclosure of the alleged fact been made, the prudent underwriter would still have insured the same risk upon the same terms and premium. In this regard, they additionally argued that the effect of the undisclosed fact upon the judgment of the actual underwriter, as it was held by the Court of Appeal in *C.T.I. v Oceanus*, was immaterial.

In this case, the House[673] in its judgment, which was in favour of the defendants, differentiated, for the first time, between the test of materiality and the right of avoidance as being two different and separate identities.

5.3.1.1.2.The requirement of indecisive influence

With regard to the test of materiality, the House, after an extensive judgment, ended up this long-standing controversy over it by holding, on a bare majority led by Lord

[672] 2 Lloyd's Rep. 427.
[673] The case came before Lord Templeman, Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadley and Lord Lloyd of Berwick.

Mustill[674], that a fact was material if its full and accurate disclosure would not have led a prudent underwriter to act differently. In other words, the materiality of a fact is established even if had full and accurate disclosure been made, a prudent underwriter would still have underwritten the same risk upon the same conditions and at the same premium.

Whereas, in respect of the right of avoidance, the House by a unanimous decision held that the establishment of the materiality of a fact would not in itself entitle the underwriter to avoid the contract unless he could further prove that he was personally induced by it to make the contract in question. This is to say that the old practice that once the materiality of a non-disclosed or misrepresented fact was established, the underwriter would be entitled to avoid the contract is no longer acceptable. This is because it is now the duty of the actual underwriter seeking to set the contract aside to satisfy the court first as to the test of materiality and secondly as to the test of actual inducement. Consequently, a positive answer to the first question would no longer, in itself, entitle the underwriter to avoid the contract should he fail to convince the court that he was induced by it to underwrite the policy.[675]

The requirements of the new test were clearly expressed by Lord Mustill after a very thorough analysis and examination of the Common Law cases and authorities as follows:

> *"1. A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium. But, 2. If the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract."*[676]

The gravity of the decision of this case appears in that it introduced what it could be considered as the most significant modification to the application of the doctrine of *uberrimae fidei* in the Twentieth Century. This change related to the test of materiality, which had been a controversial matter amongst the decisive influence, the indecisive influence and the increased risk tests.

However, apart from applying the presumption of inducement to non-disclosure, the indecisive influence and actual inducement test expressed by the House of Lords in *Pan Atlantic v Pine Top* cannot be said to have brought a new test. This is first because it was

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[674] The majority of the House comprised Lord Goff of Chieveley, Lord Mustill and Lord Slynn of Hadley. It must be mentioned that Lord Templeman and Lord Lloyd of Berwick, in connection with whether a concealed or misrepresented fact is material or not, were in favour of the decisive influence test. But this test was disapproved by the majority of the Court.

[675] *Pan Atlantic v Pine Top* [1994], [HL], at p. 434.

[676] Ibid., at p. 452-3. He also added that *"[D]iffering from the C. T. I. case and hence from the principle which the Court of Appeal was bound to apply in the present case I have concluded that it is an answer to a defence of misrepresentation and non-disclosure that the act or omission complained of had no effect on the decision of actual underwriter. As a matter of common sense however even where the underwriter is shown to have been careless in other respects the assured will have an uphill take in persuading the Court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference."* The same view was also expressed by Lord Goff of Chieveley, at p. 430-1.

partly based on the decision of the Court of Appeal in *C.T.I.* that the materiality of a fact was to be judged by the indecisive influence test depending upon the judgment of a prudent underwriter.[677] Secondly, this is because it also affirmed and adopted the judgment of Kerr, J. in *Berger v Pollock*[678] that the reaction of the actual underwriter was to be considered[679], but unlike *Berger v Pollock*, the House attached it to the issue of inducement not to that of materiality. No doubt, by this requirement, the House overruled the decision of the Court of Appeal in *C.T.I. v Oceanus* which held that the effect of a undisclosed or misrepresented fact upon the judgment of the actual insurer was irrelevant.

As far as the actual inducement test is concerned, it seems that the purpose of its introduction, as a requirement in addition to the indecisive influence test, was to overcome those critical situations, as pointed out by Kerr, J. in *Berger v Pollock*, where the actual underwriter would be entitled to avoid the contract upon the grounds of non-disclosure or misrepresentation, even if the undisclosed or misrepresented fact had no bearing on his judgment.[680] Such situations, as plainly expressed by Lord Goff, induced the critics of the test to favour

> *" ... the idea that the test of materiality should be hardened into the decisive influence test, by introducing into the concept of materiality something in the nature of inducement, though attributing it not to the actual underwriter but to the hypothetical prudent insurer. But once it is recognised that actual inducement of the actual underwriter is required, the pressure to take any such step disappears, and the idea of introducing any such requirement into the concept of materiality can be perceived to be not merely unnecessary, but inappropriate."*[681]

After modifying the law in this area by introducing the indecisive influence and actual inducement test, the judgment of the House of Lords in *Pan Atlantic v Pine Top* has become the only accepted authority in respect of materiality test. Consequently, it was followed and adopted by many cases, such as *St. Paul Fire v McConnell*[682], *Rich v Portman*[683], *Svenska v Sun Alliance*[684] and *Fraser Shipping v Colton*[685].

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[677] *C.T.I. v Oceanus* [1984] 1 Lloyd's Rep. 474.

[678] [1973] 2 Lloyd's Rep. 442, at p. 463.

[679] *Pan Atlantic v Pine Top* [1994] 2 Lloyd's Rep. 427, at p. 452, where Lord Mustill stated that *"[I] consider that the instinct of Mr. Justice Kerr in Berger v Pollock ... was right, and that the adoption of the contrary view by the Court of Appeal in C. T. I. should not now be upheld."* Also Lord Lloyd, at p. 466, said that *"[I] conclude that what Lord Justice Kerr said in Berger v Pollock was a correct statement of the law, and that his second thoughts in C. T. I. case were erroneous."*

[680] Park, at p. 155-6.

[681] *Pan Atlantic v Pine Top* [1994], at p. 431-2.

[682] [1995] 2 Lloyd's Rep. 116, [CA]. It was an appeal by the assured from the judgment of Potter J. in the Court of first instance, who, as it has been mentioned above, had applied the increased risk test to the facts of the case and found a verdict for the underwriters. The Court of Appeal depending upon the authority of the House of Lords in *Pan Atlantic v Pine Top* also found that the underwriters were entitled to avoid the contract. The application of the new test was stated by Evans, L.J., at p. 122, as follows: *" ... there is only a right to avoid when the misrepresentation or non-disclosure was "material" and when the actual insurer was induced thereby to enter into the contract."*

[683] [1996] 1 Lloyd's Rep. 430, [Marine], at p. 439-42; affirmed by the judgment of the Court of Appeal delivered by Leggatt, L.J. [1997] 1 Lloyd's Rep. 225, at p. 234-5.

[684] [1996] 1 Lloyd's Rep. 519., [Commercial Mortgage Indemnity], at p. 562-4.

[685] [1997] 1 Lloyd's Rep. 586., [Marine], at p. 594-7.

5.3.1.1.3. The requirement of actual inducement

5.3.1.1.3.1. Introduction

Admittedly, the introduction of this test as an extra requirement beside that of materiality for the avoidance of the policy upon the grounds of non-disclosure and misrepresentation is now fully established in insurance context. In accordance with this test, the actual underwriter, before avoiding the contract, must prove that he entered into it on the faith of the material misrepresentation or non-disclosure which had he been aware of, he would not have entered into the contract altogether or, at least, not on the same terms including the premium[686]. The importance of this test springs from the fact that it is seen as an extra protection, besides that of materiality, for the assured against the underwriter. This would be understandable, as explained by Lord Mustill, when the actual underwriter, in the absence of the requirement of inducement, would be able to avoid the contract upon the grounds of non-disclosure or misrepresentation of a fact affecting the judgment of a prudent underwriter, while his own judgment was not so affected.[687]

Unfortunately and despite the significance of this test, the judgment of the House of Lords omitted to clarify precisely its features or to state how it is intended to be applied in the insurance context. All that was stated by Lord Mustill, giving the leading judgment, was that the actual inducement requirement was to be construed and applied exactly in the same sense in which it is used in the general law of misrepresentation.[688] No doubt that the lack of such elements would reduce the importance of its introduction and inevitably its later success in insurance field and would make it very hard to apply in practice. Therefore, it seems reasonable to devote this subsection to briefly and clearly determine how the test of actual inducement is to be applied in insurance field.

5.3.1.1.3.2. The onus of proof

As a general rule, an established material misrepresentation or non disclosure would not, it used to be before the decision of the House of Lords in *Pan Atlantic*, in itself entitle the actual underwriter to avoid the contract, unless it has legal effect upon his own judgment in the form of inducing him to enter into the very contract upon the same terms and at the

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[686] In respect of the nature of the fact inducing the representee to contract, it was pointed out by John Romilly in *Pulsford v Richards* (1853) 17 Beav. 87, at p. 96, that it must be " *... the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer, would have made him abstain from the contract altogether.*"

[687] *Pan Atlantic v Pine Top* [1994] 2 Lloyd's Rep. 427, at p. 452.

[688] Ibid., at p. 453.

same premium.[689] It follows that if the non-disclosure or misrepresentation did not actually affect the mind of the underwriter for a reason or another[690], his entitlement to the right of avoidance on that ground would be denied. It also follows from that that it is generally accepted that it is always the duty of the person alleging inducement to prove that he was actually induced.[691]

Accordingly, it is incumbent upon the underwriter seeking to avoid the contract to prove that he was in fact induced[692] to insure the risk which he would not otherwise have insured had he been told the full and true picture of the risk covered.[693] This was affirmatively expressed by Evans, L.J. in the Court of Appeal in *St. Paul Fire & Marine v McConnell*[694], when he said that

> *" ... it is common ground that the insurer must prove that he was induced by the non-disclosure or misrepresentation to enter into a contract on terms which he would not have accepted if all the material facts had been made known to him ... ."*[695]

5.3.1.1.3.3. The presumption of inducement

Under the general law of contract, actual inducement may in some exceptional cases be inferred as a matter of fact from the establishment of the question of materiality.[696] This is to say that if the representee managed to prove that the misrepresentation was so material, there would be a fair inference of fact that he was induced by it.[697] But, the application of this inference, as already explained, is so restricted to those rare situations where the materiality of the fact would be so palpable that actual inducement could easily be inferred by the court

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[689] Ibid.

[690] *Horsfall v Thomas* (1862) 1 H. & C. 90, where the buyer of a gun which was defective failed to prove that his mind was induced by a misrepresentation about which existence he was unaware; *Re Northumberland & Durham District Banking* (1859) 28 L.J.Ch. 50, where the buyer of shares failed in his action for rescission because he could not prove that he did know about the existence of a false misrepresentation which he was alleging to have influenced his decision; *Smith v Chadwick* (1884) 9 App. Cas. 187, [HL], in this case, although the plaintiff who had bought shares in a company was aware of the misrepresentation, he did not allow it to influence his mind; this what also happened in *Attwood v Small* (1838) 6 Cl. & Fin. 232; *Industrial Properties v Associated Electrical Industries* [1977] Q.B. 580, where the judgment of the representee was held not to have been induced even if the true facts had been known to him; the same was also held in *J.E.B. Fasteners v Marks Bloom* [1983] 1 All ER 583, [CA]; *Cooper v Tamms* [1988] 1 E.G.L.R. 257, where it was held that if the representee was aware that the representation made to him was false, he would not be accepted to allege that he was induced by it.

[691] *Arkwright v Newbold* (1881) 17 Ch. D. 201.

[692] *Pan Atlantic v Pine Top* [1994] 2 Lloyd's Rep. 427, per Lord Mustill at p. 453, where he ascertained the need for actual inducement.

[693] Bower, G. S., The Law of Actionable Misrepresentation, 3rd ed., (1974, by A. Turner), (hereafter Bower), at para.114; Clark, M., The Law of Insurance Contracts, 3rd ed., (1997), at para.23-2A, (hereafter Clark 3rd ed.).

[694] [1995] 2 Lloyd's Rep. 116.

[695] Ibid., at p. 124. Also, see *Marc Rich v Portman* [1996] 1 Lloyd's Rep. 430, [Marine], where Longmore, J. stated, at p. 442, that *" ... it is for the insurer to prove that the non-disclosure did induce the writing of the risk on the terms in which it was written."*; affirmed by the Court of Appeal [1997] 1 Lloyd's Rep. 225.

[696] In fact, the origin of this inference, as Bower, at para.133, said, was the result of a theory prevailing in the earlier stages of the history of the law of misrepresentation according to which the representee would be able to prove inducement by the misrepresentation as a fact if he could first prove its materiality. However, it seems that it was initially made clear by the judgment of George Jessel in *Redgrave v Hurd* (1881) 20 Ch. D. 1, where he stated, at p. 21, that *"[I]f it is a material representation calculated to induce him (the representee) to enter into the contract, it is an inference of law that he was induced by the representation to enter into it ... ."*

with little or even no evidence.[698] In addition, even if such an inference is so drawn, it would still be treated as an exception to the general principle and its merit, in this case, would amount to no more than a *prima facie* presumption of inducement on the part of the representee and, even then, its sole role would only be to shift the burden of proof from the shoulders of the representee to those of the representor who would have to prove that there had been no such inducement.[699]

Therefore, basically, such an inference would only be drawn in very exceptional cases and, even though, it would still be one of fact which is capable of being argued against by the representor who ought to prove that the representee has not been so induced by the material misrepresentation. The right nature of this inference was explicitly provided for by Jessel in the Court of Appeal in *Smith v Chadwick*[700], where he stated that

> *" ... on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may shew that in fact he did not so act ... ."*[701]

Having introduced the requirement of inducement into the insurance law, the House of Lords in *Pan Atlantic* has been of the view that such an inference ought also to be incorporated. As a result, whenever the actual underwriter unquestionably proves the materiality of an undisclosed or misrepresented fact, a presumption that he has also been induced would be established on his part.[702]

Apart from that, although that the judgment of the House has now affirmed the resemblance between the insurance law and the general law of contract in respect of inducement, some doubt has emerged as regards the effect of the inference of inducement (the presumption of inducement) and subsequently the burden of proof in insurance field. This is because, under the general law of contract the onus of proof that a representee was induced to enter into the contract is generally on the representee himself with the exception that in some rare cases, as explained above, the representee would benefit from an inference that he was induced by a misrepresentation if its materiality was so obvious as to create a strong presumption of fact that he was so induced. In this case, the goal of this presumption is

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[697] *Smith v Chadwick* (1884) 9 App. Cas. 187, per Lord Blackburn at p. 196.
[698] Bower, at para.133.
[699] Ibid. In this respect, also see Chitty on Contracts, 27th ed., (1994), Vol. 1, at para.6-019, (hereafter Chitty); Halsbury's Laws of England, 4th ed., (1994), Vol. 31, at para.766, (hereafter Halsbury, Vol. 31); Clark, 3rd ed., at para.22-3B; *Allen, D. K.*, Misrepresentation, (1988), at p. 12-21, (hereafter Allen).
[700] (1882) 20 Ch. D. 27; subsequently affirmed by the decision of the House of Lords (1884) 9 App. Cas. 187, per Lord Blackburn, at p. 196, where he stated that *"[I] quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that if convinced that there was such a material representation they ought to find that the plaintiff was induced by it ... ."*
[701] (1882) 20 Ch. D. 27, at p. 44.
[702] *Pan Atlantic v Pine Top* [1994] 2 Lloyd's Rep. 427, per Lord Mustill at p. 452-3.

basically to relieve the representee from the need to provide further evidence that he was in fact induced by such a material misrepresentation and to make it the task of the representor to established that there was none as such.[703]

Whereas, in contrast, according to Lord Mustill's judgment, unlike the general law, it seems to be the general rule that once it is proved that the misrepresented or non-disclosed fact is material, there would be a presumption that the actual underwriter has also been induced.[704] This means that the presumption of inducement which is a mere exception under the general law of contract, has now become, following the judgment of Lord Mustill in *Pan Atlantic*, the general rule under insurance law.

Accordingly, the natural result of this presumption appears to be that if the actual underwriter convinced the court that the non-disclosed or misrepresented fact is material, in the sense that if it had been correctly and truly disclosed, it would have influence the judgment of a prudent underwriter, a general presumption that he personally was also induced by it to insure would directly follow without the need for any further evidence.

Thus, the practical aftereffect of this presumption, if it was broadly applied, would be that instead of being the duty of the underwriter seeking to avoid the contract to prove that he was induced by the non-disclosure or misrepresentation to insure, it would be the duty of the assured to prove that there was no inducement as such. Admittedly, taking into account the fact that it would be, as described by Lord Mustill[705], an *uphill task* for the assured to persuade the court that the underwriter was not induced, the position of the assured after *Pan Atlantic*'s decision seems to be unchanged; if it is not worse than it was.

Having mentioned that, it seems very consequential to actually know what the correct effect of this presumption is? Does Lord Mustill really intend the presumption of inducement to have such effect as that stated above? Or is this effect *"merely a matter of loose wording"*[706] or *"merely a careless remark"*[707] and, therefore, is not so intended? This uncertainty is further increased by the observation of Lord Lloyd who seems to have rejected the implication that once materiality was established, a presumption of inducement of the actual underwriter would follow.[708] Unfortunately, the decision of the House offers no clear-cut guidance one way or another for the correct application of this newly established test.

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[703] Bower, at para.133. Also, see Chitty, at para.6-019; Halsbury, Vol. 31, at para.766; Clark, 3rd ed., at para.22-3B, Allen, at p. 12-21.

[704] *Pan Atlantic*, at p. 453, *"[A]s a matter of common sense however where the underwriter is shown to have been careless in other respects the assured will have an uphill task in persuading the Court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference."*

[705] Ibid.

[706] Hird, Norma., 'Rationality in the House of Lords?' [1995] JBL 194, at p. 196.

[707] Schoenbaum, T. J., The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law, (1998) 29 JMLC 1, at p. 29.

[708] *Pan Atlantic v Pine Top* [1994], where he stated, at p. 465, that *" ... this heresy has long since been exploded ... "*.

However, such guidance is to be sought in the judgment of Evans, L.J. in *St. Paul Fire v McConnell Dowell*[709], which was the first case to be decided according to the new test formulated by the House. In this case, four underwriters sought to set the contract aside for non-disclosure or misrepresentation. They all succeeded in proving that the undisclosed or misrepresented fact was material, but only three of them proved that they were in fact induced by the non-disclosure or misrepresentation to grant the said cover on the same terms including the premium, which they would not have done so had they been apprised of the undisclosed or misrepresented fact. As far as the fourth underwriter was concerned, Evans, L.J. was of the opinion that a presumption of inducement ought also to be inferred and, therefore, held that he was equally induced.

However, by examining the judgment of Evans, L.J., it appears that such a presumption was not a direct one, which was inferred from the establishment of materiality alone. In fact, in reaching this conclusion, Evans, L.J. had initially cited and acknowledged the authority of the principle stated in Halsbury[710] that inducement cannot, as a general rule, be inferred in law from established materiality, unless the materiality of the fact is so obvious as to justify a rebuttable inference of fact that the representee was actually induced. Having done that, he held that since the evidence produced by the other three underwriters was clearly persuasive and since that there was no contrary evidence by the assureds to displace a presumption of inducement, the fourth underwriter like the other three was also induced by the non-disclosure or misrepresentation to insure as he did.[711]

The construction given by Evans, L.J. in the Court of Appeal in *St. Paul Fire* to the application of the presumption of inducement was subsequently echoed by Longmore, J. in *Marc Rich v Portman*[712], in which he clearly declared that

> *"[T]he presumption will only come into play in those cases in which the underwriter cannot (for good reason) be called to give evidence and there is no reason to suppose that the actual underwriter acted other than prudently in writing the risk."*[713]

Therefore, it seems fairly clear that this presumption is not to be easily and directly inferred from proved materiality, but, it is rather a more restricted one which would come to play only when, for a reason or another, the actual underwriter was unable or prevented from

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[709] [1995] 2 Lloyd's Rep. 116, [CA].
[710] Vol. 31, at para.766.
[711] *St. Paul Fire & Marine v McConnell,* at p. 127.
[712] [1996] 1 Lloyd's Rep. 430; affirmed by the Court of Appeal [1997] 1 Lloyd's Rep. 225. Also, see *Svenska v Sun Alliance* [1996] 1 Lloyd's Rep. 519, [Commercial Mortgage Indemnity], per Rix, J. at p. 564; *Fraser Shipping v Colton* [1997] 1 Lloyd's Rep. 586, [Marine], per Potter, L.J. at p. 596-7; *Gunns v Par Insurance Brokers* [1997] 1 Lloyd's Rep. 173, [Burglary], per Michael Ogden, Q.C. at p. 176.
[713] *Marc Rich v Portman,* Ibid., at p. 442.

producing his evidence of personal inducement and providing that there was no contrary evidence[714] by the assured to confront it.[715]

The adoption of this presumption where it is the duty of the assured to prove that the actual underwriter has not been induced has largely been criticised.[716] For instance, it was advanced that the assured is now considered to be as badly served by the law of insurance after the decision of *Pan Atlantic* as he was before it.[717] Also, it was reasonably submitted that, the assured could only benefit from the requirement of inducement if, and only if, the onus of proof lies with the underwriter a matter about which no clear-cut answer was given by the House and it is still yet to be decided.[718] Moreover, it was further said that if a fact is proved to be material, this does not necessarily mean that it must be an inducement.[719]

Certainly, the introduction of the House of the additional requirement of inducement has been respectfully seen as a great step forward towards the protection of the assured. But, the adoption of the presumption of inducement where the onus of proof would be upon the assured seems indeed to be a serious setback to the achievement of that end.

Furthermore, it ought to be re-emphasised once more that in spite of the fact that it is now the law that a presumption of inducement of the actual underwriter will arise whenever the issue of materiality is established, materiality and inducement are two different and separate, although related, identities and, therefore, each of which should be subject to separate and careful consideration. It is right that sometimes the evidence adduced to prove

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[714] Henley, C., Pan Atlantic v Pine Top – Docking The Underwriter, (1994) BLG Insurance Law Quarterly 1, stated, at p. 2-3, that the assured could produce his evidence from reviewing the previous underwriting practices of the actual underwriter in respect of similar risks and finding out whether his present practice is consistent with them. However, this way of producing evidence was restricted by the judgment of Longmore, J. in *Marc Rich v Portman* [1996] 1 Lloyd's Rep. 430, at p. 441, to be only confined to those risks which were written by the actual underwriter at the same time or in the immediate context. It was further said by MacGillivray on Insurance Law, 9th ed., (1997), at para.16-52, (hereafter MacGillivray, 9th ed.), that the assured could rebut the presumption of inducement by showing that the underwriter did not in fact rely upon the assured's false statement, but, he rather depended upon his own investigation of the truthfulness and accuracy of the representations made to him by the assured. As to the issue of rebuttable of presumption of inducement; also see Park, at p. 169-70.

[715] *St Paul Fire & Marine v McConell Dowell* ibid.; *Marc Rich v Portman* ibid., at p. 442.

[716] Park., at p. 163-5; Clarke, 3rd ed., at paras.22-3B & 23-2A; Hird, Norma J., 'Rationality in the House of Lords?' [1995] JBL 194., at p. 196; Clarke, M., The Significance of Silence – Non-Disclosure Again – *St Paul v McConell Dowell*, (1995) LMCLQ 477, at p. 478-9; Schoenbaum, T. J., The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law, (1998) 29 JMLC 1, at p. 29-30; Henley, C., Pan Atlantic v Pine Top – Docking The Underwriter, (1994) BLG Insurance Law Quarterly 1, where Henley, at p. 2-3; explained the potential consequences of the application of the presumption of inducement; Boxer, C., *Pine Top* just emerges above *Atlantic*, [1994] Solicitors Journal, (September), 936, at p. 937; Bennett, H., Utmost Good Faith in The House of Lords (1995) 111 LQR 181, at p. 185-6; Bennett, H., Utmost Good Faith, Materiality and Inducement, (1996) 112 LQR 405, at p. 409-10; Hird, Norma., *Pan Atlantic* – Yet More to Disclose?, [1995] JBL 608, at p. 612-13.

[717] Park, at p. 165; Clarke, 3rd ed., at paras.23-2A; Clarke, M., The Significance of Silence – Non-Disclosure Again – *St Paul v McConell Dowell*, (1995) LMCLQ 477, at p. 478.

[718] Park, at p. 164; Hird, Norma, 'Rationality in the House of Lords?' [1995] JBL 194, at p. 196.

[719] Clarke, 3rd ed., at paras.23-2A; Clarke, M., The Significance of Silence – Non-Disclosure Again – *St Paul v McConell Dowell*, (1995) LMCLQ 477, at p. 478.

materiality may, in some cases, be also adduced to prove inducement[720], but this does not make them one issue and, therefore, the proof of the former would automatically mean the proof of the latter. This distinction is obvious from the judgment of Bowen L.J. in *Smith v Land & House Property Corporation*[721], where he said that

> *"[I] cannot quite agree with the remark of the late Master of the Rolls in Redgrave v Hurd, that if a material representation calculated to induce a person to enter into a contract is made to him it is an inference of law that he was induced by the representation to enter into it ...*
> „[722]

This was also the view of Evans, L.J. in the Court of Appeal in *St. Paul Fire v McConnell*[723], where he admitted that there was a need to distinguish materiality (the hypothetical prudent underwriter) from inducement (the particular underwriter), although they would inevitably overlap.

Although that once the actual underwriter has established the materiality of the non-disclosure or misrepresentation, he would benefit from a presumption of fact that he was thereby induced to effect the policy, the weight to be attached to such a presumption would vary depending upon the particulars establishing materiality. Therefore, the clearer and more obvious is the materiality of the undisclosed or misrepresented fact, the stronger will be the inference of inducement.[724] However, and despite the fact that there is a presumption of inducement on the part of the actual underwriter following the establishment of materiality, if the court, from the evidence adduced before it, is still not so convinced or cannot make up its mind on the question of inducement or doubts whether the actual underwriter was in fact induced, such a presumption will not be sustained and the underwriter should provide his evidence of actual inducement.[725]

5.3.1.1.3.4. The degree of inducement

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[720] This what happened in *St Paul Fire & Marine v McConell Dowell* [1995] 2 Lloyd's Rep. 116, in which none of the four underwriters had adduced evidence of inducement at trial and, nevertheless, they were able to rely upon their evidence earlier adduced to establish materiality in order to prove inducement. Also, see Bennett, H., Utmost Good Faith, Materiality and Inducement, (1996) 112 LQR 405, at p. 408-9.

[721] (1884) 28 Ch. D. 7.

[722] Ibid., at p. 16. In this regard, also see Halsbury, Vol. 31, at para.765.

[723] Ibid., at p. 125 & 127.

[724] *Smith v Chadwick* (1884) 9 App. Cas. 187, where Lord Blackburn in the House of Lords mentioned, at p. 196, that *"[I] think there are a great many other things which might make it a fair question for a jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference."*. Also, see *St. Paul Fire & Marine v McConnell*, ibid., at p. 127., where the clarity of the evidence of inducement given by the other three underwriters and the expert witnesses and the absence of any contrary evidence to displace the presumption that the fourth underwriter was induced made Evans, L.J. hold that the fourth underwriter was also induced into the contract. The same was held by Cresswell, J. in *Aneco Reinsurance underwriting v Johnson & Higgins* [1998] 1 Lloyd's Rep. 565, [Reinsurance], at p. 597. In this respect, also see Bennett, H., The law of Marine Insurance, (1996), at p. 57.

[725] *Smith v Chadwick* (1884) 9 App. Cas. 187, per Lord Blackburn at p. 196-7; *Marc Rich v Portman* [1996] 1 Lloyd's Rep. 430, per Longmore, J. at p. 442.

The degree of inducement required on the part of the underwriter, unlike that required for materiality, must be decisive[726] in the sense that if the true facts had been fully and accurately communicated, he would have declined to insure altogether or, at least, to insure, but upon different and more favorable terms to himself than the original ones[727]. This is to say that the non-disclosed or misrepresented fact must have caused the underwriter to rely on it[728] in forming his judgment or in altering his position for the worse[729]. It follows from that that if the underwriter, had he known the complete and true facts, he would have nevertheless contracted on the same terms, his judgment was not, in fact, induced and, therefore, he would not be entitled to set the contract aside.[730]

The necessity for such degree of inducement was clearly pointed out in the House of Lords in *Pan Atlantic* when Lord Goff stated that

> *" ... the conclusion that actual inducement by the actual underwriter is necessary before he can avoid the contract for non-disclosure has an impact upon the question of materiality. If actual inducement is not required, materiality becomes all important, because it is the sole requirement for entitling the insurer to avoid the contract on the ground of non-disclosure. It was, I believe, because it was thought, in the C. T. I. case and subsequently, that actual inducement was not required, that critics of the decision in that case promoted the idea that the test of materiality should be hardened into the decisive influence test, by introducing into the concept of materiality something in the nature of inducement, though attributing it not to the actual underwriter but to the hypothetical prudent insurer. But once it is recognised that actual inducement of the actual underwriter is required, the pressure to take any such step disappears, and the idea of introducing any such requirement into the concept of materiality can be perceived to be not merely unnecessary, but inappropriate."*[731]

This decisive degree of inducement is that one which is required by the general law of contract and seems to be required by the insurance law too, for that the rules of both laws in this area, it is admitted, are the same. This was declared by Lord Mustill in *Pan Atlantic* when he said that

> *" ... there is to be implied in the 1906 Act a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using "induce" in the sense in which it is used in the general law of contract."*[732]

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[726] *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, per Bowen L.J., at p. 483, where he pointed out that the causal link which must be found between the misrepresentation causing the inducement and the making of the contract ought to be *" ... the very ground upon which this transaction took place, and must have given rise to this contract ... ."*; *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep. 293, at p. 324.

[727] *Pulsford v Richards* (1853) 17 Beav 87, per John Romilly at p.96.

[728] This was expressly declared by Lord Mustill in *Pan Atlantic*, where, at p. 453, he said: *"[I]f the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract."*

[729] Park, at p. 156, where he stated that this conclusion is first consistent with the presumption that avoidance is granted in such cases for violation of the underwriter's consent and secondly with the words of Lord Mustill in *Pan Atlantic* where he stated that inducement in insurance law is used in the same sense as that being used in the general law of contract.

[730] Halsbury, Vol. 31, at para.767; Bower, at para.137; Chitty, at para.6-019; Clark, 3rd ed., at para.22-3C and 23-7B; Treitel, at p. 302-3; Clarke, M., Insurers – Influenced But Yet Not Induced, (1994) LMCLQ 473, at p. 476 and Park, at p. 155-7; Bennett, H., The law of Marine Insurance, (1996), at p. 57.

[731] Ibid., at p. 431-2.

It seems to be very important to add that reaching the conclusion that the degree of inducement must be decisive does not necessarily mean that the misrepresented or undisclosed fact ought to be the sole cause influencing the underwriter to enter into the contract upon the same terms. Since, it is recognised that it suffices the underwriter to avoid the contract for material misrepresentation or non-disclosure to prove that it was *an* inducing factor[733]. This what was actually held by the Court of Appeal in *Edgington v Fitzmaurice*[734]. In this case, the plaintiff was induced to take debenture bonds partly by a misrepresentation contained in a prospectus issued by the directors of a company inviting subscriptions for debentures and partly be his own mistaken belief that his money would be secured by a charge on the company's property. The Court, in its decision, made it clear that it was not necessary in order to succeed in an action based upon misrepresentation to prove that it was the sole inducement. This was because the question of inducement was not to be determined according to whether the misrepresentation was the only inducing factor or not, but it was according to whether it was actively present to the mind of the representee when he decided to contract in the sense that he had actually relied on it to act as he did. In other words, there is no need for the misrepresentation to be *the sole* inducement as long as it was actually relied on by the representee beside other inducing factors.[735]

The decision of the Court of Appeal in *Edgington v Fitzmaurice* was subsequently referred to with approval by Evans, L.J. in the Court of Appeal in *St. Paul Fire v McConnell* as also reflecting the view of marine insurance law[736]. Therefore, surely the existence of more than one cause inducing the underwriter to effect the policy on the same terms beside the inducement of misrepresentation or non-disclosure does not at any rate undermine its merit as an inducing factor as long as such misrepresentation or non-disclosure could be shown to have been an effective inducement.[737]

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[732] Ibid., at p. 452.

[733] *Edgington v Fitzmaurice,* ibid.; *J.E.B. Fasteners v Marks Bloom* [1983] 1 All ER 583; *Pulsford v Richards*, ibid.; *The Siboen & the Sibotre*, ibid., at p. 324; Bower, at para.120; Allen, at p. 18; Halsbury, V. 31, at para.771; MacGillivray, 9th ed., at para.16-48.

[734] Ibid.

[735] Ibid., per Cotton L.J. at p. 481, where he stated that *"[I]t is not necessary to show that the misstatement was the sole cause of his acting as he did ... ."* Bowen L.J., at p. 483, was of the same view and delivered his judgment to the same effect.

[736] [1995] 2 Lloyd's Rep. 116, at p. 124-5.

[737] Halsbury, Vol. 31, at para.771. It may be of interest to mention that it was observed by Hird, Norma., in her note 'Rationality in the House of Lords?' [1995] JBL 194, at p. 196, that the judgment of the House of Lords in *Pan Atlantic* that the misrepresentation or non-disclosure *"had to have induced the making of the contract on the relevant terms"* seems to suggest that the misrepresentation or non-disclosure ought to have been *the* inducement, not *an* inducement, of the contract. However, she doubted whether such an interpretation would have been what they in fact meant. It seems that her doubt was basically based upon the judgment of Lord Mustill that the word *"induced"* is to be used *"in the sense in which it is used in the general law of contract"*. In a subsequent article entitled '*Pan Atlantic* – Yet More to Disclose?' [1995] JBL 608, at p. 612, she (Norma Hird) criticised the judgment of the Court of Appeal in *St. Paul Fire & Marine v McConnell* for adopting the *an* inducing cause test instead of *the* inducing cause test.

It ought to be further mentioned that when the underwriter succeeded in establishing that the misrepresented or non-disclosed fact was a cause inducing him to effect the policy, it would not be open to the assured to speculate or institute a conjectural inquiry as regards what would have been the reaction of the underwriter if the true facts were accurately and fully stated?; or would the underwriter have acted as he in fact did, even though there had been no misrepresentation or non-disclosure or his action would have been something different? This is because such a question was held to be irrelevant to the issue of inducement and there is no legal burden upon the underwriter to provide an answer for it.[738]

5.3.1.2. The position under the Egyptian law

Unlike the English law, the application of the test of materiality has not attracted comparably similar attention by or caused any diversity amongst the Egyptian jurists. This is because the test according to which the materiality of an undisclosed or misrepresented fact is determined was distinctly laid down by the MTL 1990 to be the judgment of the actual underwriter. This is apparent from the wording of s. 361 which states that

> *"[T]he insured ... shall give correct data ... which are considered sufficient to enable the insurer to estimate the risks as covered with insurance ... ."*

Accordingly, it is very clear that it is the judgment of the underwriter in question and no body else's which must be taken into account when determining the materiality of a fact.[739] Therefore, if a fact is of the nature that if it was rightly and completely disclosed it would *'enable the insurer to estimate the risks'*, it will be deemed material and its non-disclosure or misrepresentation will entitle him to avoid the contract.[740] It follows that if the non-disclosure or misrepresentation of a fact did not affect the judgment of the underwriter in respect of the evaluation of the extent of the risk to be insured, it would not be considered material and no right of avoidance would arise thereunder.

As far as the degree of influence of a misrepresented or non-disclosed fact upon the judgment of the actual underwriter is concerned, like the English law, it is clear from the provisions of the MTL 1990 [Egypt] that such influence must be decisive in that if the actual underwriter knew of the correct and full fact, he would either reject to insure at all or would

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[738] *Smith v Kay* (1859) 7 HL Cas. 750, per Lord Chelmsford L.C. at p. 759; *Gordon v Street* (1899) 2 Q.B. 641, [CA], per Smith, L.J. at p. 646; *Re Imperial Mercantile Credit Association, Williams' Case* (1869) L.R. 9 Eq. 225, per James V.C. at p. 226; *Drincqbier v Wood* [1899] 1 Ch. 393, per Byrne J. at p. 404; Bower, at para.120; Halsbury, V. 31, at para.771.

[739] Mixed Appeal 11/12/1940, Civil Collection, Year No. 53, p. 26, [Motor], where it was held that it was material for the actual underwriter to know whether the withdrawal of the driving license from the assured was because of his dangerous driving or not; Mixed Appeal 26/2/1930, Civil Collection, Year No. 42, p. 325, [Motor], where it was held that the false representations of the assured about the registration and the date of purchase of the insured car were material, for they affected the judgment of the actual insurance company in respect of the extent of its responsibility.

still accept to insure but upon different terms or at different, but increased, premiums. This is plainly provided for by s. 347 which states that

> *"[T]he insurer may ask for a court ruling which invalidates the insurance deed if it is established that the insured party has submitted incorrect data, however, not in bad faith, or failed to submit the data as related to the insurance thus held, such that the insurer, in both cases has estimated the risk at less than it really is."*

So, it is very clear that it is a decisive effect which a misrepresented or non-disclosed fact must produce on the judgment of the actual underwriter before it could be held material.[741] A decisive effect was defined by Ta Ha[742] to be produced if the reaction of the actual underwriter after the true nature of the risk was revealed to him appeared in that he either would refuse to insure or would nevertheless accept to insure but on different terms or at higher premiums.[743] Ta Ha further submitted that the question of materiality would also be established if the effect of the misrepresented or non-disclosed fact caused the actual underwriter to form a different picture about the nature of the risk.[744]

But, in contrast, a non-disclosed or misrepresented fact is not considered material if its correct and full disclosure will still make the actual underwriter insure the same risk on the same terms and at the same rates.[745]

In all cases, it would always be open to the assured to argue that the underwriter has not been influenced by the non-disclosed or misrepresented fact to insure. As advanced by Surur[746], this could be done by proving that the underwriter had already accepted a similar risk surrounded by the same circumstances which he is now contending that they were not disclosed and, nevertheless, he had not charged higher premiums.[747]

The requirement of the decisive influence was emphasised upon as an essential stipulation which has to be met before the underwriter could escape his liability on the grounds of material non-disclosure or misrepresentation. This what was actually held by the Mixed Court of Al Askandariyah.[748] In this case, the assured did not tell the insurance company that he had also effected additional insurances upon his life with other insurance companies. Having discovered the truth, the insurance company sought to avoid the contract on the basis of material misrepresentation. It was held by the Court that before the insurance

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[740] The actual underwriter test was also supported by many authorities such as Al Sanhuri, Vol. 7/2, at para.614; Zahrah, at p. 196; Ta Ha, at para.675; Sharaf Al Diyn, at para.218; Yihya, at p. 141-2; Al Mahdi, at p. 251; Shar'an, at paras.26-7; Lutfi, at p. 176-7; Ibrahim, at para.337; Awad, at para.538.

[741] This was also the view expressed by Awad, at para.535; Ibrahim, at para.237; Lutfi, at p. 176; Sharaf Al Diyn, at para.218; Zahrah, at p. 196; Ta Ha, at para.675.

[742] Ibid., at para.675.

[743] In this regard, also see Awad, at para.535; Ibrahim, at para.237; Lutfi, at p. 176; Sharaf Al Diyn, at para.218; Zahrah, at p. 196.

[744] Ta Ha, at para.675.

[745] Ibid.

[746] Surur, Mohammed. Shukri., Al Jaza att Al Khasah Fi Aaqd At Ta'myn, (The Special Remedies in the Contract of Insurance – in Arabic), (Ph.D. Thesis), (1975), (hereafter Surur).

[747] Ibid., p. 108.

company would be able to avoid the contract it must prove that had it known of the fact that there were other insurances upon the life of the assured it would not have entered into the contract.[749]

Also, in a life insurance, the insured deceased represented to the insurance company that he was in good and healthy condition, he was not seen by any doctor and was not suffering from any diseases. Whereas, in fact, he was suffering from burns of the second and third degree prior to the conclusion of the contract. The Court of Civil Cassation before which the case was tried when deciding whether these misrepresentations were material or not applied the actual underwriter test of materiality and, accordingly, held that such misrepresentations were material because they influenced the decision of the actual insurance company and made it accept to insure.[750]

Apart from that, the reasons behind the adoption of the actual underwriter test of materiality in preference to any other tests was explained by Surur[751] to be because the actual underwriter is the most able person to determine which facts, in his sight, are material to the estimation of the risk he is asked to insure.[752] He also added that since the judgment which is usually affected by any material non-disclosure or misrepresentation is the judgment of the actual underwriter, then it will not be unfair to make the determination of the question of materiality be pursuant to his judgment and it will not be unjust to consider his view when he claims that his estimation of the risk was misled by a misrepresentation or non-disclosure.[753] Moreover, this test is supported, he further advanced, by the practice of the courts which normally take the judgment of the actual underwriter into account when considering the question of materiality. This practice is evident by the occasional refusal of the courts to set a contract aside on the grounds of an established material misrepresentation or non-disclosure, for that the underwriter in question admitted that his decision was not influenced by it.[754]

5.3.1.3. The position under the Saudi Arabian law

The position under the Saudi Arabian law resembles that under the Egyptian law in that it is in favour of the actual underwriter test of materiality. This is unmistakably manifest from s. 342 of the CCL 1931 which states that

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[748] Mixed Al Askandariyah 6/2/1933, Gazette 23, No. 269, p. 229, [Life].
[749] Ibid.
[750] Collection of the Court of Cassation's Judgments, 26/5/1991, Case No. 188, Judicial Year 56, p. 1205, [Life]. For other examples where the actual underwriter test of materiality was applied also see Collection of the Court of Cassation's Judgments, 25/5/1981, Case No. 286, Judicial Year 47, p. 1583, [Burglary]; Collection of the Court of Cassation's Judgments, 14/4/1949, Case No. 407, Collection of Aumar, Vol. 5, p. 755; Collection of the Court of Cassation's Judgments, 30/11/1967, Case No. 269, Judicial Year 18, p. 1773, [Life].
[751] Surur, p. 105-6.
[752] Ibid., at p. 105-6.
[753] Ibid., at p. 106.
[754] Ibid.

> *"[I]f the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof ... which is a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*

So, it is the judgment of the actual underwriter to which the court must refer when considering whether a fact which was not disclosed or was misrepresented was material or not.[755] In conformity with this test it was held in *the Flying Falcon*[756] that the non-disclosure of the character of one of the directors of the insured company was not material because its full and accurate disclosure would not affect the judgment of the insurance company.[757]

Also, similar to the English and Egyptian laws, the degree of influence which a non-disclosed or misrepresented fact must have on the judgment of the actual underwriter before it could be said to be material and so entitle him to avoid the contract has to be decisive.[758] This was clearly declared by s. 342 of the CCL 1931 [SA] which states that if the non-disclosed or misrepresented fact would make the underwriter estimate the risk as

> *" ... a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*

Accordingly, it was held in a life insurance[759] that the non-disclosure of the assured of the facts that she was suffering from leukaemia and that she was attended by some doctors for other illnesses were material because had they been completely and accurately disclosed, the actual insurance company would have refused to insure.[760]

Therefore, it should now be clear that no right of avoidance would arise under the CCL 1931, unless the underwriter could prove two matters. First, that the assured had made a misrepresentation or non-disclosure of a fact which was his duty to make the underwriter fully and accurately aware of. Secondly, that the said misrepresentation or non-disclosure was material in the sense that if he was aware of the full truth before the conclusion of the contract, he would either refuse to grant the cover or alternatively would still grant it, but not upon the same terms or at the same premiums.

In the long run, it is obvious that the English law differentiates between the materiality of a fact and the right of the actual underwriter to avoid the contract. So, in

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[755] El-Sayed, at p. 193; Haberbeck & Galloway, at p. 232-3. However, see the contrary view expressed in Arbitral award 18/5/1993, [Fire], where the arbitral panel basing its judgment upon that of Steyn J. delivered in *Highlands Insurance v Continental Insurance* [1987] 1 Lloyd's Rep. 109, [Reinsurance], was of the view that materiality ought to be determined according to the prudent underwriter test. It should be added that this contradictory view is the only available one and was not followed or adopted by any other arbitral panels.

[756] Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*.

[757] Ibid., at p. 18. The same test was also applied in Arbitral award 22/12/1986, [House], at p. 15; Arbitral award 11/12/1995, [Life], at p. 15.

[758] Haberbeck & Galloway, at p. 233.

[759] Arbitral award 11/12/1995, [Life].

deciding whether a fact is material or not, it attaches considerable weight to the view of the hypothetical prudent underwriter. Thus, what is material in his view will accordingly be material in that of the actual underwriter and oppositely what is not material in his will not be material in the actual underwriter's.

Whereas, such weight is attached to the view of the actual underwriter when the question of avoidance is to be determined. Correspondingly, the actual underwriter would not escape his liability under the policy, unless he proved that he was in reality induced to insure by the non-disclosed or misrepresented fact whose materiality was already established by the prudent underwriter test. In proving his actual inducement, the actual underwriter is assisted under the English law by the adoption of the actual inducement presumption.

While, on the contrary, the Egyptian and Saudi Arabian laws do not recognise any such division between materiality and the right of avoidance. They both consider the right of avoidance as an integral part of materiality the establishment of which means the availability of the right of avoidance. Unlike the objective test adopted by the English law, the Egyptian and the Saudi Arabian laws lay great emphasis on the effect which a misrepresented or non-disclosed fact would produce on the judgment of the actual underwriter. This subjective test deems materiality as established if it is shown that the actual underwriter would not insure or would insure but not on the same terms or at the same premiums if he was aware of the true picture of the risk. Also, unlike the English test, the establishment of the materiality of a fact means the entitlement of the actual underwriter to his right to avoid the contract without the need for any further burden to be discharged.

5.3.2. Time at which materiality is judged

Under the English law, the duty of the assured to make full and accurate disclosure of all material facts in respect of the risk proposed for insurance to the underwriter must be performed during the negotiation leading to, and up to, the conclusion of the contract.[761] As a result, once the contract is concluded, the assured is no longer legally bound to inform the underwriter of any facts reaching his knowledge after that time whether material to the insurance in question or not.[762] Therefore, it appears that the crucial time at which the materiality of a fact is assessed is the time when the contract is deemed concluded. This moment is defined by s. 21 of the MIA 1906 to be

> *" ... when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract... "*[763]

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[760] Ibid., at p. 18. In this regard, also see Arbitral award 22/12/1986, [House], at p. 15; Haberbeck & Galloway, at p. 233.

[761] Ss. 18(1) and 20(1) of the MIA 1906.

[762] This is, of course, is subject to the requirement of the continuing duty of utmost good faith.

[763] Also, see *Cory v Patton* (1872) L.R. 7 Q.B. 304, [Marine]; affirmed in (1874) L.R. 9 Q.B. 577.

In this regard, it would seem to be compatible with the wording of s. 21 of the MIA 1906[764] to hold that the moment at which a contract of marine insurance is said to be concluded is the moment at which the slip presented by the broker of the assured is initialled by the underwriter irrespective of whether the broker will, then, succeed in getting 100 per cent. cover or not. According to this view, each initialling would be deemed as making a separate and binding contract between the assured and each underwriter.[765]

It follows that the question of whether a non-disclosed or misrepresented fact is material or not must be decided according to the circumstances existing at the moment when it ought to have been fully and accurately disclosed and not according to any subsequent events nor the time when the loss occurred.[766] This was explicitly pointed out by *Seaman v Fonereau*[767], where the Chief Justice held that

> *" ... these are contracts upon chance, each party ought to know all the circumstances. And he thought it not material, that the loss was not such an one as the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events ... ."*[768]

According to that, when the representation of the assured was true at the time of the conclusion of the contract, he would not be accountable if, after its conclusion, it turned out to be false.[769] Nor would he be so held if any non-disclosed or misrepresented fact, which was immaterial at the time of the making of the contract, subsequently became material.[770] But, in contrast, the underwriter would not be denied his right to avoid the policy even if a misrepresented or non-disclosed fact which was material before the conclusion of the contract turned out to be immaterial or groundless after its conclusion.[771] This is because his right is an absolute one which is that he is entitled to be correctly and completely informed of all material facts before and up to the conclusion of the contract.

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[764] " *... when the proposal of the assured is accepted by the insurer ... .* "

[765] For a full account of this view and the contrary one see the examination of this issue in 'Chapter [3]: 3.4.5. The time at which the duty of disclosure must be performed'.

[766] Halsbury, Vol. 25, at paras.221 & 355; Park, at p. 78; Arnould, Vol. 2, at paras.629 & 645; Ivamy, E., General Principles of Insurance Law, 6th ed., (1993), at p. 148; Colinvaux, at para.5-20.

[767] (1743) 2 Strange 1183.

[768] Ibid. Also see *Lynch v Dunsford* (1811) 14 East, 494, where Lord Ellenborough, C.J. stated, at p. 497, that " *... the duty of the assured or his agent in making such communications of material circumstances within their knowledge must attach at the time of effecting the insurance, and cannot depend upon the subsequent event.*"; *Seaton v Burnand* [1900] A.C. 135, [HL-Guarantee], per Earl of Halsbury L.C. at p. 140-2.

[769] *Whitwell v Autocar Fire and Accident Insurance* [1927] 27 Ll.L. Rep. 418, [Life], in which the assured, at the time of the making the contract, truly stated that no insurance company had refused to insure his life. In fact, two days before the conclusion of the contract another insurance company had refused to accept his proposal. However, this misrepresentation was not held actionable, for the assured was not aware of it until after the policy was effected.

[770] *Watson v Mainwaring* (1813) 4 Taunt 763, [Life]; *Associated Oil Carriers v Union Insurance Society of Canton* [1917] 2 K.B. 184.

[771] *De Costa v Scandret* (1723) 2 P. Wms 170; *Lynch v Hamilton* (1810) 3 Taunt. 37; *Lynch v Dunsford* (1811) 14 East, 494.

The time at which materiality is judged under the Egyptian and the Saudi Arabian laws is exactly the same as that under the English law. Therefore, if the underwriter contended that there was a misrepresentation or non-disclosure on the part of the assured before the conclusion of the contract, he would not be allowed to avoid it unless he could first establish beyond any doubt that the contended fact was material to the covered risk at the time the contract was being finalised.

This time is sharply pointed out by s. 361 of the MTL 1990 [Egypt] which requires the assured to

> *" ... give correct data, in signing the contract ... which are considered sufficient to enable the insurer to estimate the risks as covered with insurance."*[772]

This is also the case under the Saudi Arabian law where the materiality of a fact has to be evaluated at the time the policy is made out.[773] This time is implied from the wording of s. 342 of the CCL 1931 [SA] which stated that

> *"[I]f the insured keeps silent about ... particulars ... he should mention in the insurance policy ... and if the insurer discovers the true nature thereof ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."*[774]

This time was also affirmed by the judgment of many cases. For instance, in a case concerning a policy of house insurance, the arbitral panel stated, *inter aila*, that

> *" ... the main rules of insurance necessitate that the assured is bound to disclose to the underwriter at the time of the formation of the contract all the information which is important for him to know ... ."*[775]

Accordingly, if a non-disclosed fact was not material when the contract was effected, it would matter not that it became very material after its inception. This is because the established rule is that what was not material before the conclusion of the contract would not be considered material and there would be no responsibility for its non-disclosure or misrepresentation.

In this regard, it is very clear that all the three systems agree with each other that the question of whether a non-disclosed or misrepresented fact is material or not has to be answered at the time such a fact should have correctly and completely been disclosed. This time as it has been discussed earlier is the time at which the contract is concluded.

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[772] For other authorities confirming that the crucial time at which material facts are to be disclosed prior to the conclusion of the contract see Al Sanhuri, Vol. 7/2, at para.612; Al Badrawi, at para.125; Yihya, at p. 152-3; Al Mahdi, at p. 250-1; Sharaf Al Diyn, at paras.213 & 222; Ibrahim, at para.346; Awad, at para.535; Zahrah, at p. 205; Lutfi, at p. 176.

[773] El-Sayed, at p. 193.

[774] S. 342 of the CCL 1931.

[775] Arbitral award 22/12/1986, [House], at p. 15. In this regard, also see Arbitral award 12/12/1995, [Marine], *'The Flying Falcon'*, at p. 18.

5.3.3. Materiality is a question of fact

> Ss. 18(4) of the MIA 1906: *"Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact."* and ss. 20(7): *"Whether a particular representation be material or not is, in each case, a question of fact."*

It is very clear from the wording of the above two sub-sections that the determination of the question of whether a particular misrepresentation or non-disclosure is material or not is always a matter of pure fact under the English law. Therefore, it would not avail the assured in order to discharge his duty of making accurate and complete disclosure to disclose what he thinks or believes to be material. This is because materiality is a question of fact and not a question of belief or opinion. It follows that if a circumstance is material in fact, it must be disclosed irrespective of whether the assured believes it to be so or not. This was unmistakably laid down by Bayley J. and Littledale J. in *Lindenau v Desborough*[776], where they respectively said:

> *" ... the proper question is, whether any particular circumstance was in fact material? and not whether the party believed it to be so."; " ... I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was in truth material ... ."*[777]

As far as the Egyptian and Saudi Arabian laws are concerned, although neither the MTL 1990 [Egypt] nor the CCL 1931 [SA] has similar statements to those contained in ss. 18(4) and 20(7) of the MIA 1906 [UK], they both seem to generally recognise that materiality is always a question of fact. Accordingly, the question of whether a fact is material or not will not be determined according to the assured's opinion or believe, but it will be according to whether it is in actuality material or not. So, if the assured thought a fact was not material and, therefore, omitted to disclose it, he would be held in breach of the duty of disclosure if the non-disclosed fact was in reality material.[778]

5.4. General comments

Having addressed that, it ought now to be very clear that the rules regulating the test of materiality under the Saudi Arabian law and the Egyptian law are the same. This is evident by emphasising upon the need for the actual underwriter seeking to avoid the policy effected by the non-disclosure or misrepresentation of the assured to establish that such non-disclosure or misrepresentation was material in that it decisively influenced his judgment to grant the policy in question as he actually did. It follows that once the actual underwriter

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[776] (1828) 8 B. & C. 586, [Life]. Also, see *Morrison v Muspratt* (1827) 4 Bing 60, [Life]; *Seaton v Burnand* (1899) 1 Q.B. 782, per Smith, L.J. at p. 791; *Joel v Law Union & Crown Insurance* [1908] 2 K.B. 863, per Vaughan Williams L.J. at p. 883-4.

[777] Ibid., at p. 592 & 593.

[778] Ta Ha, Mustafa. Kamal., Al At Ta'myn Al Bahry, (The Marine Insurance - in Arabic), (1992), at para.195; Ibrahim, at para.337; Awad, at para.535.

establishes that he was influenced by the non-disclosure or misrepresentation of a fact to insure, the said fact will be deemed material and will entitle him to avoid the policy.

This test, of course, does not harmonise with that adopted by the English law where it would not suffice the actual underwriter to prove the materiality of a fact by merely alleging that his personal decision was affected by its non-disclosure or misrepresentation. In fact, the English test differentiates between the materiality of a fact which must be determined according to the prudent underwriter's view and the right of avoidance which must be determined according to the actual underwriter's. So, if a fact was proved to be material because its correct and full disclosure would influence the judgment of a prudent underwriter, its materiality would not entitle the actual underwriter to avoid the policy if he was not personally induced by it to accept the insurance as he in fact did.

Taking both tests into deep consideration, it is obvious that each of which has its own advantages and disadvantages. While the actual underwriter test will ensure that no policy is avoided on the ground of non-disclosure or misrepresentation unless there was actual and decisive inducement, its adoption may make underwriters, especially those careless amongst them, become more and more demanding and make the duty of disclosure of the assured more extensive than ever before.

Yet, no doubt, adopting the prudent underwriter and actual inducement test would surely be for the benefit of both the assured and the underwriter. On one hand, it will minimise those cases in which the actual, but careless, underwriters would be able to avoid a contract on the grounds of a material misrepresentation or non-disclosure which would not affect his judgment if he was prudent. So, it will no longer be open to those reckless underwriters to benefit from their negligent practice in getting red of policies which were correctly effected.

On the other hand, the adoption of this test will encourage underwriters to observe and follow the rules of proper underwriting and be more vigilant and careful when conducting their insuring business. This, of course, will decrease the number of those negligent underwriters and will doubtlessly be for the benefit of the insurance market.

However, the only problem which seems to be heavily affecting the application of this test is the adoption of the presumption of actual inducement. This is because if it is generally accepted that once an alleged non-disclosure or misrepresentation is proved to be material according the judgment of a prudent underwriter, a presumption of actual inducement will also be established on the part of the actual underwriter, this presumption will shift the onus of proof that the actual underwriter was in reality induced by the material non-disclosure or misrepresentation from being on the shoulders of the actual underwriters to be on those of the

assureds. This reversed onus of proof, which was described by Lord Mustill[779] as an *uphill task* and where it will be the duty of the assured to persuade the court that the underwriter was not induced, will reduce, if not abolish, the aim behind the introduction of the actual inducement test. The illustration of this will be the unfair situation where the actual underwriter whose judgment was not influenced by the material non-disclosure or misrepresentation of the assured would nevertheless be entitled by the presumption of actual inducement and the inability of the assured to prove the opposite, to avoid the policy. This situation would never arise if the presumption of actual inducement is viewed as an exceptional rule which will not be easily and directly inferred from proved materiality, unless for a reason or another, the actual underwriter is unable to prove his actual inducement and also providing that there is no contradictory evidence by the assured to confront it.

[779] *Pan Atlantic Insurance v Pine Top Insurance* [1994] 2 Lloyd's Rep. 427.

Chapter [6]: The Remedies of the Violation of the Doctrine

6.1. Introduction

As the previous chapters have been devoted to the discussion of the duties of the assured and his agent to make full and accurate disclosure of all material circumstances affecting the subject-matter insured to the underwriter before and during the negotiations leading to the conclusion of the contract, this chapter is, therefore, devoted to the discussion and examination of the remedies available to the underwriter should any of the above duties be violated. The focus of this chapter would therefore be on how the underwriter is protected against any violation of the pre-contractual doctrine of utmost good faith and whether avoidance of the contract is the only remedy available or damages could also be awarded either as a cumulative remedy or in lieu of avoidance. All of these issues would, in a comparative manner, be considered under the English, Egyptian and Saudi Arabian Marine Insurance Laws. Therefore, the examination of this chapter will be through the following issues: the right of election, time of election, election to rescind or affirm, election to rescind, the effect of rescission, election to affirm, cases in which the underwriter is precluded from the right of avoidance, the right to claim damages and general comments.

But, before embarking upon these issues it ought to be entirely stressed that this chapter will exclude from its ambit the discussion of the remedies available for any violation of the post-contractual doctrine which are dealt with thoroughly under chapter seven.

6.2. The right of election

As the MIA 1906 states that it is the duty of the assured in conformity with the doctrine of utmost good faith to acquaint the underwriter with full and accurate description of the risk proposed for insurance before the conclusion of the contract, it also provides for the remedy available for its violation. This remedy is the entitlement of the underwriter to avoid[780] the contract. This is enforced by ss. 18(1) and 20(1) of the MIA 1906 which respectively read as follows:

> *" ... the assured must disclose to the insurer, before the contract is concluded, every material circumstance ... . If the assured fails to make such disclosure the insurer may avoid the contract." "Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract."*

Accordingly, if the assured fails in his duty to make the underwriter aware of a material fact or misrepresents a material circumstance, the underwriter is entitled to avoid the contract irrespective of the type of duty which was violated and whether it is that contained in

ss. 18(1) or in 20(1). In both cases, the underwriter is entitled to avoid the contract.

Having mentioned that, would a material misrepresentation or non-disclosure, once they were made, automatically make the contract void or there must be an extra action to be taken by the underwriter to arrive at the same result? As a rule, whenever a contract of marine insurance is induced by a material misrepresentation or non-disclosure, this does not mean that it becomes automatically void as a consequence of such violation.[781] It actually means that the contract is made voidable and it will continue to be so until the underwriter elects to either affirm it or avoid it. This is undoubtedly evident from the wording of s. 17 where the phrase *'the contract may be avoided'* was used and the wording of ss. 18(1) and 20(1) where the phrase *'the insurer may avoid the contract'* was also used. Accordingly, non-disclosure or misrepresentation does not directly avoid the contract, but, instead, they vest the aggrieved party, who is usually the underwriter, with the right to either elect to rescind the contract and deem it as if it has ceased to exist or alternatively to waive the misrepresentation or non-disclosure and affirm the contract as if there has never been any misrepresentation or non-disclosure at all.

The right of election was identified under the English law by the judgment of Lord Denning in the Court of Appeal in *Mackender v Feldia*[782], in which he declared that

> *" ... non-disclosure does not automatically avoid the contract. it only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. "*[783]

As far as the Egyptian law is concerned, the right to avoid a policy induced by material non-disclosure or misrepresentation is governed by ss. 347(1) of the MTL 1990 which states that

> *"[T]he insurer may ask for a court ruling which invalidates the insurance deed if it is established that the insured party has submitted incorrect data, however, not in bad faith, or failed to submit the data as related to the insurance thus held, such that the insurer, in both cases has estimated the risk at less than it really is."*

Although that the words *'[T]he insurer may ask for a court ruling'* were used in the formation of ss. 347(1) and this may support the proposition that the contract induced by material misrepresentation or non-disclosure is not avoided by the underwriter's election, but by the ruling of the court, it was strongly argued by Ta Ha[784], Qayid[785] and Zahrah[786] that this

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[780] It must be made clear that the terms *'rescission'*, *'avoidance'*, *'to rescind'* and *'to avoid'* are used in this chapter interchangeably in the sense that the contract will be void *ab initio*.

[781] Eggers, Peter., & Foss, Patrick., Good faith and insurance contracts, (1998), at para.17.01, (hereafter Eggers & Foss).

[782] [1967] 2 Q.B. 590, [CA-Jewellers' Block].

[783] Ibid., at p. 598.

[784] Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at para.677, (hereafter Ta Ha).

[785] Qayid, Mohammed., Al Aaqud Al Bahryah, (The Marine Contracts – in Arabic), 1st ed., (1996), at para.335, (hereafter Qayid).

seemingly effect is not true. The avoidance laid down in ss. 347(1), they further argued, is a proportional avoidance regulated for the benefit of the underwriter alone and, therefore, it is not open to the assured to rely on it nor does it fall within the jurisdiction of the court.[787] Accordingly, it must now be clear that material non-disclosure or misrepresentation does not automatically avoid the contract nor does attributes the right of avoidance to the court. All that it does is to make the contract voidable at the instance of the underwriter. Therefore, like the position under the English law, the contract will be deemed binding between the assured and the underwriter until the latter elects to avoid it.

As to the position under the Saudi Arabian law, the right to avoid a policy induced by misrepresentation or non-disclosure is regulated by s. 342 of the CCL 1931 which states that

> *"[I]f the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof ... the insurance policy made out shall in respect to the insurer be deemed to be null and void; such silence, or false statement or difference shall cause the insurance policy to lapse, even though an event occurs to cause the loss and perishing of the insured items."*

Like the Egyptian law, the words of s. 342 of the CCL 1931 do not definitely state that it is the right of the underwriter, following a violation of the doctrine of utmost good faith by non-disclosure or misrepresentation, to avoid the policy. All that the section states is that if there is misrepresentation or non-disclosure on the part of the assured, *"... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."* Does this mean that the policy would be *null and void* by the act of the law irrespective of the intention of underwriter? Or does it nevertheless mean that the policy will be avoided if the underwriter elects it to be so? This ambiguity attracted El-Sayed's[788] attention who strongly argued that the positive answer to the first question ought not to be the correct intention of the legislator. He was of the view that the nullity contained in s. 342 is

> *" ... a proportional nullity laid down in the interests of the insurer and therefore the court is not allowed to require that it be imposed automatically, it being conditional upon the insurer's plea that it be awarded."*[789]

The argument that the nullity provided for by s. 342 is an optional one which means that the contract will be considered binding until it is avoided by the underwriter was also the view expressed in many cases[790]. In this regard, the position under the Saudi Arabian law

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[786] Zahrah, Mohammed., Ahkam Aaqd At Ta'myn Tabbqamn Li Nusus Al Taqniyn Al Madany Wa Ahkam Al Qada, (The Rules of The Insurance Contract According to The Provisions of the Civil Code and The Case Law – in Arabic), (1984-1985), at p. 232, (hereafter Zahrah).

[787] Ibid.

[788] El-Sayed, Hussein., Maritime Regulations in the Kingdom of Saudi Arabia, (1987), at p. 194, (hereafter El-Sayed).

[789] Ibid.

[790] Arbitral award 5/3/1988, [Burglary], at p. 15; Arbitral award 11/12/1995, [Life], at p. 16, where the insurance company was arguing in front of the arbitral panel that it was entitled to avoid the policy on the ground of the misrepresentations and non-disclosure of material fact on the part of the assured.

resembles that under the English and Egyptian laws in that a misrepresentation or non-disclosure will neither automatically avoid the contract nor grant such a right to the court. It will rather confer a right of election whether to avoid or affirm on the underwriter.[791] The underwriter will be given this right regardless of whether the misrepresentation or non-disclosure was fraudulent, negligent or innocent.[792]

6.2.1. Knowledge

Before going any further and discussing the consequences that may result from the exercise of the underwriter of his right of election, is the occurrence of a misrepresentation or non-disclosure on the part of the assured sufficient in itself to hold the underwriter be in a position of election and so if he does not exercise it, the contract will be affirmed or there must be something more? In fact, the mere fact that the assured misrepresented or non-disclosed a material fact would not in itself hold the underwriter be in a position of election. The underwriter[793] cannot be taken either as having avoided the contract or affirmed it, unless he, at the time of doing so, was aware of all the circumstances giving rise to the right he is being deemed to have exercised. This was emphasised on under the English law by Wightman, J. in *Russell v Thornton*[794], where he rejected the allegation of the assured that the underwriter having knowledge of the non-disclosure had elected to waive it and, so, proceeded to effect the insurance. This was because he, the underwriter, was not aware of the non-disclosure until after the conclusion of the contract.

> *" ... there was no waiver of the omission to communicate the information material to the risk, because a person cannot waive that which he does not know ... ."*[795]

6.2.2. Full knowledge

In the same manner, it was held by Stephenson, L.J. in the Court of Appeal in *C.T.I. v Oceanus*[796] that what is required is full knowledge of the violation

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[791] El-Sayed, at p. 192-3.

[792] Haberbeck, Andreas., & Galloway, Mark., Saudi Shipping Law, (1990), at p. 232-3, (hereafter Haberbeck & Galloway).

[793] The person whose knowledge is considered when determining whether the contract was affirmed or avoided was held by Lloyd, J. in *Hadenfayre v British National Insurance* [1984] 2 Lloyd's Rep. 393, [Contingency], at p. 400-1, to be that of the concerned underwriter or his agents. This type of persons was held in *Insurance Corp of the Channel Islands v Royal Hotel* [1998] Lloyd's Rep. I.R. 151, [Fire], at p. 166 & 173, to include their legal advisers. For further information about this issue, see Eggers & Foss, at paras.17.14-17.16.

[794] (1860) 6 H. & N. 140.

[795] Ibid., at p. 143-4. Also, see *Earl of Darnley v London, Chatham & Dover Railway* (1867) L.R. 2 H.L. 43, per Lord Chelmsford at p. 57; *Merchants' & Manufactures' Insurance v Davies* [1938] 1 K.B. 196, [CA-Motor], per Wilfrid Greene at p. 208; *The Litsion Pride* [1985] 1 Lloyd's Rep. 437, per Hirst, J. at p. 516; *Motor Oil Hellas v Shipping Corporation of India, The Kanchenjunga* [1990] 1 Lloyd's Rep. 391, [HL], per Lord Goff at p. 397-9; *Clarence Roy Hill v Citadel Insurance* [1995] LRLR 218, [Reinsurance], per Cresswell, J. at p. 233-4; *Simner v New India Assurance* [1995] LRLR 240, per Anthony Diamond at p. 257-8; *Yukong Line v Rendsburg* [1996] 2 Lloyd's Rep. 604, at p. 607.

[796] [1984] 1 Lloyd's Rep. 476.

"[T]here can, in my opinion, be no ... affirmation of a contract unless the underwriter enters into it or carries it out after he has full knowledge of the information."[797]

However, when it is said that full knowledge of the misrepresentation or non-disclosure must be available to the underwriter before he could be taken to have elected does not mean that he has to be exclusively aware of all the information entitling him to avoid. This is because it would satisfy the requirement of knowledge if the underwriter, as it was held by Evans, L.J. in *Callaghan v Thompson*[798], was *'in possession of sufficiently certain knowledge of the fact and nature of'* the violation including the knowledge of his entitlement to avoid the contract[799]. In addition, the knowledge which is required on the part of the underwriter is his awareness of the facts that there was a misrepresentation or non-disclosure entitling him to avoid the contract and not the explanations which the assured provides for them.[800]

6.2.3. Unequivocal Knowledge

It would not constitute knowledge on the part of the underwriter to be put on inquiry as to the possibility of the existence of some information that either not disclosed or misstated and, so, if he did not inquire, he would be taken as having elected to waive the misrepresentation or non-disclosure and affirm the contract. This was explicitly said by Scrutton, L.J. in the Court of Appeal in *McCormick v National Motor & Accident Insurance Union*[801], where he stated that it is clear that

" ... whether you treat it as an election or whether you treat it as a ratification or whether you treat it as a decision simply to act on the Knowledge you have acquired, the duty to take action does not arise (1) unless you know all the facts-being put on inquiry is not sufficient; you must know the facts ... ."[802]

Nor would the underwriter be vested with knowledge by merely knowing that he had available to him or at his disposal the means of knowledge. This what was held by the judgment of the Court of Appeal in *C.T.I. v Oceanus*[803], where it was announced by Kerr, L.J. that being put on enquiry or having the means of knowledge is not equivalent to knowledge.

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[797] Ibid., at p. 529-30. Also, per Kerr, L.J. at p.498.
[798] Unreported, 16 January 1998, [CA-Fire]. Also, see *Insurance Corp of the Channel Islands v Royal Hotel* ibid., per Mance, J. at p. 163.
[799] *Peyman v Lanjani* [1985] 1 Ch. 457, [CA]; *Yukong Line v Rendsburg* [1996] 2 Lloyd's Rep. 604, at p. 607; Eggers & Foss, at para.17.20.
[800] *Barber v Imperio Reinsurance Company (UK)*, unreported, 15 July 1993, [CA]. In this regard, also see Eggers & Foss, at para.17.19.
[801] (1934) 49 Ll.L.Rep. 361, [CA-Motor].
[802] Ibid., at p. 365. Also, see *General Accident, Fire & Life Assurance Corporation v Campbell* [1925] 21 Ll.L.Rep. 151, [Reinsurance], per Branson, J. at p. 158; *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Rep. 560, [Marine], per Donaldson, J. at p. 565; *C.T.I. v Oceanus* ibid., per Kerr, L.J. at p. 498.
[803] Ibid.

> *"[A]firmation in the present context means that the underwriter elects to affirm the policy after he has acquired full knowledge of the material facts which would entitled him to avoid it. Having the means of knowledge, or having been put on enquiry, is not enough"*[804]

Therefore, it is clear that what is required in order to make the underwriter in a position to elect is actual knowledge. Therefore, deeming the underwriter as having a constructive knowledge is not sufficient and would not afterwards held him accountable as if he has either avoided or affirmed the policy. In *Hadenfayre v British National Insurance*[805], Lloyd, J relying upon the judgments of Kerr, L.J. and Stephenson, L.J. in *C.T.I. v Oceanus*[806] expressed the view that

> *"[C]onstructive notice is not, of course, enough; it is not enough that the defendants were put on inquiry ... . What is required is actual knowledge."*[807]

However, according to the authority of *the Litsion Pride*[808] citing *Campbell v Flemming*[809], the requirement that full knowledge of all material circumstances must be known to the underwriter does not mean that he, before being taken to have made his election, must be aware of every single circumstance.[810] It suffices him to know those material facts revealing that there has been material non-disclosure or misrepresentation and that he is subsequently entitled to avoid the policy[811]. It was further submitted by Eggers & Foss[812] that this test of knowledge is applicable irrespective of whether the violation was caused by misrepresentation or non-disclosure.

As to the position under the Egyptian and Saudi Arabian laws, although, as it appears, the requirement of knowledge has not received similar and comprehensive treatment as that it has under the English law, it is generally accepted by the Egyptian[813] and Saudi Arabian[814] laws that before a right of election can be said to have arisen on the part of or been exercised

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[804] Ibid., at p. 498.
[805] [1984] 2 Lloyd's Rep. 393.
[806] Ibid.
[807] *Hadenfayre v British National Insurance* ibid., at p. 400; *Simner v New India Assurance*, ibid., in which Anthony Diamond at p. 258, expressed the view that *"... what has to be shown is actual knowledge of the relevant facts and that imputed or constructive knowledge does not suffice."*; *Peyman v Lanjani* [1985] 1 Ch. 457, per Stephenson, L.J. at p. 483; *Malhi v Abbey Life Insurance* [1996] LRLR 237, [CA-Life], per Rose, L.J. at p. 242; Colinvaux's Law of Insurance, 7th ed., (1997), at para.5-03, (hereafter Colinvaux, 7th ed.).
[808] [1985] 1 Lloyd's Rep. 437, per Hirst, J. at p. 516.
[809] (1834) 1 A. & E. 40., per Lord Devlin, C.J. at p. 42, where he said *"[T]here is no authority for saying that the party must know all the incidents of a fraud before he deprives himself of the right of rescinding."* Also, see *Insurance Corp of the Channel Islands v Royal Hotel*, ibid.
[810] In this concern, also see Arnould's Law of Marine Insurance and Average, 16th ed., (1997), Vol. 3, at para.586, (hereafter Arnould, Vol. 3).
[811] *Peyman v Lanjani*, ibid.; *Yukong Line v Rendsburg*, ibid; *Insurance Corp of the Channel Islands v Royal Hotel* ibid., where it was held that the underwriter did not need to know the circumstances of the violation for absolute certainty, but it was enough for him to have a firm trust in the correctness of such circumstances and adequate justification for such trust.
[812] At para.17.18.
[813] Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), (1964), Vol. 1, at para.317, (hereafter Al Sanhuri, Vol. 1).
[814] Coulson, N., Commercial Law in the Gulf States, The Islamic Legal tradition, (1984), at p. 60-1, (hereafter Coulson).

by the underwriter, he must adequately be aware of those facts informing him about the occurrence of a misrepresentation or non-disclosure and about his entitlement to avoid the contract. Clearly, what is required is actual knowledge and, so, neither being put on inquiry, nor having the means of knowledge would satisfy this requirement.

However, it is still not clear from the available authorities in both laws what is the extent of knowledge required on the part of the underwriter before he is able to elect. Is it full knowledge in the sense that he is to know for certain every single fact about the fact that there was a misrepresentation or non-disclosure and the following right of avoidance before he is to make his election? Or is it enough, like the English law, if he is sufficiently informed of those facts revealing that there was a violation entitling him to avoid? In any event, it seems adequate to adopt the view of the English law where the underwriter would be held in a position to elect once sufficient information about the violation and the right to avoid is within his knowledge. This attitude would stop underwriters from deliberately delaying their decision, in some cases until after a loss is taken place, on the ground that they are still waiting for further information to come.

6.3. Time of election

It is very clear under the English law that it would be the right of the underwriter, if the issuance of the policy was induced by a material non-disclosure or misrepresentation on the part of the assured, to elect whether to avoid the policy or affirm it, provided that, at the time of election, he (the underwriter) was sufficiently aware of the circumstances of the violation vesting him with such a right. But, what it is less clear is the exact time within which the underwriter is bound to take an action determining whether he waives the violation and considers the contract as still existing or whether he deems it as void. The determination of this time, as argued by Arnould[815], would not be of much significance to the assured if the discovery of the non-disclosure or misrepresentation was after the occurrence of a total loss of the subject-matter insured, or after the time of the insurance had expired. This is due to the fact that the assured would not usually be affected by any delay on the part of the underwriter in deciding whether he would affirm or repudiate the contract. However, if the delay was so long to the degree that the assured would be prejudiced if the contract was avoided, the underwriter would be disallowed to exercise it.[816]

The time of election would, however, become very important and crucial to the assured if the discovery of the non-disclosure or misrepresentation by the underwriter was during the currency of the policy while the subject-matter insured was still at risk and before the occurrence of any loss. This is owing to the fact that if the underwriter makes his election

[815] Vol. 2, at para.582; Halsbury, Vol. 25, at para.242.

to avoid the policy without delay, the assured, bearing in his mind that he is no longer insured under the present policy, will be able to seek another insurance to cover his risk. But, in contrast, if the underwriter unreasonably delayed determining his election, the assured might become precluded from effecting an alternative insurance, or might do so, but at an increased premium, or at less favourable terms to him than those he should otherwise be able to get.[817]

Unfortunately, the MIA 1906 does not contain any provision ascertaining the time at which an election whether to avoid or not should be made. Notwithstanding, the answer could be sought from the case law.[818] Under the general law, the determination of the time within which a contracting party ought to specify his position whether to affirm the contract or avoid it came under consideration in *Clough v The London & North Western Railway*[819], where it was held by Mellor, J. that a party who had been induced to contract by the fraud of the other party was entitled to keep his election, whether to avoid the contract or not, open as long as he made nothing to affirm it.[820] This right, as he further stated, was subject to some qualifications the presence of any of which would preclude the party defrauded from invoking his entitlement to his right to avoid. This would be the case if the right of election was delayed until

> *" ... an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected ... ."*[821]

On the other hand, it was further added that even delay itself in the absence of any other circumstances would

> *" ... furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."*[822]

The issue was again discussed in the field of marine insurance in *Morrison v The Universal Marine Insurance*[823], in which the broker of the assured omitted in good faith to disclose to the underwriters material circumstances. Although the underwriters shortly after

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[816] Ibid.
[817] Ibid.
[818] Ss. 91(2) of the MIA 1906 states that *"[T]he rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."*
[819] (1871) L.R. 7 Ex. 26.
[820] Ibid., at p. 34. However, unlike a fraudulent misrepresentation, if the misrepresentation inducing the formation of the contract was innocent, the right of the representee to avoid the contract on that account would not stay open as long as he made nothing to affirm it, for that he has to exercise it within reasonable time. So, if he did not take any action within reasonable time, his right to avoid would be barred even if there was no evidence of affirmation on his part. This what was held by the Court of Appeal in *Leaf v International Galleries* [1950] 2 K.B. 86, [CA], per Denning L.J. at p. 91-2. This rule, as suggested by Treitel, G., The Law of Contract, 8th ed., (1991), at p. 345, (hereafter Treitel), would also apply to a negligent misrepresentation. For further information, see Treitel, at p. 338-45.
[821] Ibid., at p. 35.
[822] Ibid.

initialling the slip and before the issuance of the policy became acquainted with the non-disclosure, they executed and delivered the policy without protest as regards their intention to avoid the contract. They, instead, waited until news of the loss of the ship arrived and, then, gave notice to the broker, declaring their intention to repudiate the policy. In this case, Blackburn, J., conceded that the underwriters, after having knowledge that the broker had omitted to disclose material circumstance, were entitled to a right of election and the mere execution and delivery of the policy did not constitute waiver of the right to rescind on their side. In respect of the time during which the right of election ought to be exercised, Blackburn, J., was of the opinion that it must be exercised *"within reasonable time"* and not when the news of the loss comes. He justified holding so upon the ground that *"[A] man cannot wait to take his chance, he must elect within a reasonable time"*.[824] Unfortunately, he did not go further and explain the exact meaning or the boundaries of the term *"reasonable time"*. All that he did say was that *"reasonable time"* did not mean that the underwriters were bound to determine their election to avoid or not *"with desperately hot speed"*.[825]

Subsequently, the assured obtained a rule for a new trial on the ground of misdirection[826], which was made absolute by the majority of the Court of Exchequer (Martin and Bramwell, BB., Cleasby, B., dissenting). The majority of the Court reversed the judgment of Blackburn, J., but, nevertheless, agreed that the underwriters whenever vested with a right of election, must exercise it within reasonable time and were not entitled to wait until a loss occurs and then elect to repudiate. Martin, B. stated that if the act of the underwriters in executing and delivering out the policy would induce the assured to the mistaken belief that he had a valid policy, they would be estopped from denying it.[827] Bramwell, B. also held that the act of the underwriters of the execution and delivery of the policy, after they knew that there had been non-disclosure, would constitute an election not to avoid on their side. Holding the contrary view would require the underwriters to prove that the assured did not consider their action, or had no right to consider it, as an election to affirm.[828]

The underwriters appealed against the decision of the Court of Exchequer and the case came to be tried again.[829] Honyman, J., who delivered the judgment of the Court of Appeal, reversed the decision of the Court below (Martin and Bramwell, BB.) and restored that of Blackburn, J. The importance of this case appears in that, as regards the time of election, it referred with approval to and accepted as the law applicable to contracts of marine

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[823] (1872) L.R. 8 Ex. 40, [Marine].
[824] Ibid., at p. 47.
[825] Ibid.
[826] Ibid., at p. 52.
[827] Ibid., at p. 53.
[828] Ibid., at p. 58.

insurance[830] the general law delivered by Mellor, J. in *Clough v The London & North Western Railway.*[831] According to which, as Honyman, J. cited, the underwriter is entitled to keep open his right of election as long as he does no action determining whether to avoid or not. This rule, as it was held, is subject to some restrictions which, if invoked, would prevent the underwriter from exercising his right to rescind. These were held to be that the underwriter would not be allowed to avoid the contract if his action was not taken until after an innocent third party gained an interest in the subject-matter insured or that the underwriter was so late to the extent that the assured had altered his position under the belief that the underwriter elected to affirm the insurance. It was further held that even mere lapse of time would sometimes be taken as evidence that the underwriter elected to affirm the contract. But, if the lapse of time was so great, this would probably be regarded as conclusive evidence to that effect.[832]

The rule of *Clough v The London & North Western Railway* was also approved and applied by the Court of Appeal in *Allen v Robles*[833], in which arose the question of the time within which the underwriters, with knowledge of the breach of the condition that a notice of an accident ought to be given within certain time, must make their election whether to avoid the contract or not. It was held by Fenton Atkinson L.J. that even if after having become aware of the violation, it would be open to the underwriters to delay their election of whether to avoid the policy or to admit liability. But, he qualified the right of the underwriters to rescind, as held in *Clough v The London & North Western Railway,* by stating that

> *"[T]he lapse of time would only operate against them if thereby there was prejudice to Mr. Robles (the assured) or if in some way rights of third parties intervened or if their delay was so long that the Court felt able to say that the delay in itself was of such a length as to be evidence that they had in truth decided to accept liability ... ."*[834]

The time of election was ultimately and explicitly laid down in the field of marine insurance by the judgment of Donaldson, J. in *Liberian Insurance Agency v Mosse*[835]. In his judgment, Donaldson, J. was clearly doing no more that adopting the decision of *Clough v The London & North Western Railway,* which was followed and acted upon in *Morrison v*

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[829] (1873) L.R. 8 Ex. 197.
[830] Ibid., at p. 203-4.
[831] Ibid., at p. 34-5. Clearly, by adopting the view expressed in *Clough v The London & North Western Railway* where the right of the representee to avoid would not be barred by mere lapse of reasonable time, Honyman, J. was in favour of the stricter rule applicable to fraudulent misrepresentations than that applicable to innocent and negligent once expressed in *Leaf v International Galleries*, where mere lapse of reasonable time would bar the right of avoidance.
[832] (1873) L.R. 8 Ex. 197, at p. 204.
[833] [1969] 2 Lloyd's Rep. 61, [CA-Motor]. Also, see *Simon, Haynes, Barlas & Ireland v Beer* [1945] 78 Ll.L. Rep. 337, [Indemnity], per Atkinson, J. at p. 369.
[834] Ibid., at p. 63-4. It was submitted by Arnould, Vol. 2, at para.585, that although this principle was applied to a breach of a condition, it would equally be applicable to the right to avoid a marine policy for non-disclosure or misrepresentation.
[835] [1977] 2 Lloyd's Rep. 560.

The Universal Marine Insurance[836] and *Allen v Robles*[837]. He formulated the principle regulating the time of election, which deserved to be quoted in full, as follows:

> *"[M]aterial non-disclosure or misrepresentation entitles the underwriter to avoid the contract. The right exists from the time when the contract is made and continues until the underwriter, with full knowledge of the non-disclosure or misrepresentation, affirms or is deemed to have affirmed the contract. Full knowledge of the facts is essential before there can be any question of affirmation-being put upon inquiry is insufficient. And even when the underwriter has full knowledge of the facts, he is still entitled to a reasonable time in which to decide whether to affirm the contract. In a situation in which the underwriter has taken no action to affirm or repudiate the contract and a reasonable time for making up his mind has elapsed, he will be deemed to have affirmed the contract if either so much time has elapsed that the necessary inference is one of affirmation or the assured has been prejudiced by the delay in making an election or rights of third parties have intervened."*[838]

In conclusion, although the underwriter is given a seemingly open right to choose the time within which to make his election to avoid or not, his right has to be exercised within reasonable time. If no action was taken and reasonable time expired, the underwriter would nevertheless be entitled to avoid the policy, subject to three qualifications the occurrence of any of which would preclude him from insisting upon his right to avoid.[839] These would be when the election of the underwriter to avoid the contract is made so late as to make it prejudicial to the assured to allow the underwriter to avoid. Or when a third party has gained an interest in the subject-matter insured which would be affected if the underwriter was permitted to avoid.[840] Or when no election has been made, no prejudice has been made to the assured or a third party and a great deal of time has elapsed which would justify an inference that his election is one of affirmation. However, it ought to be made very clear that none of the above qualifications would prevent the underwriter from avoiding the policy if his action was taken within reasonable time.[841]

As far as the time of election under the Egyptian and Saudi Arabian laws are concerned, unfortunately, neither the MTL 1990 [Egypt] nor the CCL 1931 [SA] contain any provisions determining when an election must be made. However, according to the general law in both countries[842], the position appears to be that an underwriter induced to enter into a

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[836] (1873) L. R. 8 Ex. 197.
[837] Ibid.
[838] [1977] 2 Lloyd's Rep. 560, at p. 565. This judgment was also referred to with approval by Halsbury, Vol. 25, at para.242.
[839] In this regard, also see the judgment of Diamond, J. in *Simner v New India Assurance* [1995] LRLR 240, at p. 259-60.
[840] An example of an interest of a third party in the insurance was given by Eggers & Foss, at para.17.37, to be when a mortgagee of an insured vessel lend money in return for an assignment of its hull insurance to him.
[841] Ibid., p.259-60. For additional information, see Eggers & Foss, at paras.17.25-17.39, where it was stated that *"[W]hat constitutes a reasonable time will vary from case to case. Factors will include whether the insurance is still current, the timing of the next step in the transaction (i.e. acceptance of further premium, agreeing to endorsement and variations and so on), and whether the insurer has recently agreed to amend cover"*.
[842] This is the CC 1948 in Egypt and the Shari'a law in Saudi Arabia.

contract by a misrepresentation or non-disclosure would have to make his election either to avoid or to affirm within reasonable time.[843]

According to ss. 140(1) of the CC 1948 [Egypt], reasonable time is considered to be three years within which the underwriter has to make his election whether to avoid or not. This period, according to ss. 140(2), will be counted from the date at which the underwriter is in possession of sufficient information about the violation. But, in any case, if for any reason the underwriter was ignorant of the violation for a long time, he would have to make his election within 15 years from the date when the contract was concluded, otherwise his right to avoid would be denied.[844]

Unlike the English and Egyptian laws, the situation under the Saudi Arabian law[845] is not clear. This is because the law does not seem to have generally provided any time limit within which a contracting party has to make his election, nor any guidelines about what is meant by 'reasonable time'.[846] However, according to the view expressed by Imam Malik, which is the only authority found in this regard, an aggrieved party seems to be required to make his election within reasonable time and reasonable time must not exceed one year.[847] Accordingly, the underwriter entitled to avoid has to make his election within one year running from the time when he was sufficiently aware of the violation. Therefore, if he after being informed that there had been misrepresentation or non-disclosure did not make his election until after the period of one year expired, his late action to avoid would be rejected.

6.4. Election to rescind or affirm

It is clear from the judgment of Lord Goff in the House of Lords in *Motor Oil Hellas v Shipping Corporation of India, The Kanchenjunga*[848] that under the English law the election of the underwriter, whether of affirmation or of avoidance, could be communicated to the assured by words or by conduct[849]. If it was communicated by words, the underwriter would only be held to have made such an election if he, with knowledge of the relevant facts,

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[843] Coulson, at p. 66; Al Sanhuri, Vol. 1, at paras.321-3; Al Sanhuri, Abdur Razzaq., Masadir Al Haq Fi Al Figh Al Islami, (Sources of Obligation in the Islamic Jurisprudence – in Arabic), Vol. 4, (1953-54), at p. 118-120 & p. 278-9, (hereafter Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4).

[844] Al Sanhuri, Vol. 1, at paras.321-3; Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 118-120. Also, see Mixed Appeal 3/2/1915, Civil Collection, Year No. 27, p. 146 and Mixed Appeal 15/6/1926, Civil Collection, Year No. 38, p. 472, where it was held that the mere silence of the aggrieved party would not deprive him of his right to avoid even if it was for a long time, unless it was lost by the time limit; Bani Suwif Al Juz'iyah 31/3/1900, Al Huquwaq 15, p. 133, where it was held that the mere silence of the hurt party would not deprive him of his right to avoid, unless his silence could be interpreted as a waiver of his right to avoid.

[845] Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 278-9; Coulson, at p. 66.

[846] Coulson, at p. 66.

[847] Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 194-5 & 278-9.

[848] [1990] 1 Lloyd's Rep. 391, at p. 398-9; *Benjamin Scarf v Alfred George Jardine* (1882) 7 App. Cas. 345, [HL], per Lord Blackburn, at p. 360-1.

[849] *Yukong Line v Rendsburg*, ibid., at p. 607.

made his election in clear and unequivocal terms.[850] On the other hand, if it was the conduct of the underwriter which was said to have amounted to an election, he would be held to have done so, if he had acted in a manner which was only consistent with the alleged election.[851]

Undoubtedly, the exercise of the underwriter of his right to rescind the insurance or to affirm it would inevitably produce some consequences. Such consequences will vary depending upon the action taken by the underwriter. But, it seems appropriate at this stage and before examining the nature of rescission and affirmation to mention that whenever the underwriter made unequivocal election, his act, if taken with full knowledge, would be final and irrevocable. This is to say that if the underwriter elected to affirm the contract, he would not afterwards be allowed to change his election and seek rescission. This is what was held by Mellor, J., in *Clough v The London & North Western Railway*[852] and which was subsequently referred to with approval by Cleasby, B., in *Morrison v The Universal Marine Insurance Company*[853] and by Honyman, J., in the Court of Appeal[854].

In contrast, the right of avoidance may sometimes become alive again and, so, be available to the underwriter to exercise, despite the fact that he has already determined to affirm the policy. This would be the case if the underwriter discovered that there was another reason for avoidance of which existence he had been unaware at the time when he affirmed the first violation or which occurred thereafter. In this situation, the underwriter would definitely be provided with a separate and new right of avoidance concerning the other violation. Accordingly, the principle that election once is made is final and irrevocable should be understood to only preclude the underwriter from his right to avoid regarding a violation which he has already waived, whereas it will not preclude him as such if it is exercised for another and unrelated one.[855]

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[850] *Motor Oil Hellas v Shipping Corporation of India, The Kanchenjunga*, ibid., at p. 398.

[851] Ibid.; *Clarence Roy Hill v Citadel Insurance* [1995] LRLR 218, per Cresswell, J. at p. 239. Also see *Iron Trades v Imperio* [1991] 1 Re.L.R. 213, per Hobhouse J. and *Pan Atlantic Insurance v Pine Top Insurance* [1992] 1 Lloyd's Rep. 101, per Waller J., where the exercise of the underwriter of his contractual right to inspect records was considered as affirmation. However, if such an action was accompanied by an express reservation or a plain position to the contrary, it would not constitute an affirmation on the part of the underwriter. This what was actually held by Cresswell, J. in *Clarence Roy Hill v Citadel Insurance,* ibid., at p. 239. Also, see the judgment of Lloyd, L.J. in *Barber v Imperio Reinsurance Company,* unreported, 15 July 1993, [CA], where he was of the view that the underwriter was not bound to reserve his rights if he was making inquiries under the policy, but he would nevertheless be bound to do so if his action under the policy was paying a claim. In this regard, also see Eggers & Foss, at paras.17.57-17-59.

[852] (1871) L.R. 7 Ex. 26, in which it was declared, at p. 34, that *" ... if it can be shewn that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever."; Benjamin Scarf v Alfred George Jardine,* ibid., at p. 360.

[853] (1872) L.R. 8 Ex. 40, at p. 59.

[854] (1873) L.R. 8 Exq. 197, at p. 203. This principle was recently affirmed by the judgment of Lord Goff in the House of Lords in *Motor Oil Hellas v Shipping Corporation of India, The Kanchenjunga*, ibid., at p. 399. Also, see *Yukong Line v Rendsburg* [1996] 2 Lloyd's Rep. 604, per Moore-Bick, J. at p. 607-8.

[855] Clarke, M., The Law of Insurance Contracts, 3rd ed., (1997), at para.23-18B2, (hereafter Clarke, 3rd ed.).

In the same way, according to ss. 139(1) of the CC 1948 [Egypt], a voidable contract could be affirmed expressly by words or impliedly by conduct.[856] If the affirmation or avoidance of the contract is by words, there is no specific words or formula to be used as long as they are clear and unequivocal.[857] An affirmation or avoidance of the contract would also be inferred from the conduct of the underwriter. This would be, for example, when the underwriter with knowledge of the existence of a misrepresentation or non-disclosure executed the contract[858] or made an action which was clearly contrary to his right to avoid.[859] But, if there were more than one ground to avoid the policy on, the reliance of the underwriter upon one of them would not impliedly amount to affirming the contract on the others[860], unless he could separately be proved to have done so.[861] In the same manner, the action of the underwriter of the execution of the policy would not be deemed as an implied affirmation if such an action was accompanied by an expressed reservation of his right to avoid.[862] Nor would his entrance into an unsuccessful conciliatory negotiation with the assured be taken as impliedly waiving the violation.[863]

On the other hand, if the underwriter, after being aware that here had been non-disclosure or misrepresentation, made his election, his election whether of avoidance or affirmation would be final and irrevocable. This result will be held binding irrespective of the attitude of the assured towards the action of the underwriter and whether he accepts it or not.[864]

The position under the Saudi Arabian law is similar to the English and Egyptian laws. Therefore, a contract of insurance which was rendered voidable by misrepresentation or non-disclosure could be either affirmed or avoided by words or by conduct.[865] There is no need for the underwriter to use any particular words in order to express his election provided that the words used are manifest and unequivocal.[866] An affirmation or avoidance of the contract

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[856] Al Sanhuri, Vol. 1, at para.317.
[857] Mixed Appeal 17/6/1915, Civil Collection, Year No. 27, p. 417 and Mixed Appeal 5/3/1922, Civil Collection, Year No. 24, p. 261 where the aggrieved party affirmed the contract by words.
[858] Mixed Appeal 29/5/1913, Civil Collection, Year No. 25, p. 417, where it was held that if the contract by which a land was divided between partners was voidable, the action of the aggrieved partner of keeping his share and dealing with it as an owner would be deemed an implied affirmation.
[859] Mixed Appeal 27/4/1926, Civil Collection, Year No. 38, p. 365, where the conduct of the aggrieved party of accepting the price of the sale and spending it was considered an affirmative action; Mixed Appeal 2/3/1916, Civil Collection, Year No. 28, p. 184, where the damaged party was held to have affirmed the contract by conduct; Mixed Appeal 2/3/1922, Civil Collection, Year No. 34, p. 215, in which the contract was held affirmed by conduct.
[860] Mixed Appeal 26/5/1904, Civil Collection, Year No. 16, p. 285.
[861] Al Sanhuri, Vol. 1, at para.318.
[862] Mixed Appeal 20/12/1906, Civil Collection, Year No. 19, p. 45.
[863] Mixed Appeal 26/5/1904, Civil Collection, Year No. 16, p. 285.
[864] Mixed Appeal 27/4/1926, Civil Collection, Year No. 38, p. 365.
[865] Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 157-8, 193, 208-9, 232-3 & 260-1; Ibn Qadi, S., Jami' Al Fusulayn (in Arabic), (1883), Vol. 1, at p. 242; Baillie, N., The Moohummudan Law of Sale, (1850), at p. 88, (hereafter Baillie); Al Kasani, 'Alauddin., Badai' Al Sanai' Fi Tartib Al Shara'I (in Arabic), 1st ed., (1910), at p. 291, (hereafter Al Kasani).
[866] Ibid.

would also be inferred from the conduct of the underwriter.[867] In addition, like the English and Egyptian laws, if the underwriter made his election, he would not be able to change it. Moreover, if there were more than one violation, the affirmation of any of which would not mean the affirmation of the rest.[868] Furthermore, it should be stated that the election once is made is final and binding irrespective of whether the assured accepts it or not.[869]

6.4.1. Election to rescind

As a matter of principle, a violation of a contract of insurance caused by a material non-disclosure or misrepresentation of a fact would not automatically make the contract void. All that it does is to make the contract voidable at the instance of the aggrieved party who is usually the underwriter. This means that the contract, until the underwriter with full knowledge of the matter makes his election whether to avoid it or not, would still be considered subsisting. But, once the underwriter with full knowledge elects to avoid the contract, it will cease to be binding.

As far as the form in which the right of avoidance should be expressed is concerned, under the English law this can simply be exercised by a notice served on the assured. This notice, as a matter of confirmation, could be supported by a court order.[870] However, if there is a dispute over the entitlement of the underwriter to avoid the policy, the underwriter will be able to bring an action at law to enforce his right which he has previously elected to exercise.[871] If the verdict of the court is supporting the right of avoidance, its effect will merely be seen as a judicial determination of the fact that the election of the underwriter to avoid the contract was justified and effective at the time it was first taken.[872] Therefore, in any case, rescission would take effect, if, depending upon the circumstances of each case, it

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[867] Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 157-8, 193, 208-9, 232-3 & 260-1.

[868] Baillie, at p. 108.

[869] Baillie, at p. 84; Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 193-4, 209 & 261.

[870] *Reese River Silver Mining v Smith* (1869) LR 4 HL 64, per Lord Hatherley at p. 72-4; *Abram Steamship v Westville Shipping* [1923] AC 773, [HL], per Lord Atkinson at p. 783-4; Clarke, 3rd ed., at para.23-17B; Schoenbaum, T., The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law, (1998) 29 No. (1) Journal of Maritime Law & Commerce 1, at p. 35.

[871] *Reese River Silver Mining v Smith* ibid., per Lord Hatherley at p. 73-4; *Abram Steamship v Westville Shipping* ibid., per Lord Atkinson at p. 781.

[872] *Reese River Silver Mining v Smith* ibid.; *Abram Steamship v Westville Shipping* ibid., where Lord Atkinson pointed out, at p. 781, that *" ... it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract."*; *Insurance Corporation of the Channel Islands v McHUGH & Royal Hotel* [1997] LRLR. 94, [Business Interruption], where Mance, J. stated, at p. 138, that *"[I]t is a right* [the right of avoidance] *which a party can (and insurers regularly do) exercise without invoking the assistance of any Court. The Court's role, when invoked at all, is now usually to declare that the contract has been validly avoided."*

is justified, from the time at which the notice of rescission was given to the assured or his agent.[873]

Likewise, the position under the Egyptian and Saudi Arabian laws as to the means by which an election to avoid can be communicated to the assured seems to be similar to that under the English law in the sense that there is no need for any particular form to be embodied in. Therefore, the underwriter could plainly inform the assured of his decision to avoid the policy, for example, by sending him a notice in this regard.

However, if the assured disputed the entitlement of the underwriter to avoid, the latter could enforce his right by bringing a legal action at the court. The role of the court and the weight to be attached to its verdict were summarised by Coulson to be

> *" ... to decide whether or not the facts constitute a proper ground for rescission. If the court decides that they do, then it will either confirm the party's act of rescission, so that it will be effective at the time the party made it, or authorise rescission."*[874]

6.4.1.1. The effect of rescission

6.4.1.1.1. Avoidance of the contract *ab initio*

If the underwriter, following the discovery that there has been non-disclosure or misrepresentation of a material fact, elects to repudiate the policy and treat it as void, this will certainly cause the policy to be void *ab initio*[875]. This effectively means that the avoidance here is retroactive in the sense that not only the insurance is void, but also its parties have to be brought back to their former positions in which they stood before they entered into it.[876] Accordingly, the underwriter will cease to be liable for any unsettled claims and, if there was no fraud[877], will have to return the premium back to the assured and the latter will have to pay back any losses paid for by the former.[878]

This was acknowledged by MacKinnon, J. in *Cornhill Insurance v L. & B. Assenheim*[879], where he after holding that the underwriters were entitled to avoid the policy

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[873] Ibid.

[874] Coulson, at p. 57.

[875] *Cornhill Insurance v L. & B. Assenheim* [1937] 58 Ll.L. Rep. 27, [Motor], at p. 31; Eggers & Foss, at para.16.49. Although it was stated by Lord Denning at p. 598 and Diplock L.J. at p. 603 in the Court of Appeal in *Mackender v Feldia* ibid., that if the underwriter elected to avoid the contract, it would be avoided from the moment of avoidance and not from the beginning, their judgments, it was argued by Arnould, Vol. 2, at para.581, did not alter the law in respect of the retroactive effect of rescission for non-disclosure or misrepresentation. This is because, he submitted, the Court of Appeal in this case was not concerned with *"the incidents or effects of a valid election to avoid the policy"*.

[876] *Abram Steamship v Westville Shipping* ibid., where Lord Atkinson, at p. 781, clearly laid down the effect of the rescission of the contract as follows *"[W]here one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into."*; *Clarke v Dickson* (1858) El BI & EI 148, 154.

[877] Ss. 84(3)(a) of the MIA 1906.

[878] *Cornhill Insurance v L. & B. Assenheim*, ibid., at p. 31; Eggers & Foss, at paras.16.87-16.89.

[879] Ibid.

upon the grounds of the non-disclosure of the material fact that the former underwriters of the assureds refused to renew their policy, stated that

> *"[A]voidance of the policy, of course, results in it being set aside ab initio, the repayment of any losses, and the return of any premiums paid under it ... ."*[880]

However, an exception to this entire avoidance was held to have existed in respect of those clauses of the policy which are inserted in order to state, in case there is a dispute, the law governing the policy, jurisdiction clause, or the procedure to be followed to solve any dispute arising thereunder, arbitration clause.[881] According to this exception and despite the fact that the whole policy would be avoided, these clauses could still be alive and, therefore, capable of being referred to even if the cause of avoidance was alleged to be fraudulent non-disclosure or misrepresentation.[882] This is because, as Arnould[883] said, they would be seen as constituting a distinctive contract which is collateral or ancillary to the main one in which they are inserted. It follows that if the main contract is avoided, it does not inevitably follow that the separate contract contained in the arbitration or jurisdiction clause is also avoided.[884]

Likewise, the above rule that avoidance, when elected, means that the whole insurance is avoided, not only part of it[885] would also be subject to any other exceptions which the policy may contain. So, if, for example, the policy states that the underwriter is vested with the right, in case there is a material non-disclosure or misrepresentation, either to reject the whole contract altogether or only to reject any claim arising thereunder while keeping the contract alive, he can choose whether to avoid the whole contract or just the said

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[880] Ibid., at p. 31.

[881] *Harbour Assurance v Kansa General International Insurance* [1992] 1 Lloyd's Rep. 81, [Reinsurance], where Steyn, J. stated, at p. 91, that *"[D]isputes as to the avoidance of contracts for innocent or negligent misrepresentation, undue influence, or duress may be referred to arbitration. In all such cases a widely drawn arbitration clause will survive avoidance of the contract. When the arbitrator declares that the contract is avoided it operates retroactively, i.e. it operates ab initio"*. In this respect, also see the judgment of Bankes, L.J. in *Metal Products v Phoenix Assurance* [1925] 23 Ll.L. Rep. 87, at p. 88; *Mackender v Feldia* [1967] 2 Q.B. 590, in which Lord Denning made it beyond doubt that any avoidance of the contract for non-disclosure would not abrogate some of the policy's clauses, for instance, arbitration or jurisdiction clauses, which would survive and, nevertheless, govern any dispute between the parties concerning the exercise of the right of avoidance. This was laid down, at p. 598, as follows: *" ... the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is "a dispute arising under" the policy and remains within the clause: just as does a dispute as to whether one side or other was entitled to repudiate the contract ... "*; a similar view was also expressed by Diplock L. J. at p. 603.

[882] This was also held by Steyn, J. in *Harbour Assurance v Kansa General International Insurance* ibid., where he asserted, at p. 91, that *" ... a question of voidability for fraudulent misrepresentation is just as much capable of being referred to arbitration as an issue of avoidance for innocent misrepresentation."* However, the case went to the Court of Appeal [1993] Q.B. 701, where it was held by Ralph Gibson L. J., at p. 712, that if fraud was involved in the drawing up of the arbitration clause, the clause would not be capable of being invoked.

[883] Vol. 3, at para.581.

[884] Ibid., relying upon the judgment of Colman J. in *Yasuda Fire & Marine Insurance v Orion Marine Insurance Underwriting Agency* [1995] 1 Lloyd's Rep. 525, [Underwriting agency agreement], it was further suggested by Arnould that similar treatment could also be given to other clauses such as an inspection of records clause, but the clause has yet to be tested in the field of rescission.

[885] *George Urquhart v Duncan Macpherson* (1878) 3 App. Cas. 831, per Montague E. Smith at p. 837-8; Clarke, 3rd ed., at para.23-17C.

claim.[886] In the contrary, if there is no such or similar stipulations, the underwriter, in case there is a claim by the assured, cannot elect to repudiate the claim alone on the ground of non-disclosure or misrepresentation, keep the premium and deem the contract as still binding.[887] He can only either repudiate the contract altogether including the claim or, if he chooses to do so, affirm it and pay the claim.[888]

Avoidance also has the same effect under the Egyptian law in that once the underwriter elects to avoid, the policy will be void *ab initio.*[889] So, the policy will be deemed as if it has not existed before and will not be open to both parties to rely on any of its terms.[890] This means that both parties would be restored to their original position in which they were in before they entered into the contract.[891] It follows that the underwriter will cease to be liable for any unpaid losses and entitled to restore any paid ones and the assured will be allowed to claim his premium back.[892]

In the same manner, avoidance under the Saudi Arabian law means that the policy is void *ab initio.*[893] So, avoidance when elected would make the contract as if it has never existed before and would bring the contracting parties into their original position on which they stood before they enter into it.[894] This what was affirmed by the arbitral panel in a life insurance case.[895] In this case, the assured was asked about whether she was suffering from leukemia or not and about the names of the doctors attended her for other illnesses, she answered negatively. In fact, she was suffering from leukemia for a long time and it was ultimately the cause of her death. The arbitral panel held that since the health condition of the

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[886] *Tilley & Noad v Dominion Insurance* [1987] 284 EG 1056, [Professional indemnity], per Mervyn Davies J. at p. 1062-4.

[887] *Brewtnall v Cornhill Insurance Company* (1931) 40 Ll.L. Rep. 166, [CA-Motor], per Charles, J. at p. 168; *West v National Motor & Accident Insurance Union* [1955] 1 Ll.L. Rep. 207, [CA-Burglary]; Eggers & Foss, at para16.28.

[888] *West v National Motor & Accident Insurance Union*, per Singleton L.J. at p. 210 and Hodson L.J. at p. 211. In contrast, see the judgment delivered by Kershaw in *Roadworks (1952) v J. R. Charman* [1994] 2 Lloyd's Rep. 99, [Marine], at p. 107, where he relying on the judgment delivered by Hirst, J. in *The Litsion Pride* [1985] 1 Lloyd's Rep. 437, at p. 514-16, in respect of fraudulent claims, admitted that there were material non-disclosure and misrepresentation on the part of the assureds and, then stated that it would not be necessary for the underwriter in order to defend the claim of the assureds to avoid the whole contract, for it was open to him to reject the claim alone while keeping the contract binding. This judgment was described by Eggers & Foss, at para16.29, to be wrong. Eggers & Foss further stated that the remedy of avoidance is *' ... an all or nothing remedy'*.

[889] Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at para.677, (hereafter Ta Ha); Awad, Ali. Jamal Al Diyan., Al Qanun Al Bahry, (The Maritime Law – in Arabic), (1987), at para.538; (hereafter Awad); Sharaf Al Diyn, Ahmed., Ahkam At Ta'myn, (Insurance Rules – in Arabic), 3rd ed., (1991), at paras.254 & 260, (hereafter Sharaf Al Diyn).

[890] Ss. 142(1) of the CC 1948 [Egypt]. Also, Al Sanhuri, Vol. 1, at paras.336-7.

[891] Ta Ha, at para.677; Awad, at para.538.

[892] Awad, at para.538.

[893] Al Sharbini, Mohammed. Ibn Ahmed Al Khatib., Mughni Al Muhtaj, (in Arabic), (1309 A.H.), Vol. II, at p. 49.

[894] Ibid.

[895] Arbitral award 11/12/1995, [Life].

assured was one of the circumstances required by the insurance policy, any misrepresentation in that respect would avoid the policy *ab initio*.[896]

However, dissimilar to the English and Egyptian laws, according to s. 342 of the CCL 1931 [SA][897] and as an exception to the retroactive effect of avoidance, the assured, if the contract is avoided, will not be relieved from his duty to pay the premium.[898] This is to say that while the underwriter will cease to be liable for any unsettled losses and entitled to restore the amounts paid for prior claims, the assured's obligation to pay the premium will be intact.[899]

Apart from that, as to the English law, a term vesting the underwriter with the right, in case there was material non-disclosure or misrepresentation, to avoid the whole policy or only the claim while keeping the contract intact seems to be valid and applicable. However, in the light of s. 342 of the CCL 1931 [SA], such a term does not seem to be of any importance to the underwriter who will be entitled to keep the premium whether he avoids the whole policy or the claim brought thereunder.

6.4.1.1.2. Return of premium

As briefly stated above, one of the consequences of avoidance of the policy is that the assured would be entitled, as against the underwriter, to a return of his premium.[900] Under the English law, this right was provided for by ss. 84(1) and 84(3)(a) of the MIA 1906 which respectively read as follows:

> *"[W]here the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured." "[I]n particular- [W]here the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable ... ."*

As a result, the premium ought to be returned, unless the avoidance was due to fraudulent non-disclosure or misrepresentation by the assured or his agents[901] or the policy

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[896] Ibid., at p. 15.

[897] *"[T]he insurance policy is void in respect of the underwriter if the assured keeps silent about or if he gives different particulars than those he ought to state in the insurance policy, or if the particulars he gives do not conform to those shown in the bill of lading ... ."*

[898] Haberbeck & Galloway, at p. 232; El-Sayed, at p. 194.

[899] Ibid.

[900] The right to claim a return of premium is enforceable not by an action on the policy, but by an action for many had and received. For this, see *Stevenson v Snow* (1761) 3 Burr 1237, [Marine], per Lord Mansfield C.J. at p. 1240; *Anderson v Thornton* (1853) 8 Exch 425, [Marine], per Parke B., at p. 427; *Castelli v Boddington* (1852) 1 E. & B. 66, [Marine], per Lord Campbell C. J. at p. 79, affirmed in (1853) 1 E. & B. 879. As to the right to claim a return of premium generally see ss. 82, 83 and 84 of the MIA 1906; Ivamy, E. R. Hardy, General Principles of Insurance Law, 6th ed., (1993), chapter 15; MacGillivray, 9th ed., (1997), chapter 8, (hereafter MacGillivray, 9th ed.); Colinvaux, 7th ed., chapter 7; Birds, John., Modern Insurance Law, 4th ed., (1997), chapter 8.

[901] As to the entitlement of the assured to his premium back because of the fraud of the underwriter or his agent see *Carter v Boehm* (1766) 3 Burr 1905, per Lord Mansfield at. p. 1909; *Kettlewell v Refuge Assurance* [1908] 1 K.B. 545, per Lord Alverstone C.J. at p. 550 and per Gorell Barnes, President. at p. 551, affirmed by the House

contained a stipulation stating the events upon the occurrence of any of which there would be no return of premium[902], in which cases the assured would be deprived of his entitlement to claim the premium. This was unquestionably illustrated by the judgment of Gibbs J. in *Feise v Parkinson*[903], where he stated that

> *"[W]here there is fraud, there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium."*[904]

It is also the duty of the underwriter under the Egyptian law once he elects to avoid the contract to bring the premium back to the assured.[905] Nevertheless, dissimilar to the English law, the entitlement of the assured to the return of his premium does not seem to be affected by the presence or absence of fraud. Therefore, it matters not that the ground on which the policy is avoided is fraudulent misrepresentation or non-disclosure or mere innocent ones. In both cases, the underwriter is bound to return the premium to the assured. This approach by the MTL 1990 seem to be understandable in the light of ss. 347(3) which regulates how the underwriter is compensated if he was induced to insure by fraudulent or innocent misrepresentation or non-disclosure.[906]

However, the position under the Saudi Arabian law is different. This is because, as explained above, avoidance according to s. 342 of the CCL 1931 will not make the assured cease to be liable to the underwriter for the payment of the premium. Practically, this means that if the assured has already paid the premium, he is not allowed to claim it back and if he has not paid it yet, the underwriter is entitled to claim its payment.[907] This result does not seem to be affected by whether the cause upon which the policy was avoided involves fraud or not.

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of Lords [1909] AC 243; *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 K.B. 482; *Mutual Reserve Life Ins. v Foster* (1904) 20 T.L.R. 715, [HL-Life], per Lord Lindley at p. 717.

[902] The policy may state that the policy will be void and the premium paid will also be forfeited if any statement in the proposal is not correct. For this, see *Duckett v Williams* (1834) 2 Cr. & M. 348, [Life]; *Thomson v Weems* (1884) 9 App. Cas. 671, per Lord Blackburn at p. 682; *Broad & Montague v South East Lancashire Insurance* (1930) 40 Ll.L.Rep. 328, [Motor]; *Kumar v Life Insurance Corporation of India* [1974] 1 Lloyd's Rep. 147, [Life], per Kerr J. at p. 154. Also, the policy may stipulate that it is void and the premium is not returnable if there is any future alteration to the risk insured, for this, see *Sparenborg v Edinburgh Life Assurance* [1912] 1 K.B. 195, [Life]. In both situations, any violation of the stipulation will, on one hand, avoid the policy and, on the other, lead to the forfeiture of the premium irrespective of whether the violation was innocent or fraudulent. For a deep consideration of this issue, see Eggers & Foss, at paras.16.75-16.86.

[903] (1812) 4 Taunt. 640, [Marine].

[904] Ibid., at p. 641. Also, see *Carter v Boehm* (1766) 3 Burr 1905, per Lord Mansfield at p. 1909; *Anderson v Thornton* (1853) 8 Exch 425, where Parke B. stated, at p. 427-8, that *"[I]n cases of insurance, material mis-statement or concealment vitiates the contract, and whether it be fraudulently made or not is a matter which is wholly immaterial, except with reference to the return of premium ... . The representations were material, and were admitted to be so. With respect to the return of the premium, there is no doubt in my mind that the plaintiff would be entitled to recover it, as there was no fraud in the representation ... . The insurance never bound the defendant, and, consequently, the plaintiffs were entitled to the return of the premium."*

[905] Awad, at para.538.

[906] This subject is fully discussed under subsection: '6.6.2. Damages under Egyptian law'.

[907] Haberbeck & Galloway, at p. 232; El-Sayed, at p. 194.

On the other hand, this exceptional application where the assured will be deprived of his premium if the policy is avoided for non-disclosure or misrepresentation, even in the absence of fraud, was rationalisd by El-Sayed[908] to be because the

> *" ... failure to meet the contractual obligation is on his part and, so, although the obligation from the other party lapses, his own obligation does not ... ."*[909]

6.4.2. Election to affirm

Different to the effect of rescission upon the existence and the validity of the contract of insurance and upon the subsequent rights and obligations of all parties to it, affirmation does not normally rise many questions as such. This is due to the fact that when the underwriter elects to waive a material non-disclosure or misrepresentation, he will be seen as doing no more than allowing the contract which has been previously effected and which has been made voidable by the misrepresentation or non-disclosure of the assured to continue to be as valid and binding as if there has been no violation at all. But, as it has earlier been discussed with regard to the right of election, before it could be said that the underwriter acted in a manner which it was conformable to the supposition that he had elected to affirm the contract, full knowledge of the material non-disclosure or misrepresentation and the vested right to avoid must have been known to him.[910]

In addition, such affirmation, as a further stipulation, must also be unequivocal.[911] This is to say that the act of the underwriter must indisputably be an intentional act or conduct of affirmation and nothing else.[912] In the Australian Supreme Court in *Claude R. Ogden v Reliance Fire Sprinkler*[913], Macfarlan, J. explicitly stated that before a decision that a right to avoid the policy for misrepresentation had already been waived three elements should be satisfied. These were that at the relevant time the underwriter holding the right of avoidance had full knowledge of the circumstances of the misrepresentation and of his right to avoid; that the underwriter having such knowledge made an unequivocal and distinct act indicating that he affirmed the policy and waived the misrepresentation and, finally, that such distinct act was an intentional one to that effect.[914]

Therefore, if the underwriter's act or conduct is not as to unmistakably represent or amount to a waiver of the misrepresentation or non-disclosure and affirmation of the contract, then he cannot be taken as having affirmed. For instance, it was held by May, J. in *March*

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[908] El-Sayed, ibid., at p. 194.
[909] Ibid.
[910] See subsection: 6.2. The right of election' and the cases cited under the requirements of election.
[911] *Motor Oil Hellas v Shipping Corporation of India The, Kanchenjunga*, [1990] 1 Lloyd's Rep. 391, per Lord Goff at p. 399; *Earl of Darnley v London, Chatham & Dover Railway* (1867) L.R. 2 H.L. 43, per Lord Chelmsford at p. 57.
[912] *Peyman v Lanjani* [1985] 1 Ch. 457, per Stephenson L.J. at p. 488.
[913] [1975] 1 Lloyd's Rep. 52, [Public & Products Liability].
[914] Ibid., at p. 65. In this regard, also see MacGillivray, 9th ed., at paras.17-84-17-86; Colinvaux, 7th ed., at para.5-03.

Cabaret Club v The London Assurance[915] that the mere action of the underwriter of not returning the premium to the assured was held not to constitute an affirmation on his part.[916] However, this would not be so if the conduct of the underwriter misled the assured to believe that he was still had a valid insurance.[917] For instance, if the underwriter, after discovering that there had been non-disclosure or misrepresentation, did accept the due premium from the assured and this misled the assured to believe that he had a good policy, the underwriter would not afterwards be allowed to seek to rely upon the said non-disclosure or misrepresentation to disaffirm the policy[918]. Likewise, if he, after being aware of the violation, gave future instructions to the assured in respect of the subject-matter insured, he would also be precluded from avoiding the policy[919]. Moreover, if the underwriter with full knowledge of the misrepresentation or non-disclosure rejected the claim of the assured and he neither returned previous premiums nor declared his intention to avoid the policy, such an act would be clear evidence that he intended to affirm the policy.[920]

The position under the Egyptian and Saudi Arabian laws is exactly similar to that under the English law. If the underwriter elects to waive the non-disclosure or misrepresentation of the assured and affirms the validity of the policy, all that which will follow is that the voidable policy will be made binding as if there was no violation as such.[921] Also, like the election to avoid, before holding the underwriter to have waived the violation and affirmed the insurance, he must first be sufficiently abreast of the circumstances surrounding the violation vesting him with the right to avoid.[922] Secondly, his expressed or implied act of affirmation must be explicit and unequivocal.[923] Examples of acts impliedly affirming the contract include the acceptance of the payment of the premium without reservation or paying the loss of the insured item without any objection.[924]

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[915] [1975] 1 Lloyd's Rep. 169, [Traders combined].
[916] Ibid., at p. 178.
[917] *Simon, Haynes, Barlas & Ireland v Beer* [1945] 78 Ll.L. Rep. 337, at p. 376-7. For further illustrations of misleading conduct by the underwriter, see Bennett, Howard., The Law of Marine Insurance, (1996), at p. 70-1, (hereafter Bennett).
[918] *General Accident, Fire & Life Assurance Corporation v Campbell* [1925] 21 Ll.L.Rep. 151, at p. 158.
[919] *De Maurier (Jewels) v Bastion Insurance* [1967] 2 Lloyd's Rep. 550, at p. 559.
[920] *Simon, Haynes, Barlas & Ireland v Beer*, ibid., at p. 377.
[921] See the text talking about the Egyptian and Saudi Arabian laws under subsection: '6.2. The right of election' and the authorities cited thereunder.
[922] Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), 2nd ed., (1990), Vol. 7 (Part 2), at para.631, (hereafter Al Sanhuri, Vol. 7/2); Sharaf Al Diyn, at paras.271 & 273-4; Zahrah, Mohammed., Ahkam Aaqd At Ta'myn Tabbqann Li Nusus Al Taqniyn Al Madany Wa Ahkam Al Qada, (The Rules of The Insurance Contract According to The Provisions of the Civil Code and The Case Law – in Arabic), (1984-1985), at p. 247, (hereafter Zahrah).
[923] Ibid. Also, see Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 193 & 260-1; Ta Ha, at para.677; Qayid, at para.335; Al Mahdi, Nazih. Mohammed Al Sadiq., Aaqd At Ta'myn, (The Insurance Contract – in Arabic), (undated), at p. 293, (hereafter Al Mahdi).
[924] Al Sanhuri, Vol. 7/2, at para.631; Qayid, at para.335; Al Mahdi, at p. 293; Ta Ha, at para.677; Sharaf Al Diyn, at para.268; Lutfi, Mohammed. Husam. Mahmud., Al Ahkam Al 'amah L Aaqd At Ta'myn, (The General Rules of The Insurance Contract – in Arabic), 2nd ed., (1991), at p. 225-6, (hereafter Lutfi).

6.5. Cases in which the underwriter is precluded from avoidance

The right of the underwriter to avoid the contract, which would otherwise be available to him, may, in some cases, be barred.[925] This is to say that although that there was material non-disclosure or misrepresentation on the part of the assured which made the contract voidable at the instance of the underwriter, the underwriter would be precluded from the exercise of his right to avoid and would be taken as if he elected to waive the said non-disclosure or misrepresentation and deem the contract as still binding. The cases in which the underwriter is precluded from his right to avoid are the following:

6.5.1. Preclusion due to affirmation of the contract

As earlier explained[926], the underwriter insuring under the English, Egyptian and Saudi Arabian laws is entitled when he discovers that there was material non-disclosure or misrepresentation on the part of the assured either to avoid the contract or waive the violation and affirm it. So, if he, with full knowledge of the non-disclosure or misrepresentation giving rise to the right of avoidance, expressed in clear and unequivocal terms his intention to affirm or acted in a manner which is consistent only with his having chosen to affirm the contract, he would be taken as having affirmed it. The consequences which follow from that are that this election to affirm is final, irrevocable, the right to avoid will no longer be invoked and the contract becomes valid.[927]

6.5.2. Preclusion due to reliance by the assured

Unlike affirmation, which requires actual knowledge of the violation of the assured by the underwriter before it could be effective in precluding him from avoiding, there is no need for such a requirement if the assured bases his claim upon estoppel[928]. In this case, all that he needs to do in order to preclude the underwriter form exercising his right to avoid the policy is to prove that he himself relied upon the conduct of the underwriter as constituting an unequivocal representation that the policy was still subsisting and he accordingly relied[929] upon it and altered his position. Therefore, estoppel could be used as an alternative way by which the underwriter would be precluded from avoiding the contract, especially when

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[925] See Clarke, 3rd ed., at para.23-18; Arnould, Vol. 2, and Vol. 3, at para.586; Allen, David., Misrepresentation, (1988), at p. 32-9.

[926] The topics of affirmation, its requirements and its effect have all been fully discussed under subsections: '6.4. Election to rescind or affirm' and '6.4.2. Election to affirm'.

[927] See the authorities and cases cited under sub-section: '6.4. Election to rescind or affirm'.

[928] For good consideration of the similarities and differences between election and estoppel, see the judgment of Lord Goff in the House of Lords in *Motor Oil Hellas v Shipping Corporation of India, The Kanchenjunga*, [1990] 1 Lloyd's Rep. 391, at p. 399.

[929] See *Jones v Bangor Mutual Shipping Insurance Society* (1889) 61 L.T. 727, where reliance of the assured on the underwriter's conduct was proved by the refraining of the assured from effecting an alternative insurance.

affirmation cannot be invoked. This what was held by Mellor, J. in *Clough v The London & North Western Railway*[930], where he stated that

> *" ... we think that the party defrauded may keep the question open so long as he does nothing to affirm the contract. ... We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating ... in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind."*[931]

In addition, estoppel as a method through which the underwriter could sometimes be prevented from his right to rescind was also recognised by the judgment of Staughton, L.J. in the Court of Appeal in *Orakpo v Barclays Insurance Services.*[932]

As far as the Egyptian and Saudi Arabian laws are concerned, they do not in fact recognise reliance by the assured on the conduct of the underwriter as an independent cause precluding him from his right to avoid. Apparently, this seems to be because they both look at this cause as forming part of preclusion by affirmation. Therefore, unlike the English law, if the assured relied on the conduct of the underwriter as constituting an unequivocal representation that the policy was still binding and, so, altered his position, he would nevertheless, under the Egyptian and Saudi Arabian laws, be able to preclude the underwriter from avoiding the contract but on the basis of implied affirmation and not on that of estoppel. It follows that all the requirements needed for the establishment of affirmation must be met before holding the underwriter to have affirmed the contract.

6.5.3. Preclusion due to the lapse of time

Respecting the English law, the underwriter is entitled, after having sufficiently known of the material non-disclosure or misrepresentation, to take time to deliberate whether to avoid. He is entitled to have reasonable time to deliberate on his position in the light of the knowledge he possesses. After the lapse of such time, he has to make his election not as

> *" ... a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it."*[933]

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[930] (1871) L.R. 7 Ex. 26.

[931] Ibid., at p. 35. This judgment was referred to with approval by Honyman, J. in *Morrison v The Universal Marine Insurance* (1873) L.R. 8 Ex. 197, at p. 203-4; Fenton Atkinson, L.J. in *Allen v Robles* [1969] 2 Lloyd's Rep. 61, at p. 63-4 and Donaldson, J. in *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Rep. 560, at p. 565. This judgment was also approved by Halsbury, V. 25, at para.242. In this concern, see the judgment of Stephenson L. J. in the Court of Appeal in *Peyman v Lanjani* [1985] 1 Ch. 457, where he stated, at p. 489, that the acts of the defrauded party on the absence of the required knowledge to rescind would not constitute affirmation on his part. But, if such acts were to the other party's prejudice or detriment in that they represented that the defrauded party was going on with the contract, the defrauded party would be estopped from avoiding.

[932] [1995] LRLR 443, [CA-Buildings], at p. 449-50; *Simon, Haynes, Barlas & Ireland v Beer* [1945] 78 Ll.L. Rep. 337, at p. 369. For other views supporting estoppel as a way preventing the underwriter from the right of avoidance see Clarke, 3rd ed., at para.23-18B3 and Colinvaux, 7th ed., at para.5-03.

However, the mere delay in determining his election to the extent that reasonable time is said to have expired, will not, in itself, be construed as amounting to affirmation and, therefore, bar his right to avoid, unless

> *" ... so much time has elapsed that the necessary inference is one of affirmation or the assured has been prejudiced by the delay in making an election or rights of third parties have intervened."*[934]

So, clearly if what is considered as reasonable time has expired and the underwriter's decision has unequivocally not been determined, this will, nevertheless, furnish the court with evidence that the underwriter's decision is one of affirmation. But, if the lapse of time is so great, it will be considered as conclusive evidence that he has in reality affirmed the contract and accepted liability.[935]

Concerning the Egyptian and the Saudi Arabian laws, they also, similar to the English law, recognise that the expiry of reasonable time[936] would, if no action to avoid had been taken, preclude the underwriter from invoking the right of avoidance. However, they differ from the English law in that they do not leave the expiry of reasonable time uncertain and depend upon the occurrence or change of certain circumstances in the absence of which it will not expire. Instead, they both stated that if the action of the underwriter to avoid is not taken within reasonable time, that is to say three years under the Egyptian law[937] or one year under the Saudi Arabian law[938], the underwriter will be precluded from avoiding and such delay will be construed as an implied action of affirmation.[939]

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[933] *Motor Oil Hellas v Shipping Corporation of India, The Kanchenjunga* [1990] 1 Lloyd's Rep. 391, per Lord Goff at p. 398.

[934] *Liberian Insurance Agency v Mosse* ibid., at p. 565. Also, see *Clough v The London & North Western Railway* (1871) L.R. 7 Ex. 26, per Mellor J., at p. 34-5; *Morrison v The Universal Marine Insurance Company* (1873) L.R. 8 Ex. 197, per Honyman, J. at p. 204; *Allen v Robles* [1969] 2 Lloyd's Rep. 61, per Fenton Atkinson L.J. at p. 64; *Pan Atlantic Insurance v Pine Top Insurance* [1992] 1 Lloyd's Rep. 101, per Waller, J. at p. 107.

[935] Ibid. Also, see Eggers & Foss, at para.17.55 & 17.56.

[936] Coulson, at p. 66; Al Sanhuri, Vol. 1, at paras.321-3; Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, (1953-54), at p. 118-120 & p. 278-9.

[937] Ss. 140(1) of the CC 1948 [Egypt]. However, the time limit set up in ss. 140(1) must be read in the light of ss. 140(2) which is to the effect that since the three years period will be counted from the date at which the underwriter is in possession of sufficient information about the misrepresentation or non-disclosure, if for any reason the underwriter was uninformed of the violation for a long time, he would have to make his election within 15 years from the date when the contract was concluded, otherwise his right to avoid would not be available. In this regard, also see Al Sanhuri, Vol. 1, at paras.321-3; Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 118-120. Also, see Mixed Appeal 3/2/1915, Civil Collection, Year No. 27, p. 146 and Mixed Appeal 15/6/1926, Civil Collection, Year No. 38, p. 472, where it was held that the mere silence of the aggrieved party would not deprive him of his right to avoid even if it was for a long time, unless it was lost by the time limit; Bani Suwif Al Juz'iyah 31/3/1900, Al Huquwaq 15, p. 133.

[938] This is according to the view expressed by Imam Malik which is the only one in this subject. For this, see Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 4, at p. 194-5 & 278-9.

[939] For further information about what constitute reasonable time and its length, see subsection: '6.3. Time of election '1. 2.'

6.5.4. Preclusion due to the performance of the contract

According to ss. 1(b) of the Misrepresentation Act 1967 [UK], the right of the underwriter to avoid a policy obtained by material non-disclosure or misrepresentation would not be barred if he subsequently performed or executed it.[940] However, it was argued[941] that since the MA 1967 would only apply to active representations, then it does not apply to a violation of the contract by pure non-disclosure. Accordingly, it was further argued[942] that it would still be conceivable that the right of the underwriter to avoid for pure material non-disclosure could be barred if he executed the policy.[943]

In the same manner, the Egyptian and Saudi Arabian laws also deal with the performance of the contract by the underwriter after being acquainted with the fact that there was a violation as being an implied act of affirmation and not, like the English law, as a separate and independent cause precluding the underwriter from the exercise of his right to avoid. So, if the assured wishes to raise this defence, he has to prove that the execution of the contract by the underwriter was taken without reservation and while he was sufficiently aware of the violation entitling him to avoid and by so doing he impliedly intends to affirm the contract.[944]

6.5.5. Preclusion due to the exclusion of the right of avoidance

The right of avoidance of the underwriter could also be barred by inserting into the policy a clause excluding the right of either party to avoid the policy upon the ground of material, but not fraudulent, non-disclosure or misrepresentation should there be any.[945] The effect of such a clause would be to deprive the underwriter of his right to avoid the policy, a right which would otherwise have been available to him, had the exclusion clause not been incorporated into the policy. The legitimacy of the application of this provision under the

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[940] Prior to the enactment of the Misrepresentation Act 1967, the situation was that, unless there was fraudulent misrepresentation or non-disclosure, the execution of a contract obtained by innocent misrepresentation or non-disclosure would bar the aggrieved party from his right of avoidance. For further information in this regard, see Treitel, 8th ed., at p. 337-8; Clarke, 3rd ed., at para.23-18D and the cases cited thereunder.

[941] Treitel, 8th ed., at p. 360-1.

[942] Clarke, 3rd ed., at para.23-18D.

[943] It is interesting to note that the defence that performance or execution of the policy would bar the right of avoidance was unsuccessfully argued by the underwriter in *Kettlewell v Refuge Assurance* [1908] 1 K.B. 545, per Lord Alverston C. J. at p. 549; affirmed by the House of Lords in [1909] AC 243.

[944] Al Sanhuri, V. 7/2, at para.631; Lutfi, at p. 223-6; Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, V. 4, (1953-54), at p. 193, p. 208-9 & p. 261; Sharaf Al Diyn, at para.274.

[945] For further information about the application of the clause see Eggers & Foss, at paras.16.59-16.63; MacGillivray, 9th ed., at paras.16-61-16-64. Sometimes the formation of the declaration guaranteeing the truthfulness and accuracy of representations made by the assured may have the effect of excluding the right of avoidance. This what was in fact considered in *Fowkes v The Manchester & London Life Insurance Company* (1863) 3 B & S 917, [Life], where it was held that the declaration that any false statements knowingly made by the assured would avoid the policy would have the effect of excluding the right of avoidance in respect of any untrue statement unknowingly made by the assured. This was subsequently applied by Kekewich, J. in *Hemmings v Sceptre Life Association* [1905] 1 Ch 365, at p. 369.

English law was approved by the judgment of Steyn, L.J. in the Court of Appeal in *Pan Atlantic Insurance v Pine Top Insurance*[946], where he stated that

> *" ... conceptually it is also possible to draft a clause which excludes the other party's right to rescind for non-disclosure, except in the case of fraud ... ."*[947]

Steyn, L.J. additionally accepted the argument of the plaintiffs that this clause has an analogy with an arbitration clause or an exclusive jurisdiction clause and, therefore, it forms a distinct part of the contract and could survive its avoidance.[948]

The scope of the application of this clause came again under further consideration in *Toomey v Eagle Star Insurance (No.2)*[949], which was about a reinsurance policy containing a clause stating that the policy is *neither cancellable nor avoidable by either party*. In his judgment, although Colman J. reaffirmed the possibility of the underwriter's right of avoidance being barred by the insertion of such a clause in the policy[950], he restricted its application to the right to avoid for innocent material non-disclosure or misrepresentation, but not for negligent once as contended by the plaintiffs.[951] This was because, he said, the words of the clause that the policy would be *neither cancellable nor avoidable by either party* did not state in clear terms that the right of avoidance would also be excluded if there was negligent material non-disclosure or misrepresentation.[952]

As a consequence of these tow cases, it seems now established that the right to avoid for non-disclosure or misrepresentation could be excluded by the insertion of a clause to that effect. In addition, the scope of this clause and whether or not it would extend to cover cases where negligent non-disclosure or misrepresentation was alleged should depend in each case upon the wording of the clause in question.

On the other hand, the validity of the exclusion clauses and whether it will have the effect of restricting or removing the remedy of avoidance vested in the underwriter will now be subject to the application of s. 3 of the MA 1967 [UK] which would invalidate their

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[946] [1993] 1 Lloyd's Rep. 496; affirmed by the HL in [1994] 2 Lloyd's Rep. 427, per Lord Mustill at p. 453.

[947] Ibid., at p. 502; *Toomey v Eagle Star Insurance (No.2)* [1995] 2 Lloyd's Rep. 88, [Reinsurance], per Colman, J. at p. 91-2.

[948] *Pan Atlantic Insurance v Pine Top Insurance*, ibid., where he held, at p. 502, the clause to be *" ... discrete from the remainder of the contract, and would be ineffectual if it was not interpreted as surviving the discharge of the contract."*

[949] [1995] 2 Lloyd's Rep. 88.

[950] Ibid., where he stated, at p. 91, that *" ... it is indeed possible to write a clause into a contract which does in fact exclude the right to rescind the contract for material misrepresentation or material non-disclosure."*

[951] Ibid., where he stated, at p. 93, that *" ... the correct approach, as a matter of construction, is to conclude that in fact the effect of cl. (a)*, [the exclusion clause], *is only to exclude the right to avoid for innocent material misrepresentation and innocent material non-disclosure and not for negligent misrepresentation or non-disclosure."*

[952] Ibid., at p. 92-3. In fact, in reaching this conclusion, Colman, J. relied on the judgment of Lord Greene, in *Alderslade v Hendon Laundry* [1945] K.B. 189, at p. 192, in which he said *" ... if a contracting party wishes ... to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."*

incorporation into the contract unless they satisfy the requirement of reasonableness stated in ss. 11(1) of the Unfair Contract Terms Act 1977 [UK].[953]

By the same token, it is also admissible under the Egyptian[954] and Saudi Arabian[955] laws for the parties to a contract of marine insurance to insert into it a clause precluding the underwriter, in the event of any material non-disclosure or misrepresentation on the part of the assured, from exercising his right of avoidance. The practical effect of such a clause will be to disallow the underwriter from invoking his right of avoidance activated by the assured's misrepresentation or non-disclosure.

As to the Saudi Arabian law[956], like the English law, it also restricts the application of this clause to those cases where the underwriter seeks to avoid in respect of innocent misrepresentation or non-disclosure. This, of course, will exclude fraudulent misrepresentation or non-disclosure from its realm.[957] But, it is not clear whether such a clause will preclude the underwriter from avoiding for negligent misrepresentation or non-disclosure or not. In any case, it could be argued that if the words of the clause clearly state that the underwriter will not avoid in case of negligent misrepresentation or non-disclosure, it seems that such a clause will be given effect.

On the other hand, in order for the exclusion clause to be valid and prevent the underwriter from avoiding in case of material misrepresentation or non-disclosure, two requirements must be met. First, the party inserting it into the policy (usually the assured) must make the other party (usually the underwriter) clearly aware of its existence and seek his agreement to be bound by it. Failing that will preclude the party inserting it from the right to rely on it. The second requirement for the validity of the clause is that it must, as the English law, satisfy the test of reasonableness in the sense that it must not be inserted to preclude the underwriter from avoiding in respect of deliberate misrepresentation or non-

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[953] For more details about the application of s. 3 of the MA 1967 and ss. 11(1) of the Unfair Contract Terms Act 1977, see 'subsection: '6.6.1.1.3. Ss. 3 of the MA 1967 [UK]'.

[954] Al Sanhuri, Vol. 7/2, at para.631; Sharaf Al Diyn, at para.272; Yihya, Abdul Wadood., Al Mujaz Fi Aaqd At Ta'myn, (The Concise in the Contract of Insurance – in Arabic), (undated), at p. 196, (hereafter Yihya); Al Badrawi, Abdul Mun'am., At Ta'myn (The Insurance – in Arabic), (1981), at para.145, (hereafter Al Badrawi); Mursi, Mohammed. Kamil., Sharh Al Qanun Al Madany Al Jadyd, Al Aaqud Al Musammat, Al Juzau Al Thalith, Aaqd At Ta'myn, (The Elucidation of the New Civil Code, The Named Contracts, Part three, The Insurance Contract – in Arabic), (1952), at para.124, (hereafter Mursi); Arafa, Mohammed. Ali., Sharh Al Qanun Al Madany Al Jadyd Fi At Ta'myn Wa Al Aaqud Al Saghirah, (The Elucidation of the New Civil Code in Insurance and Small Contracts – in Arabic), 2nd ed., (1950), at p. 167, (hereafter Arafa); Al Mahdi, at p. 290-1; Lutfi, at p. 223-25.

[955] Al Kasani, Vol. 5, at p. 172-3; Hamilton, Charles, The Hedaya, Commentary on book of Al Hidayah by Al Mighni, (1982), at p. 366-7.

[956] It ought to be mentioned that the view presented under the general law of Saudi Arabian (Shari'a law) as to this issue represents the view of the majority of Islamic jurists.

[957] Az Zaraqa, M. A., Al Figh Al Islami Fi Taubih Al Jadyd, (The Islamic Jurisprudence in its New Appearance – in Arabic), (1959), at p. 377.

disclosure and it must be drawn in very clear terms declaring that the underwriter is not to avoid for non-fraudulent misrepresentation or non-disclosure on the part of the assured.[958]

The above two requirements were extended in scope and applied in respect of a clause exempting the underwriter from his duty to indemnify the assured if the latter failed to inform the former of any changes occurring to the risk insured. This was in a fire insurance case where it was held by the arbitral panel that in order for such clauses to be given effect, three conditions must be met.[959] These were first, the exemption clauses must be expressed in very clear terms in the policy, secondly, if they are written within other clauses, they must be written in very distinct terms attracting the attention of the concerned party to their importance and thirdly, they must exactly state the duty the violation of which would expose the aggrieved party to their effect.[960] The arbitral panel was also of the view that in all cases such clauses must be given a very restricted construction.[961]

As far as the Egyptian law is concerned, similar to the English and Saudi Arabian laws, it allows the assured to rely on the exclusion clause if it is to preclude the underwriter from his right of avoidance regarding innocent misrepresentation or non-disclosure.[962] As to whether it will also have the same effect concerning negligent misrepresentation or non-disclosure, there is no clear authority in this regard, but it seems that if the clause was expressed in very broad terms, it would extend to preclude the underwriter from rescinding the contract not only for innocent misrepresentation, but also for negligent once.[963] However, the assured would not be able to invoke the exclusion clause if he made fraudulent

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[958] This paragraph was drawn from the following authorities: Al Bajirmi, Sulaiman, Hashiyyat Al Bajirmi (in Arabic), 3rd ed., (1890-1891), Vol. 2, at p. 220; Al Hattab, Mohammed. Ibn Mohammed., Mawahib Al Jalil Li Sharh Mukhtasar Khalil (in Arabic), (1911), Vol. 4, at p. 440; Ibn Qudamah, Muwaffiqu Al Din. Abi Mohammed. Abdullah Ahmed Ibn Mohammed., Al Mughni (in Arabic), (1983), Vol. 4, at p. 259, (hereafter Ibn Qudamah); Al Nawawi, Muhyi Al Din. Abi Zakaria. Yahya. Ibn Sharif., Minhaj Al Talibiyn, (Translated by Howard, E. C., (1977), at p. 132.

[959] Arbitral award 18/5/1993, [Fire].

[960] Ibid., p. 15-6.

[961] Ibid., at p. 16.

[962] See Mixed Appeal 22/12/1937, Civil Collection, Year No. 50, p. 60, [Life] & Mixed Appeal 21/3/1936, Gazette 26, No. 245, p. 332, [Life], where it was held that if there was a clause excluding the right of the underwriter to avoid in the event of material non-disclosure or misrepresentation by the assured and if it was discovered that some of the information supplied by the assured in respect of his health state was incorrect, the underwriter would not be able to avoid the policy because of the exclusion clause. The exclusion clause may sometimes take the form of what it is called the 'indisputable clause' providing that the underwriter would not be allowed to avoid for non-fraudulent material misrepresentation or non-disclosure if the assured paid the premium and the policy was in effect for certain time. This type of clauses was discussed under the Egyptian law in Mixed Appeal 22/12/1937, Gazette 28, No. 124, p. 134, [Life] and was held to be effective in precluding the underwriter from avoiding the policy provided that there was no fraud, the premium was paid and the required time had expired. As far as the English law is concerned, this clause was also held to be effective in excluding the right of the underwriter to avoid for non-fraudulent non-disclosure or misrepresentation. This what was held by Moulton, L.J. in *Anstey v British Natural Premium Life Association* (1908) 99 LT 765, [Life], at p. 766. For the same conclusion, also see *Wood v Dwarris* (1856) 11 Exch 493, [Life], per Alderson, B. at p. 503.

[963] See Mixed Appeal 29/5/1940, Civil Collection, Year No. 52, p. 288, [Life] and Mixed Appeal 28/5/1941, Civil Collection, Year No. 53, p. 204, [Life], where the exclusion clause which was drawn in very broad terms was held to be applicable save where there was fraud.

misrepresentation or non-disclosure.[964] This was argued[965] to be because that is against the general law[966] which prohibits the exclusion of liability in case of fraud or grave mistake.

On the other hand, the Egyptian law does not seem to impose any requirements before giving effect to an exclusion clause inserted into a policy save that it must not provide for the exclusion of liability in the event of fraud which will be contrary to the general law.[967] It could further be argued that in order for this clause to be applicable it must be formulated in very distinct words stating that the underwriter is not to avoid the policy for any non-fraudulent non-disclosure or misrepresentation should there be any on the part of the assured.

6.6. The right to claim damages

6.6.1. Damages under English law

Although it is traditionally accepted that avoidance is the remedy available to the parties to a contract of marine insurance for a violation of the doctrine of utmost good faith and, in cases where there is no fraud, the assured can also claim his premium back[968], the truthfulness of this principle has recently become under deep consideration in *Banque Keyser v Skandia (U.K.) Insurance*[969]. Briefly, in this case, the plaintiffs, as contrary to the above principle that avoidance is the only remedy available, tried to establish that a violation of the doctrine of utmost good faith on the part of the underwriters could give rise to a claim for damages. Steyn, J., who tried the case at first instance, examined the dictum of Scrutton, J.[970] that non-disclosure would not give rise to a claim for damages[971] and reached the conclusion that a violation of the duty of the utmost good faith would nevertheless entitle the assured, if he was induced by it, to claim damages.[972]

This novel view, however, was subsequently overruled by the decision of the Court of Appeal delivered by Slade, L.J.[973] with whose judgment the House of Lords[974] was

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[964] Al Sanhuri, Vol. 7/2, at para.631; Sharaf Al Diyn, at para.272; Al Mahdi, at p. 290; Arafa, at p. 167-8; Mursi, at para.124; Al Badrawi, at para.145; Yihya, at p. 196; Lutfi, at p. 223-25. Also, see Masir Mixed Court of First Instance 21/2/1938, Gazette 28, No. 125, p. 135, [Life], where it was held that an exclusion clause would only bar the right of the underwriter to avoid the policy for non-fraudulent non-disclosure or misrepresentation.

[965] Al Mahdi, at p. 290-1; Sharaf Al Diyn, at para.272.

[966] Ss. 211(2) & 217(2) of the CC 1948 [Egypt].

[967] Ibid.

[968] This what was held by Lord Mansfield more than two hundred years ago in *Carter v Boehm* ibid., at p. 1909 and which is now embodied in s. 17 of the MIA 1906.

[969] [1987] 2 WLR 1300, [Credit].

[970] *Glasgow Assurance Corporation v William Symondson* (1911) 16 Com. Cas. 109.

[971] Ibid., where he said, at p. 121, that " ... *non-disclosure is not a breach of contract giving rise to a claim for damages, but a ground of avoiding a contract.*"

[972] *Banque Keyser v Skandia (U.K.) Insurance* ibid., at p. 1333, " ... *in principle an insured can claim damages from an insurer arising from loss suffered by the insured as a result of a breach of the obligation of the utmost good faith by the insurer.*"

[973] [1989] 3 WLR 25, per Slade, L.J. at p. 82-9. For further examination of the decisions of both the Court of Appeal and the lower Court as to the availability of damages as a remedy, see Birds, John., Insurer's duty of utmost good faith; damages for non-disclosure [1986] JBL 439; Matthews, Paul., New Foundations For

afterwards in full agreement. Consequently, it is now an established law in respect of a violation of the doctrine of utmost good faith that no damages can be claimed and avoidance is the only remedy.

However, if fraud is alleged and then proved, it seems that the above principle that avoidance is the only available remedy cannot be sustained. This is because it was suggested[975] that a party to a contract of insurance, if suffered loss as a result of a fraudulent misrepresentation or non-disclosure made to him, would be entitled to avoid the contract as well as recovering damages to compensate him for his loss.[976] Although no insurance case has been reported[977] where damages was recovered for a fraudulent misrepresentation or non-disclosure, the right of the aggrieved party to claim damages was said to be based on the general law action of deceit.

The right of a contracting party under the general law to recover damages in an action of deceit as a result of loss caused by his reliance on a fraudulent statement made to him by the other contracting party was extensively dealt with by the House of Lords in *Derry v Peek.*[978] In this case, Lord Herschell stated that in order for a party to succeed in an action of deceit, he must prove that there was fraud. He proceeded and made it clear that fraud would be proved if he (the aggrieved party) showed that a false statement was made to him " ... *(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.*"[979]

This possibility of the aggrieved party being able to recover damages in an action of deceit is further supported by the observations made in *London Assurance v Clare*[980] and *Kettlewell v Refuge Assurance Company*[981]. In *London Assurance v Clare,* Goddard, J. after rejecting the claim of the underwriter that he was entitled to recover, as damages for a violation of contract, the expenses incurred in investigating a fraudulent claim, suggested that

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Insurance Law: Current Legal Problems: Uberrima Fides in Modern Insurance Law, (1987), at p. 51-4; Davenport, B., The Duty Of Disclosure - *La Banque Financiere v Westgate (The Good Luck)* (1989) 3 LMCLQ 251, at p. 256-260; Birds, John., Insurers not liable in damages for failure to disclose [1989] JBL 421, at p. 421-4;.Yeo, Y., Of reciprocity and remedies - duty of disclosure in insurance contracts (1991) 11 LS 131, at p. 144-153; Allen, David., Non-Disclosure: Hairshirt or Halo? [1992] 55 MLR 96, at p. 98-101; Bennett, at 72-5.

[974] [1990] 2 All ER 947, per Lord Templeman at p. 959, " ... *I agree with the Court of Appeal that a breach of the obligation does not sound in damages.*" and Lord Jauncey at p. 960, "*I agree with the compelling reasons of the Court of Appeal for rejecting the first proposition* [a violation of the duty sounded in damages] ... ."; also, see per [1990] 2 Lloyd's Rep. 377, at p. 387. This principle was also referred to with approval by the Judgment of the Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks (The Good Luck)* [1990] 2 WLR 547, at p. 590-1.

[975] Clarke, 3rd ed., at para.23-15A; Arnould, Vol. 2, at para.596, Footnote No. 71.

[976] See ss. 91(2) which states that *"[T]he rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."*

[977] Clarke, 3rd ed., at para.23-15A.

[978] (1889) 14 App. Cas. 337, [HL].

[979] Ibid., at p. 374. For further information about the rules regulating fraud see Furmstone, M., Law of Contract, 12th ed., (1991), at p. 277-8; Treitel, at p. 307-8; Beale, H., Bishop, W., and Furmston, M., Contract Cases and materials, 3rd ed., (1995), Ch. 13; Hepple, B., & Matthews, M., Tort: Cases & Materials, 4th ed., (1991), at p. 155-9; Heuston, R., & Buckley, R., Salmond & Heuston on the Law of Torts, 19th ed., (1987), at Ch. 18.

[980] [1937] 57 Ll.L. Rep. 254, [Fire].

[981] [1908] 1 K.B. 545; affirmed by the House of Lords in [1909] AC 243.

if the claim of the underwriter had been put as damages for fraud, there might have been something to be said about it.[982] Also, in *Kettlewell v Refuge Assurance Company*, it was stated by Lord Alverstone that the assured would be able to avoid the policy induced by the fraudulent representation of the underwriter's agent and would also be able to recover her premiums as damages in an action of deceit.[983]

Having mentioned that, it seems now arguable that if a policy of insurance was obtained by a fraudulent misrepresentation or non-disclosure, the aggrieved party would be able to avoid the policy[984], irrespective of the materiality of the fraudulent misrepresentation or non-disclosure to the risk insured[985], and also claim damages in an action of deceit.

As to negligent misrepresentation, damages were also held to be available at common law for negligent misrepresentation. This would be the case if the representor carelessly made an untrue statement and the representee who relied on it and suffered loss managed to establish that such a negligent misrepresentation was made in breach the duty of care which the former owed him.[986] Before *Hedley Bryne v Heller & Partners*[987], the situation was that a duty of care would only arise out of a contract[988], for example between a solicitor and his client, or in the absence of a direct contract, it may arise out of an implied contract at common law or a fiduciary relationship in equity.[989] However, the decision of the House of Lords in *Hedley Bryne v Heller & Partners*[990] broadened the scope of the duty of care and made it arise whenever the parties were in a special relationship. Such a relationship will arise whenever one party holding out that he possesses a special knowledge gives another information or advise while knowing that the latter will probably rely on it.[991] In this situation, the knowledgeable party will be considered in law as being under a duty of care to give accurate information the negligent discharge of which will entitle the aggrieved party to claim damages.

Having briefly presented the position under the general law, would the relationship existing between the underwriter and the assured justify the imposition of a duty of care the negligent breach of which will sound in damages?[992] In fact, this question arose in *Banque Keyser v Skandia (U.K.) Insurance*[993] in which the insured banks sought to be indemnified in

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[982] Ibid., at p. 270.
[983] Ibid., at p. 550.
[984] *Sibbald v Hill* (1814) 2 Dow 263, per Lord Eldon at p. 266-7; *The Bedouin* (1894) P. 1, [CA-Marine], per Lord Esher, at p. 12; *Kettlewell v Refuge Assurance Company* ibid., per Lord Alverstone at p. 550 and per Gorell Barnes, at p. 550-1, affirmed by the HL, ibid.
[985] *The Bedouin* ibid., per Lord Esher, at p. 12.
[986] *Hedley Bryne v Heller & Partners* [1964] AC 465, [HL].
[987] Ibid.
[988] *Derry Peek* (1889) 14 App. Cas. 337.
[989] *Nocton v Ashburton* [1914] AC 932, [HL].
[990] [1964] AC 465, per Lord Pearce at p. 539.
[991] Ibid., per Lord Hodson at p. 510.
[992] This issue was explored and commented on by Eggers & Foss, at paras. 16.112-16.122.
[993] [1987] 2 WLR 1300.

respect of their loss and brought an action contending, *inter alia*, that they were entitled to claim damages in tort for the loss they suffered as a result of the underwriters' breach of their duty of care to them in that they failed to disclose to them the fraud of the assureds' agent. Steyn, J., before whom the case came, applied the test establishing the duty of care discussed above and held that the commercial relationship between the assureds and the underwriters coupled with the requirement of good faith and faire dealing[994] would constitute a special relationship justifying the imposition of a duty of care at common law on the underwriters and the breach of such a duty would entitle the assureds to claim damages.[995]

The case went to the Court of Appeal[996] which reversed the judgment of Steyn, J. and held that the mere fact that there was an existing business relationship between the assureds and the underwriters did not justify the imposition of a duty of care to speak upon the latter.[997] The court also rejected the decision of Steyn, J. that " ... *the nature of the contract as one of utmost good faith can be used as a platform to establish a common law duty of care*".[998] Moreover, as an additional ground, the court affirmed and applied the view of Lord Scarman in *Tai Hing Cotton Mill v Liu Chong Hing Bank*[999] that a tortious duty of care will not arise whenever the parties are in a contractual relationship.[1000]

The case subsequently went to the House of Lords[1001] where the decision of the Court of Appeal that the underwriters did not owe the insured banks any duty of care the breach of which would sound in damages was upheld[1002].

6.6.1.1. Damages under the Misrepresentation Act 1967 [UK]

Since the enactment of the MA 1967[1003], there was an argument[1004] that this Act would be applicable to insurance contracts and that the established remedy of avoidance would not be the only remedy available for the violation of the contract by a

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[994] Ibid., at p. 1338-9.
[995] Ibid., at p. 1341.
[996] *Banque Keyser Ullman v Skandia (U. K.) Insurance* [1989] 3 WLR 25.
[997] Ibid., at p. 106.
[998] Ibid., at p. 107.
[999] [1985] 2 All ER 947, [Privy Council], at p. 957. However, the principle that a tortious duty of care will not arise whenever the parties are in a contractual relationship does not seem, in the light of the judgments delivered in *Esso Petroleum v Mardon* [1976] Q.B. 801, per Shaw, L.J. at p. 832-3 and *Henderson v Merrett Syndicates* [1994] 3 WLR 761, per Lord Goff at p. 774, to still be a cause precluding the representee from establishing a tortious duty of care. In this regard, also see Eggers & Foss, at paras.16.117-16.118.
[1000] *Banque Keyser Ullman v Skandia (U. K.) Insurance* [1989] 3 WLR 25, where it was stated, at p. 106, that it ought not to be " ... *the general function of the law of tort to fill in contractual gaps*".
[1001] [1990] 2 Lloyd's Rep. 377, [Credit].
[1002] Ibid., per Lord Templman at p. 383-4.
[1003] For a very thorough comments on the provisions of the MA 1967 see Atiyah & Treitel, Misrepresentation Act 1967 [1967] 30 MLR 369; Fairest, P., Misrepresentation and The Act of 1967, [1967] CLJ 329. For further information about the award of dmages under the Misrepresentation Act 1967 for the violation of the duty of good faith, see Eggers & Foss, at paras.6.18-6.22.
[1004] Hudson, A. H., Making Misrepresentations (1969) 85 LQR 524, at p. 524-8; Treitel, at p. 360-1; Colinvaux, 7th ed., at para.5-14; Arnould, Vol. 3, at para.581, Footnote No. 23 & at para.626; Clarke, 3rd ed., at para.23-15B; Bennett, at p. 75-6.

misrepresentation or non-disclosure. In fact, the argument centered on the effect of ss. 2(1), 2(2) and 3 of the Act. Therefore, the following sub-sections are devoted for the discussion of their effect in the field of marine insurance.

6.6.1.1.1. Ss. 2(1) of the MA 1967 [UK]

The contention[1005] was that material misrepresentations made by the assured or his agent prior to the conclusion of the contract would be subject to ss. 2(1)[1006]of the Act and, therefore, the assured would, if the underwriter suffered loss, be held liable to damages from which he would only escape if he could prove that *" ... he has reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true"*.

It ought to be said that the admission of the availability of the remedy of damages contained in ss. 2(1) does not seem to contradict ss. 17 and 20(1) of the MIA 1906 [UK] which state that avoidance is the remedy of the violation of the doctrine of utmost good faith. This is because although ss. 17 and 20(1) state that their violation will entitle the aggrieved party to avoid the contract, they do not neither expressly nor impliedly exclude the availability of damages as a cumulative remedy whenever the exercise of the remedy of avoidance alone seems inequitable; or state that avoidance is the only remedy available for the violation of the doctrine.

This, as argued by Richard Aikens[1007], is further supported by the language used to formulate the remedy of avoidance contained in ss. 17 and 20(1). In both sections, it is respectively stated that *" ... the contract may be avoided ... ."*; *" ... the insurer may avoid the contract."* Obviously, the use of the word *'may'* and not *'must'* or *'the only remedy is that the contract can be avoided'* positively indicates that avoidance was not contemplated to be the only remedy available to the concerned parties for the violation of the duty of utmost good faith.[1008]

In addition, in the light of both ss. 91(2) of the MIA 1906 and the introduction of the common law requirement of actual inducement to ss. 18(2) and 20(2) of the MIA 1906 by the judgment of Lord Mustill in the House of Lords in *Pan Atlantic Insurance v Pine Top Insurance*[1009] any attempt to resist the introduction of the remedy of damages to ss. 17, 18(1) and 20(1) will appear very odd and unexplainable.

[1005] Ibid.

[1006] *"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he has reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."*

[1007] *"STAR SEA"*: Continuing Duty of Utmost Good Faith, a paper presented at a conference entitled 'Insurance and Law' organised by Malcolm Clarke at St John's College, University of Cambridge in March 1999.

[1008] Ibid., at p. 7.

[1009] [1994] 2 Lloyd's Rep. 427, at p. 452.

Moreover, it was argued by Bennett[1010] that the absence of the remedy of damages from the formation of ss. 17 and 18 of the Act could simply be explained on ground that they in fact codify Lord Mansfield's judgment in *Carter v Boehm*[1011].

Having mentioned that, it seems very likely that a party to a policy of marine insurance induced by a false representation will be entitled to first avoid the policy according to ss. 20(1) of the MIA 1906 and secondly, if he suffered loss, to claim damages according to ss. 2(1) of the MA 1967. No insurance case has yet been reported where ss. 2(1) was invoked and damages were accordingly awarded.[1012]

Apart from that, it was further argued[1013] that since the wording of the sub-section that a misrepresentation has to be made to the other party, the application of ss. 2(1), though it would also apply to what is called half-truth representation, would be limited to active misrepresentation only. Accordingly, ss. 2(1) will not be applicable to those cases where a violation of the contract is alleged to have been caused by a mere pure non-disclosure. The exclusion of cases of pure non-disclosure from the ambit of the Act was clearly laid down by the judgment of Slade, L.J. in the Court of Appeal in *Banque Keyser Ullman v Skandia (U. K.) Insurance*[1014] where he stated that

> *"[I]f it had been the intention of the legislature that a mere failure to discharge the duty of disclosure in the case of a contract uberrimae fidei would fall to be treated as the "making" of a representation within the meaning of the Act of 1967, we are of the opinion that the legislature would have said so."*[1015]

6.6.1.1.2. Ss. 2(2) of the MA 1967 [UK]

Theoretically speaking, it was also suggested[1016] that, in the case of non-fraudulent misrepresentation made by the assured, the right of the underwriter to avoid upon that ground could also, according to ss. 2(2)[1017] of the MA 1967, be barred. This is because under this sub-section, the court would be vested with a discretionary power to award damages in lieu

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[1010] Bennett, at p. 74.
[1011] (1766) 3 Burr. 1905.
[1012] Clarke, 3rd ed., at para.23-15B. Also, see the judgment of Colman, J. in *Toomey v Eagle Star Insurance (No.2)* [1995] 2 Lloyd's Rep. 88, where he stated, at p. 93, that the insertion of a clause excluding the right of avoidance for an innocent misrepresentation or non-disclosure would not have the effect of excluding the right to claim damages under ss. 2(1) of the MA 1967.
[1013] Treitel, at p. 360-1; Clarke, 3rd ed., at para.23-15B; Hudson, A., Making Misrepresentations (1969) 85 LQR 524, at p. 527-8; Arnould, Vol. 3, at para.581, Footnote No. 23 & at para.626; Bennett, ibid., at p. 68-9; Atiyah & Treitel, Misrepresentation Act 1967 [1967] 30 MLR 369; Chitty, on Contracts, 27th ed., (1994), Vol. 1, at para.6-102.
[1014] [1989] 3 WLR 25.
[1015] Ibid., at p. 97.
[1016] Clarke, 3rd ed., a paras.23-15B & 23-18A. Also, see Hudson, A., Making Misrepresentations (1969) 85 LQR 524, at p. 524; Treitel, at p. 360-1; Colinvaux, 7th ed., at para.5-14; Bennett, at p. 68-9.
[1017] *Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."*

of rescission whenever there is an action brought by the underwriter to avoid a contract of insurance upon the ground of material misrepresentation and whenever it is equitable for the court to do so.

However, the suggested effect of this sub-section that it would enable the court, whenever it is equitable to do so, to award damages instead of avoidance of the contract was rejected by Arnould[1018] as apparently being in direct conflict with s. 17 of the MIA 1906[1019] which provides that the remedy of a violation of the doctrine of utmost good faith is avoidance of the contract. It was also submitted by Arnould that whenever there is a conflict between the two acts, the MIA 1906, which is specifically concerned with marine contracts, ought to prevail over the MA 1967.[1020] Even if ss. 2(2) was to give the court a discretionary power to award damages in lieu of rescission, it would be highly unlikely, it was further argued, that the court would find it equitable to exercise it.[1021]

The applicability of ss. 2(2) to insurance contract came under deep consideration in *Highlands Insurance v Continental Insurance*[1022], in which *Highlands* sought to avoid the reinsurance contract upon the ground of misrepresentation, whereas *Continental* sought to rely upon ss. 2(2) of the MA 1967 and, so, declare the contract as still subsisting. As to the contention of *Continental*, Steyn, J. declined to grant relief under ss. 2(2) as being inapplicable to the facts of the case[1023]. Relying upon the authority of Arnould, he added that since avoidance of the contract is the appropriate remedy for material misrepresentation in insurance context, it will be difficult to conceive of circumstances where it would be equitable under ss. 2(2) to restrict the right of the underwriter to damages instead of rescission.[1024] In any case, he thought that relief under ss. 2(2) must not be granted if avoidance is sought in the field of commercial contracts of insurance, for that would undermine the policing function of the remedy in ensuring that fair presentation of the risk insured is always made.[1025]

[1018] Vol. 2, at para.626; Vol. 3, at para.626.

[1019] It is also in direct contradiction to ss. 20(1) which provides that the remedy of its violation is avoidance of the contract.

[1020] Ibid. Also, see ss. 91(2) of the MIA 1906.

[1021] Ibid.

[1022] [1987] 1 Lloyd's Rep. 109.

[1023] Ibid., at p. 117-8.

[1024] Ibid., at p. 118.

[1025] Ibid. In this concern, see John Birds in his article: 'Avoiding an insurance contract for material misrepresentation' [1986] JBL 420, where he, at p. 422, was of the opinion that the restriction of the application of ss. 2(2) to the field of non-commercial contracts of insurance would be welcomed as being appropriate, especially when the underwriter seeks to avoid upon the grounds of innocent material misrepresentation. Also, see Bennett, Howard., Utmost Good Faith, Materiality and Inducement (1996) 112 LQR 405, at p. 405.

6.6.1.1.3. Ss. 3 of the MA 1967 [UK]

The function of s. 3[1026], it is suggested, is to monitor and, subsequently, invalidate the incorporation into the contract of any term or clause excluding or restricting any liability to which a contracting party may be subject by reason of a misrepresentation made by him or any remedy resulting from such liability, which would otherwise have been available to the other contracting party had not such a term or clause been inserted in the contract. If these terms or clauses are to be given effect, it will be the duty of the party seeking to rely upon them to prove that they satisfy the requirement of reasonableness stated in ss. 11(1) of the Unfair Contract Terms Act 1977.[1027]

In insurance context, s. 3 of the MA 1967 would seem, in appropriate cases, applicable to insurance contracts.[1028] The suggested example of the application of this section would, as argued by Arnould[1029], be to abrogate a term entitling the underwriter, if there was a non-fraudulent misrepresentation on the part of the assured, not only to avoid the contract, but also to forfeit the premium. As such, it could strongly be argued that the application of this section would also extend to the stipulation that the policy is neither cancellable nor avoidable by either party. This is because such a stipulation would, in case there was a misrepresentation, preclude the aggrieved party from his right of avoidance. However, a similar stipulation excluding the right of cancellation and avoidance by both parties was held by Colman, J. in *Toomey v Eagle Star Insurance (No.2)*[1030] to be effective in preventing the reinsurers from their right to avoid for innocent misrepresentation or non-disclosure. The only limitation he thought that the provisions of the MA 1967 could impose upon the effect of this stipulation was that it would not exclude the right to claim damages under ss. 2(1).[1031]

It may be of interest to add that a term that the policy is not voidable, would seem to preclude the court from exercising its discretionary power to award damages in lieu of rescission under ss. 2(2) of the MA 1967. This, it was submitted[1032], is due to the fact that this sub-section would not come into operation and, so, entitle the court to practice its discretionary power to grant the relief of damages instead of rescission, unless at the time of the action the right to avoid was still open to the underwriter. It follows that if the underwriter

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[1026] *"If a contract contains a term which would exclude or restrict - (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or (b) any remedy available to another party to the contract by reason of such a misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does."*

[1027] Ss. 11(1) *"In relation to a contract term, the requirement of reasonableness for the purpose of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."*

[1028] But, as it has earlier been stated, this section would not be invoked if the violation was due to a non-disclosure.

[1029] Vol. 2, at para.626.

[1030] [1995] 2 Lloyd's Rep. 88.

[1031] Ibid., at p. 93.

was precluded from the right of avoidance by reason of the insertion of this term, the court would not have any discretionary power to choose whether to order damages in lieu of rescission or not, which is an essential component without the existence of which ss. 2(2) of the MA 1967 would not operate.[1033]

Having, theoretically speaking, discussed the effect of the MA 1967 upon insurance contracts and having taken into account the fact that no insurance case has yet been reported[1034] where the Act was actually invoked and damages were accordingly awarded in lieu of rescission or as accumulative remedy and on the light of the submissions of Arnould[1035] that ss. 2(2) of the MA 1967 is in conflict with the wording of ss. 17, 18 and 20 of the MIA 1906, the concrete effect of the Act and whether it would really be applied to insurance litigation is something the answer of which would still yet to be decided.

6.6.2. Damages under Egyptian law

As far as the availability of damages as a cumulative remedy for a violation of the doctrine of utmost good faith under the Egyptian law is concerned, unlike the English law, the rules regulating the awarding of this remedy is much clearer and straight forward. According to ss. 347(1)[1036] and 347(3)[1037] of the MTL 1990, the underwriter who was induced to effect a policy of marine insurance by a misrepresentation or non-disclosure is entitled as against the assured to two remedies. First, he has the right to avoid the policy *ab initio*.[1038] Secondly, he is also entitled to claim damages as a separate and a cumulative remedy to avoidance.[1039]

The basis upon which the underwriter is deemed to be eligible to claim damages, especially in those cases where no loss was suffered by him, was argued by Ta Ha[1040] to be a compensation for him because the cause rendering the policy voidable was not on his part. This view could attract support when the source of the violation was fraud, but how could it be justified if no fraud was established, or even alleged, and no harm was sustained by the underwriter. However, the availability of this remedy as a cumulative one besides avoidance ought, in the absence of any official elucidation to the contrary, to be treated as a

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[1032] Arnould, Vol. 2, at para.626; Colinvaux, 7th ed., at para.5-14.
[1033] For the time at which the right of avoidance must be available in order for the court to be able to exercise its discretionary power under ss. 2(2) of the MA 1967, see Eggers & Foss, at paras.16.103-16.104.
[1034] Clarke, 3rd ed., at paras.23-15A and 23-15B.
[1035] Arnould, Vol. 2, at para.626.
[1036] *"The insurer may ask for a court ruling which invalidates the insurance deed if it is established that the insured party has submitted incorrect data, however, not in bad faith, or failed to submit the data as related to the insurance thus held, such that the insurer, in both cases has estimated the risk at less than it really is."*
[1037] *"The court, with due consideration to all conditions, may issue a ruling in favour of the insurer against the insured party ... for payment of an amount equal to the insurance premium if the insurer can establish there has been an ill will on the part of the insured party, or the payment of an amount equivalent to half that premium if no ill will has been established."*
[1038] Qayid, at para.335; Ta Ha, at para.677.
[1039] Ibid.

precautionary remedy warning assureds of the ultimate result of any innocent or fraudulent misrepresentation or non-disclosure on their part.

Although the underwriter is given the right to claim damages in the event of a material non-disclosure or misrepresentation, the amount of damages recoverable by him will depend on the type of the violation committed and whether it was innocent or fraudulent.[1041] Therefore, if the material misrepresentation or non-disclosure of the assured was held to be innocent, the amount of damages to be awarded would be a sum equivalent to half of the premium paid or to be paid under the policy. But, if the violation was held to be fraudulent, the amount recoverable by the underwriter as damages would be a sum equal to the full premium paid or to be paid under the policy. This, in fact, is clearly stated by ss. 347(3) of the MTL 1990 as follows:

> *"[T]he court, with due consideration to all conditions, may issue a ruling in favour of the insurer against the insured party ... for payment of an amount equal to the insurance premium if the insurer can establish there has been an ill will on the part of the insured party, or the payment of an amount equivalent to half that premium if no ill will has been established."*

It ought to be emphasised that this distinction in the amount of damages awarded between an innocent violation and a fraudulent one is only in respect of the right to claim damages. In other words, while the right of the underwriter to avoid the policy is guaranteed regardless of whether the misrepresentation or non-disclosure was innocent or fraudulent, the amount of damages which he is entitled to claim will remarkably be affected by whether fraud is present or not. It seems also relevant now to add that the rights of the underwriter to avoid the contract and to claim damages are not affected by whether the assured's misrepresentation or non-disclosure was connected with the loss suffered by the insured object or not.[1042] This is the aim behind enacting ss. 347(2) which declares that

> *"[I]nvalidating the insurance deed shall take place even though the incorrect data or refraining from submitting the data does not have any link with the damage and harm occurred to the object covered by insurance."*

Unfortunately, there are no available authorities on the real effect of ss. 347(3). However, taking the sub-section into deep consideration it appears that although the underwriter is considered to be eligible to claim damages whenever there is a misrepresentation or non-disclosure on the part of the assured, the awarding of this remedy seems to be always subject to the discretionary power of the court. This is evidently explicit from the use of the sentence that *"[T]he court, with due consideration to all conditions, may*

[1040] Ta Ha, at para.677.
[1041] Qayid, at para.335.
[1042] Civil Cassation 14/4/1949, Collection of Aumar, Vol. 5, p. 755, No. 407, [burglary], where it was held by the Court of Civil Cassation that it would not affect the right of avoidance of the insurance company the fact that the misrepresentations made did not cause the loss which the assured was insured against. Also, see Qayid, at para.335; Ta Ha, at para.675.

issue a ruling in favour of the insurer against the insured party ... ."[1043] Such a power, it must be made clear, is only confined to the decision of whether to award damages or not and not to the determination of its amount a matter which is distinctly settled by ss. 347(3).

Accordingly, it could be argued that there would be cases under which the court may reserve its consent to grant the underwriter the remedy of damages. This seems to be so when, for example, there was no fraud and the underwriter also suffered no loss because of the innocent misrepresentation or non-disclosure. But, if fraud is involved, it seems that the remedy of damages should always be granted regardless of whether or not the underwriter suffered loss or incurred liability as a result of his issuance of the policy. In sum, the court should not award damages for an innocent misrepresentation or non-disclosure, unless is of opinion that there are compelling reasons justifying its action and, even then, it ought to take into account whether, in the light of the circumstances surrounding the violation, it is in accordance with justice and fair dealing to do so.

Having discussed that, it is still left to be considered the question of whether there is a possibility that the underwriter who suffered loss could rely on the rules of the general law to claim damages for negligent or fraudulent misrepresentation or non-disclosure? Despite the fact that this issue has not been dealt with before and, therefore, no authority is in point, it could strongly be argued that according to the general principles of the law which are to the effect that the more specific rules are to be given priority in application over the general ones and since the MTL 1990 was intentionally enacted to regulate the contract of marine insurance and since its s. 347 distinctly laid down in clear terms those remedies available to the underwriter, not only in case of an innocent misrepresentation or non-disclosure, but also in respect of fraudulent ones, then it ought to be given effect in preference to any other rules and no other remedies ought to be sought elsewhere.

6.6.3. Damages under Saudi Arabian law

As to the recoverability of damages by the underwriter under the Saudi Arabian law, the position seems to be rather complicated and depends on the type of facts which were misrepresented or non-disclosed, the ground on which the underwriter brings his case to claim damages and whether it is brought under the CCL 1931 or under the general law. So, as discussed above, if the underwriter avoids the contract for fraudulent or non-fraudulent misrepresentation or non-disclosure of a fact, he will be entitled to forfeit the premium as instant damages. These damages are secured by the wording of s. 342 of the CCL 1931 which states that

> *"[I]f the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of*

[1043] Ss. 347(3) of the MTL 1990.

lading, and if the insurer discovers the true nature thereof ... the insurance policy made out shall in respect to the insurer be deemed to be null and void ... ."

Plainly, this forfeiture seems to be a direct result of the action of the avoidance of the contract and is to take place even if no loss was caused to the underwriter as a consequence of the assured's misrepresentation or non-disclosure. This statutory forfeiture of the premium was explained by El-Sayed to be grounded on the fact that the failure to meet the contractual obligation was on the assured's part and, therefore, he must take the consequences.[1044]

In this regard, it ought to be mentioned that apart from the right to forfeit the premium, in the absence of fraud, no right to claim any additional damages is sustainable under the CCL 1931. This seems to be always the rule even if the underwriter has suffered loss resulting from the assured's non-fraudulent misrepresentation or non-disclosure.

On the other hand, if fraud was involved in the sense that the policy was obtained by a fraudulent misrepresentation or non-disclosure on the part of the assured, the underwriter's normal rights would still be untouched. This is to say that he would still be entitled to avoid the contract and forfeit the premium, but his right to claim additional damages under the CCL 1931 would depend on the kind of facts which were fraudulently misrepresented or non-disclosed. Therefore, if the fraud was regarding the value, quantity, or quality of the item or items insured, it would be open to the underwriter to claim additional damages. This claim is enforced by s. 329 of the CCL 1931[1045] which clearly states that

"If trickery is used in stating the value of the insured goods and items, or if false statements are made as to the quantity and amounts, or if a forgery is committed in the shipping documents, the insurer may require that an inspection be made on the said goods and an assessment of the value thereof be made; in addition, he may bring a civil action against the insured for damages, and a prosecution for committing the felony or misdemeanour."

Evidently, it is only fraud in respect of the value, quantity, or quality of the object insured which will entitle the underwriter, in addition to his right to avoid the policy and to forfeit the premium, to recover additional damages under the CCL 1931. There is no obvious reason why only these circumstances in particular for which the CCL 1931 permitted damages to be granted if they were not fully and accurately stated. However, this seems to be due to the fact that such information is deemed in the sight of the legislator to be of exceptional importance, especially when the insured object is not available for examination at the time the policy is initialed. No matter what is the real reason behind their nomination, it must be made clear that this right will only arise in case where there is fraud in the disclosure of the value, quantity, or quality of the subject-matter. It follows that if any of such information was innocently misrepresented or non-disclosed, the right to claim damages contained in s. 329 would not be activated and, so, the only damages available to the

[1044] El-Sayed, at p. 194.

underwriter would be the forfeiture of the premium under s. 342. In this regard, it does not appear that the awarding of damages under s. 329 will be subject to any qualifications or whether or not the underwriter has suffered loss owing to the fraudulent misrepresentation or non-disclosure.

Having mentioned that, would the underwriter who was induced to effect a policy of marine insurance by fraudulent misrepresentation or non-disclosure of circumstances not covered by s. 329 of the CCL and as a result of which he suffered loss be able to claim damages in tort of deceit under the general law (Shari'a)? In principle, a person who was deceived by a fraudulent act or statement to enter into a contract and, as such, suffered loss is eligible to be compensated for his loss. However, before any fraudulent misrepresentation or non-disclosure is said to be actionable and entitling the deceived party to rescind the contract and claim damages under the general law of Saudi Arabia three conditions must first be satisfied.[1046]

First, there must be a fraudulent conduct on the part of the representor. Secondly, the alleged fraud must be of the nature that an ordinary prudent person will be deceived by it. The third and most important condition for the awarding of damages is that the deceived party must have relied on the fraudulent conduct to his detriment.[1047] Hence, if the defrauded party relying on the fraudulent conduct suffered no loss, no damages would be attainable. Neither of which alone will give rise to a right to claim damages.[1048]

Therefore, if the underwriter relied on the assured's fraudulent misrepresentation or non-disclosure to grant the required cover and such reliance caused him to suffer loss, it would be his right to claim damages if he managed to establish that there was fraud inducing him to insure and that as a consequence of which he suffered loss. In this connection, it was argued by Haberbeck & Galloway that the condition that fraud must be of the nature that it would induce an ordinary prudent person to contract must, in the field of insurance, be taken to refer to a prudent insurer.[1049]

It is left to be mentioned that it is very crucial to note that damages under the general law of Saudi Arabian are rigorously compensatory.[1050] This is to say that the underwriter will only be compensated in respect of those losses which he has actually suffered and nothing else.[1051]

[1045] Haberbeck & Galloway, at p. 232-3.
[1046] Ibn Nujaim, Zain Al Din. Abn Ibrahim., Al Ashbah Wa Al Nadair (in Arabic), 1st ed., (1983), at p. 88, (hereafter Ibn Nujaim); Coulson, at p. 70-1; Haberbeck & Galloway, at p. 232-3.
[1047] Ibid.
[1048] Ibn Nujaim, at p. 88.
[1049] Ibid., at p. 233.
[1050] Al Khui, Sayad. Abu Al Qasim., Manhaj Al Salihin (in Arabic), 10th ed., (undated), at p. 107; Ibn Qudamah, Vol. 5, at p. 422; Al Sanhuri, Sources of Obligation in the Islamic Jurisprudence, Vol. 6, at p. 168-71.
[1051] Haberbeck & Galloway, at p. 233. Examples of actual loss, it was advanced by the writers, would be when the underwriter spends money to salvage a damaged vessel or cargo.

6.7. General comments

Having profoundly discussed the rules regulating the remedies available to the underwriter if his judgment to insure has been induced by a material misrepresentation or non-disclosure, it should now be clear that it is the general rule amongst all the three legal systems that he will unhesitatingly be entitled to avoid the tainted contract.

However, if the remedy sought is damages, they all differ in the legal approach adopted towards it. The MIA 1906 [UK], on one hand, does not recognise any right to claim damages under its provisions, regardless of whether the misrepresentation or non-disclosure is fraudulent or innocent. The only resort available to underwriters seeking damages will be either the general law action in tort of deceit if the misrepresentation or non-disclosure is fraudulent or ss. 2(1) of the MA 1967 [UK] if the violation is innocent or negligent misrepresentation.

The MTL 1990 [Egypt], on the other hand, is comparatively generous in the sense that it allows the underwriter, subject to the discretionary power of the court, to claim damages for any violation of the duty of utmost good faith irrespective of whether it is fraudulent or innocent. Such generosity is not however reflected in the amount of damages granted, for that the maximum to which the underwriter will be entitled is a sum equivalent to the amount of full premium.

As to the Saudi Arabian law, its approach towards the award of damages is rather novel and can be summarised as follows. Based upon the supposition that the violation is on the part of the assured, s. 342 of the CCL 1931 entitles the underwriter to avoid the contract and recover damages in the form of the forfeiture of the premium. This type of damages seems to be granted whenever the contract is avoided on the basis of misrepresentation or non-disclosure and irrespective of whether they are associated with fraud or not. If fraud was involved, the underwrite could also claim additional damages, but whether his action is to be brought under the CCL 1931 or under the general law depends on the kind of the misrepresented or non-disclosed facts. If they were as to the value, quantity, or quality of the subject-matter insured, the underwriter's action to recover damages would be grounded on s. 329 of the CCL 1931. However, if the fraudulent misrepresentation or non-disclosure was in respect of any other facts, apart from the right to forfeit the premium, no action for damages could be available under the CCL 1931 and the underwriter should have resort to the rules of the general law through an action in tort of deceit.

No doubt, this confused system for the award of damages under the CCL 1931 [SA] where the underwriter could either get excessive damages or only nominal once would not be

for the benefit of both parties to the contract, nor the development of marine insurance business.

Apart from the remedy of damages, another topic which seems to be worthy commenting upon is the time within which the underwriter is obliged to make his election whether to avoid or affirm. Although that the three legal systems require that the election must be made within reasonable time, they do not agree with each other about what the legal treatment is if long time has expired and no election is made by the underwriter.

While underwriters insuring under the Saudi Arabian law will be able to delay their action of avoidance for a year, those insuring under the Egyptian law will be entitled to a three years period from the time when the misrepresentation or non-disclosure was discovered or, at the maximum, a period of 15 years from the conclusion of the contract irrespective of whether the violation was discovered or not.

The position of the English law is rather different. Although it does state that the underwriter ought to make his election within reasonable time, if no election was made and reasonable time expired, the underwriter would generally still entitle to make his election, but his right to avoid would not be an absolute one. In other words, the expiry of reasonable time would not affect the right of the underwriter to avoid, unless, at the time he decided to avoid, the position of the assured had already altered or the rights of third parties had intervened or his action was taken so late that the court felt able to say that the delay in itself was of such a length so as to be evidence that the underwriter had in fact decided to affirm the contract. Therefore, if one of the above three matters exists, the right to avoid will be lost.

Finally, it ought to be made clear that apart from the remedy of damages and some other differences, all the three legal systems seem to have similar applications of the main rules regulating the remedies available to the underwriter for a violation of the doctrine of utmost good faith.

Chapter [7]: The Continuing Duty of Utmost Good Faith

7.1. Introduction

As a rule, the doctrine of utmost good faith embracing the duties of full disclosure and of making true representation ceases to apply to parties to a contract of marine insurance once the contract is concluded[1052]. Accordingly, the assured will not be accountable for any material non-disclosure or misrepresentation made after that period. However, as against this rule, there are circumstances where this duty will become active again and, so, eligible to be invoked not only during the currency of the contract but also at a latter time when a claim for loss is presented.

Under the English law, this continuing nature could easily be inferred from the use of the unrestricted terms in the formation of s. 17 of the MIA 1906, which states that

> *"[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."*

This ability to survive and extend to matters arising after the conclusion of the contract was recently declared by Hirst, J. in *the Litsion Pride*[1053] where he stated that

> *"[I]n my judgment the authorities in support of the proposition that the obligation of utmost good faith in general continues after the execution of the insurance contract are very powerful. ... it is quite remarkable that s. 17, which both parties accept covers both the pre- and post-contract duty, makes no differentiation between these two stages."*[1054]

The reason why there may be situations under which the doctrine will continue to apply after the conclusion of the contract was pointed out by Hobhouse, J. in *the Good Luck*[1055] in very clear and distinct terms as follows:

> *"[T]here is no duty to disclose matters relevant to the making of the contract once the contract had been made; the time has then passed within which they must be disclosed. The later disclosure of later discovered facts would serve no useful purpose and, therefore, is not required. By contrast there can be situations which arise subsequently where the duty of utmost good faith makes it necessary that there should be further disclosure because the relevant facts are relevant to the later stages of the contract."*[1056]

Similar to the English doctrine, the Egyptian one is also recognised to have a continuing nature extending its application to circumstances occurring after the contract has been finalised. This is clearly declared by s. 361 of the MTL 1990 [Egypt] which states that

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[1052] *Cory v Potton* (1872) L.R. 7 Q.B. 304; affirmed in (1874) L.R. 9 Q.B.; *Lishman v The Northern Maritime Insurance* (1875) L.R. 10 Q.B. 179. Ex Ch. This point was also emphasised on in ss. 18(1), 19(1), 20(1) and 21 of the MIA 1906.

[1053] [1985] 1 Lloyd's Rep. 437.

[1054] Ibid., at p. 511.

[1055] [1988] 1 Lloyd's Rep. 514; affirmed in this point by the judgment of the Court of Appeal in [1990] 2 WLR 547, per May L.J. at p. 591.

[1056] Ibid., at p. 545-6.

"[T]he insured ... shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance. The insured shall also apprise the insurer, during the insurance validity, of all increase in such risks, within the limits of his awareness thereof."

As far as the Saudi Arabian law is concerned, the CCL 1931 [SA] does not generally seem to have recognised any coherent post-contractual doctrine of utmost good faith requiring the assured to comply with its rules in respect of any duties or circumstances occurring after the inception of the contract. Instead, the CCL 1931 deals with the continuing doctrine of utmost good faith through several, but isolated, sections each of which separately imposes on the assured a duty to make further disclosure or to act honestly in respect of matters occurring during the currency of the policy or when a claim for loss is presented or the subject-matter insured is abandoned.[1057]

Having briefly outlined the legal position under the English, Egyptian and Saudi Arabian laws and due to the fact that each of them has its own approach towards the continuing doctrine, the rules regulating its application under each legal system will be considered and analysed separately. This will be followed by making general comments in this regard.

7.2. The continuing doctrine under English law

This post-formation duty has extensively been under consideration by many recent judgments almost all of which relied upon s. 17 of the MIA 1906 as the basis justifying imposing such a duty. Nonetheless, none of these cases seem to have comprehensively revealed or clarified the ambiguities concerning the base, ambit, and duration of the duty and the available remedies for its breach. Therefore, this section intends to examine and discuss the application of the post-formation duty of utmost good faith compared, whenever it seems appropriate, with the pre-formation duty in the light of recent decided cases.

7.2.1. The continuing duty prior to the enactment of the MIA 1906

Although it is now established that the continuing duty to observe utmost good faith and to act accordingly rests after the enactment of the MIA 1906 on s. 17, it must be emphasised that this continuing duty did exist along ago before the enactment of MIA 1906 and had been invoked and applied several times in the field of insurance. Of the situations in which a continuing duty of utmost good faith existed and applied are the following:

[1057] The principle that the doctrine of utmost good faith will, in some cases, continue to apply to the conduct of the assured after the conclusion of the contract and while he is performing some post-contractual obligations was acknowledge in many cases such as Arbitral award 18/5/1993, [Fire], at p. 16-20; Arbitral award 22/12/1986, [House], at p. 15-6; Arbitral award 14/10/1987, [Reinsurance], at p. 14; Arbitral award 7/12/1996,

7.2.1.1. Orders for ship's papers

The duty of utmost good faith was held to be the basis[1058] of the right of the underwriter to have discovery of the ship's papers[1059] following a loss. The aim of such an order is basically to enable the underwriter to deliberate whether to accept, reject or compromise the assured's claim.[1060] This practice, which originated in the Eighteenth Century[1061], was exclusively applicable to marine insurance and its earliest trace seems to have been found in 1808 in *Clifford v Taylor*[1062], a case tried before Mansfield Ch.J. This

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[Fire], at p. 21; Arbitral award 5/3/1988, [Burglary], at p. 14; Arbitral award 11/6/1996, [Fire], at p. 10-11; Arbitral award 29/3/1997, [Fire], at p. 16-8; Arbitral award 29/3/1997, [Motor], at p. 8-10.

[1058] *Rayner v Ritson* (1865) B. & S. 888, [Marine], where Cockburn C.J., at p. 890-1, stated that *"[T]he exceptional practice in these cases seems to have arisen out of the particular nature of the contract of insurance. The underwriter of a policy of marine insurance who is sued for a constructive total loss of the ship is so much at the mercy of the assured with respect to the circumstances under which the vessel has been abandoned, and there ought to be uberrima fides on the part of the latter, and he ought therefore to lay those circumstances before the underwriter. ... the assured must lay before the underwriter every thing that throws light on a part of the transaction in which both parties are interested."*; *China Traders' Insurance v Royal Exchange Assurance* (1898) 2 Q.B. 187, per Vaughan Williams L.J., at p. 193-4; *Boulton v Houlder Brothers* [1904] 1 K.B. 784, [Marine], in which Mathew L.J., at p. 791-2; said that *"[T]he case is important because it appears to be necessary, as one would hardly expect it to be, to reiterate the statement of a well-established rule of law. It is an essential condition of a policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract. That being the meaning of the contract, effect is given to it by means of the order for discovery of ship's papers, and the affidavit with relation to them."*; *Harding v Bussell* [1905] 2 K.B. 83, [Marine], where it was expressed by Mathew L.J., at p. 85-6, that *"[N]ow what is the origin of this practice ... . The answer is indicated by a long series of authorities. The underwriter is so entitled because he can get the information as to his position in no other way. He is entitled to be treated with absolute good faith and to have information from the assured as to all that has been done with reference to the subject-matter of the insurance."*; *Graham Joint Stock v Motor Union Insurance* [1921] Com. Cas. 130, [Marine], per Scrutton L.J. at p. 137; *Leon v Casey* [1932] 2 K.B. 576, [Marine], when Scrutton L.J. pointed out, at p. 579-80, that *" ... insurance has always been regarded as a transaction requiring the utmost good faith between the parties, in which the assured is bound to communicate to the insurer every material fact within his knowledge not only at the inception of the risk, but at every subsequent stage while it continues, up to and including the time when he makes his claim... ."*

[1059] For a full account of the origin and historical development of orders for ship's papers see *Leon v Casey* ibid., per Scrutton L.J. at p. 578-87. In this concern, also see *Fraser v Burrows* (1877) 2 Q.B.D. 624, [Marine], per Kelly, C.B. at p. 625-6, overruled by *Graham Joint Stock v Motor Union Insurance* ibid., per Bankes L.J. and Scrutton L.J. at p. 131-41; *The West of England v The Canton Insurance Company* (1877) 2 Ex. D. 472, [Marine]; *Rayner v Ritson* ibid., per Cockburn C.J. at p. 890-1; *The China Transpacific v The Commercial Union Assurance* (1881) 8 Q.B.D. 142, [Marine]; *Henderson v The Underwriting & Agency Association* (1891) 1 Q.B. 557, [Land & Marine]; affirmed by *Village Main Reef v Stearns* (1900) Com. Cas. 246, [Land & Marine]; *Willis v Baddeley* (1892) 2 Q.B.D. 324, [Marine]; *China Traders' Insurance v Royal Exchange Assurance* ibid., per Vaughan Williams L.J. at p. 192-4; *London & Provincial Marine v Chambers* (1900) Com. Cas. 241, [Marine]; *Boulton v Houlder Brothers* ibid., per Mathew L.J. at p. 791-2; *Harding v Bussell* ibid., per Mathew L.J. at p. 85-6; *Schloss Brothers v Stevens* [1905] Com. Cas. 224, [Land & Marine].

[1060] *Rayner v Ritson*, ibid., per Cockburn C.J., at p. 890-1; *Harding v Bussell*, ibid., per Mathew L.J. at p. 85-6.

[1061] At the beginning, discovery orders were only available at Equity's Courts to which an underwriter, who had an action against him at a common law court, should apply, in order to be able to obtain discovery. This would usually cause delay and extra expenses for this additional litigation involved. In order to overcome this difficulty, the Common Law Courts evolved an order for the production of all the documents of the insured risk by the assured. This order would normally be accompanied by a stay of all the proceedings until full compliance with it by the assured is obtained. See also *Probatina Shipping v Sun Insurance Office* [1974] 2 All ER 478, [Marine], per Lord Denning at p. 493-4.

[1062] 1 Taunt. 167, [Marine]. An earlier attempt to have resort to this order could even be traced back to *Harrison v Houblon* (1680) in Yale (ed.), Nottingham's Chancery Cases (Selden Society), V. 2, 818.

case was followed by *Goldschmidt v Marryat*[1063] in which the necessity for such practice was clearly elucidated by James Mansfield.[1064]

7.2.1.2. Claims and adjustment of losses' stage

Another application of the continuing duty of utmost good faith, existing even earlier than that relating to orders for ship's papers, was in the field of claims and adjustment of losses. The reason for the need for this duty in this context was justified on the imbalance of knowledge between the assured and the underwriter. This was clearly explained by Cockburn C.J. in *Rayner v Ritson*[1065] where he stated that

> *"[T]he underwriter of a policy of marine insurance who is sued for a constructive total loss of the ship is so much at the mercy of the assured with respect to the circumstances under which the vessel has been abandoned, and there ought to be uberrima fides on the part of the latter, and he ought therefore to lay those circumstances before the underwriter."*[1066]

This inequality of knowledge was acknowledged by Lord Ellenborough in *Shepherd v Chewter*[1067] as being the basis requiring the imposition of a post-formation duty of disclosure on the assured. In this case, the assured sought to be indemnified in respect of the loss of his ship by capture. The underwriter, who was unaware that the insured ship had deviated from the direct line of the voyage before its loss, signed an adjustment with the assured. After being abreast of the deviation, the underwriter endeavored to avoid his liability. Lord

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[1063] (1908) 1 Camp. 559, [Marine], at p. 562-3, *"[I] think they [orders for ship's papers] have been very properly introduced; as they often obviate the necessity of going into a Court of Equity, and save a great deal of delay, expence, and litigation"*.

[1064] Although this order used to be granted at common law as a matter of right, according to the Rules of the Supreme Court, Order 72, rule 10, it is now available as one of procedure and is subject to the discretionary power of the court. However, the authority of orders for ship's papers as being based on a continuing duty of good faith were recently doubted by Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 199-201. Of the criticisms to which these orders are exposed is that they are confined to marine insurance contracts and does not apply to non-marine insurance contracts, that they do not seem to be mutual for there is no authority where they were invoked by assureds and that the noncompliance of the assured with them, as held by Leggatt, L.J. in the Court of Appeal in *Manifest Shipping v Uni-Polaris Insurance (The Star Sea)* [1997] 1 Lloyd's Rep. 360, [Marine], at p. 71, was never suggested to furnish the underwriter with the right of avoidance. Having mentioned that, they, Bennett further argued, ought to be viewed as *"a purely procedural response to the lack of appropriate common law discovery procedures"* and so they are *"independent of the doctrine"* of utmost good faith. In this regard, also see J., Gilman., Arnould's Law of Marine Insurance & Average, 16th ed., (1997), Vol. 3, at para.579C, (hereafter Arnould, Vol. 3); Eggers, Peter., & Foss, Patrick., Good faith and insurance contracts, (1998), at paras.1.40-1.42, 3.67, and 11.111-11.113, (hereafter Eggers & Foss).

[1065] (1865) B. & S. 888.

[1066] Ibid., at p. 890-1.

[1067] (1808) 1 Camp. 274, [Marine], at p. 275. It must be mentioned that Lord Ellenborough, when he gave judgment for the underwriter, did not clearly state that there was a breach of the duty of utmost good faith. However, it was the non-disclosure of a deviation occurred before the loss at the time of making the adjustment that gave the underwriter the right to avoid the contract. Also, see *Herbert v Champion* (1808) 1 Camp. 133, [Marine], where Lord Ellenborough, at p. 136-7, held the underwriter entitled to take advantage of circumstances with which he had been made acquainted before signing the adjustment but before paying the loss; *Luckie v Bushby* (1853) 13 C.B. 864, [Marine], in which it was held by Talfourd, J. at p. 880, that a signed adjustment would not prevent the underwriter from alleging that it was induced by misrepresentation; *Rodgers v Maylor* (1790) Marshall, Samuel., A Treatise on the Law of Insurance, 2nd ed., (1808), at p. 634, where Lord Kenyon expressed the conception that " *the adjustment was prima facia evidence against the defendant : But if there*

Ellenborough held that an adjustment would not be binding upon the underwriter unless there was full disclosure of the facts of the case at the time. This was stated as follows:

> *" ... the adjustment was prima facie evidence against the defendant : but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case... ."*[1068]

A similar duty to observe utmost good faith was also held to apply to the assured when he presents his claim for loss to the underwriter. According to such a duty, any claim for loss made by the assured to the underwriter has to be made honestly. So, in *Britton v The Royal Insurance Company*[1069], the insurance company rejected the assured's claim on the grounds that he made a false and fraudulent claim and account of his loss. The insurance company further argued that according to a condition in the policy, they were entitled to avoid the policy should the assured make any fraudulent claim. Willes, J., who tried the case, entered a judgment for the insurance company and approved the legitimacy of such a condition by saying that

> *"[T]he contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such condition is only in accordance with legal principle and sound policy."*[1070]

7.2.1.3. Amendments to the contract

Another trace of the application of the duty of utmost good faith prior to the enactment of the MIA 1906 was also held to exist whenever there was an amendment to the insurance contract. In *Lishman v The Northern Maritime Insurance*[1071], the assured effected insurance on freight and five days latter the ship was lost. The assured sought to get a stamped policy from the insurers who, for the first time, asked for the insertion of a new warranty for their benefit into the policy. The assured agreed to this amendment and a policy was issued in due course. The insurers rejected the claim of the assured on the ground of the non-disclosure of the loss and alleged that the original contract once was amended would activate the duty of disclosure again. Blackburn, J. rejected the claim of the insurers by stating that since the amendment did not affect the risk originally accepted and since it was only for the benefit the insurers only, then there was no need for further disclosure. This actually was expressed as follows:

> *"[T]he rule has been long established that a concealment of material facts known to the assured before effecting the insurance will avoid the policy, the principle being that with regard to insurance the utmost good faith must be observed. Suppose the policy were actually*

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had been any misconception of the law or fact upon which it had been made, the underwriter was not absolutely concluded by it." For further cases and discussion of this issue, see Marshall, at p. 632-7; Eggers & Foss, at paras.3.58-3.60.

[1068] (1808) 1 Camp. 274, at p. 275.

[1069] (1866) 4 F. & F. 905, [Fire].

[1070] Ibid., at p. 909. Also, note the judgment of Pollock, C.B. in *Goulstone v The Royal Insurance Company* (1858) 1 F. & F. 276, [Fire], at p. 279.

[1071] (1875) L.R. 10 C.P. 179. ExCh.

executed, and the parties agreed to add a memorandum afterwards, altering the terms: if the alteration were such as to make the contract more burdensome to the underwriters, and a fact known at that time to the assured were concealed which was material to the alteration, I should say the policy would be vitiated. But, if the fact were quite immaterial to the alteration, and only material to the underwriter as being a fact which shewed that he had made a bad bargain originally, and such as might tempt him, if it were possible, to get out of it, I should say there would be no obligation to disclose it."[1072]

7.2.2. The continuing doctrine after the enactment of the MIA 1906

Having in mind the fact that there are situations where the doctrine of utmost good faith will not end once the contract is concluded, but it will continue to apply to future events whenever one of the contracting parties has to make a decision in respect of the performance of the contract or when making a claim for loss, Chalmers, the draftsman of the Act, seems to have reflected this fact by the enactment of s. 17. This is obvious from the very broad terms in which the doctrine of utmost good faith was framed.[1073]

The fact that the doctrine of utmost good faith embodied in s. 17 of the Act applies not only to the pre-formation period[1074], but also to the post-formation one was recently affirmed in many cases. So, in *the Litsion Pride*[1075], which seems to be the first case where

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[1072] Ibid., at p. 182. Also, see *Sawtell v Loudon* (1814) 5 Taunt. 359.

[1073] The broad nature of s. 17 was illustrated by many cases such as *C.T.I. v Oceanus* [1984] 1 Lloyd's Rep. 474, at p. 492, where Kerr, L.J. said that *"[T]he duty of disclosure, as defined or circumscribed by ss. 18 and 19, is one aspect of the overriding duty of the utmost good faith mentioned in s. 17."* Stephenson, L.J. expressed agreement with Kerr, L.J. by mentioning that *" ... the special sections which follow s. 17 must be read in the light of this leading section, and all their references to insurer and assured follow the imposition of the statutory duty of utmost good faith on each party."* Also see the judgment of Lord Lloyd in *Pan Atlantic v Pine Top* [1994] 2 Lloyd's Rep. 427, [Reinsurance], at p. 455, where he pointed out that *" ... the duty to disclose every material circumstance known to the assured before a contract of insurance is concluded... is closely linked with the duty to ensure that every material representation is true (s.20). Both are illustrations or consequences of the rule, set out in s. 17, that a contract of insurance is a contract of utmost good faith."*

[1074] It must be noted that even at the pre-formation stage the duty was held to have a broad nature granting it an additional function as a supplementary duty to those stated in ss. 18, 19 and 20 when there is "bad faith" or "genuine bad faith" and they cannot be invoked. This what was actually stated by Vaughan Williams L.J. in *Contiere Meccanico Brindisino v Janson* [1912] 3 K.B. 452, at p. 463, who avoided the policy according to s. 17 rather than s. 18, as follows: *"[T]he avoidance of the policy in such a case would seem rather to be based on want of good faith in accordance with s. 17 of the Act of 1906 than on s. 18, which to a large extent seems excluded by the " seaworthiness admitted " form of policy."* This additional function was also supported by the judgment of Parker, L.J. in *C.T.I v Oceanus*, ibid., at p. 512, where he stated that *" ... the duty imposed by s. 17 goes, in my judgment, further than merely to require fulfilment of the duties under the succeeding sections. If, for example, the insurer shows interest in circumstances which are not material within s.18, s.17 requires the assured to disclose them fully and fairly. Again, if the assured or his broker realized in the course of negotiations that the insurer had made a serious arithmetical mistake or was proceeding upon a mistake of fact with regard to past experience he would, under s. 17, be obliged to draw attention to the matter. It would ... be the plainest breach of the duty under s. 17 not to do so."; Marc Rich v Portman* [1996] 1 Lloyd's Rep. 430, where Longmore, J., at p. 445, concerning the pre-formation period, expressed the view that *" ... s. 17 can in an unusual case have an operation independent of ss. 18-20... such cases will be rare ... ."*; *Agnew v Lansforsakringsbolagens* [1996] LRLR 392, [Reinsurance], in which Mance, J. mentioned, at p. 402, that *"[T]he pre-contractual duty is probably best regarded as an aspect of an overriding duty of good faith, which itself operates, if and as the context requires, on a continuing basis... ."* and *SAIL v Farex* [1995] LRLR 116, where Hoffmann, L. J., adding extra support, at p. 149-50, stated that *"[S]ection 17 seems to me adequate to deal with cases of genuine bad faith without the need to extend the meaning of "material circumstances" beyond matters relevant to the actual contract of insurance."* In connection with this, also see the opinion expressed by Arnould, Vol. 3, at para.579F, who after expressing his disagreement with the restrictive view of Hoffmann, L.J of the scope of the pre-contractual duty to mere *"bad faith"* or *"genuine bad faith"*, stated that *"[I]t may, however, be appropriate to regard section 17 as having only a limited role in relation to the pre-contractual duties of the assured and as supplementing sections 18-20 in cases of pre-contractual non-disclosure and misrepresentation where there is genuine bad faith in some respect not falling precisely within those ensuing sections."*

[1075] [1985] 1 Lloyd's Rep. 437.

the continuing application of the doctrine came under deep consideration for the first time, Hirst, J. acknowledge that a post-formation duty of utmost good faith will apply to the assured whenever there is a decision to be made by the underwriter under the terms of the contract. He expressed this conclusion in very broad terms by saying that

> *"... the authorities in support of the proposition that the obligation of utmost good faith in general continues after the execution of the insurance contract are very powerful."*[1076]

The judgment of Hirst, J. in *the Litsion Pride*, was subsequently affirmed and adopted by Hobhouse, J. in *the Good Luck*[1077] where he pointed out that

> *" ... there can be situations which arise subsequently where the duty of utmost good faith makes it necessary that there should be further disclosure because the relevant facts are relevant to the later stages of the contract."*[1078]

A similar conclusion was also advanced by Tuckey, J. in *the Star Sea*[1079] who after paying remarkable attention to the circumstances under which the duty will arise declared that

> *"[T]hree things are of note. First, the duty is not limited to the pre-contractual stage ... . Second, there is no requirement of materiality ... . Third, the only specified remedy for breach is avoidance."*[1080]

7.2.3. The juristic basis of the continuing duty

The reason why it is important to ascertain or even discuss the legal source of this duty is because the identification of the nature of a principle will normally affect its scope, available remedies and even its future development.[1081] This issue has been, so far, the subject of much controversy amongst the Courts. Judges could not agree upon one doctrine revealing the ambiguities or stating what the right basis of the duty is. Unfortunately, such controversy is not only confined to the nature of the post-formation duty, but it also encompasses that of the pre-formation one. This difficulty arose partly from the absence of any uniform and clear judgment stating the law in this respect and partly out of the judgment of May L.J., in the Court of Appeal in *the Good Luck*[1082] where he stated that

> *" ... we see no reason why the source in law of the obligation, or the remedy for its breach, should be different after the contract is made from what it is at the pre-contractual stage."*[1083]

[1076] Ibid., at p. 511.
[1077] [1988] 1 Lloyd's Rep. 514; affirmed in this point by the judgment of the Court of Appeal in [1990] 2 WLR 547, per May L.J. at p. 591.
[1078] Ibid., at p. 545-6.
[1079] [1995] 1 Lloyd's Rep. 651.
[1080] Ibid., at p. 667.
[1081] *Banque Keyser v Skandia (U.K.) Insurance* [1987] 2 WLR 1300, where Steyn J., at p. 1329, concerning the necessity of considering the rubric in which these rules ought to be placed, pointed out that *" ... the rubric in which a rule is placed often has an important influence on its width of application and future development."*
[1082] [1990] 2 WLR 547.
[1083] Ibid., at p. 591.

Accordingly, it becomes very essential, in order to present a complete analysis of the legal origin upon which the continuing duty is based, to consider the legal source of the duty before and after the conclusion of the contract.

7.2.3.1. The juristic basis of the pre-contractual duty[1084]

Previously, it was held that the basis upon which a policy of insurance was voidable for a material misrepresentation or non-disclosure was either actual[1085] or constructive[1086], or legal fraud[1087]. This view based upon fraud was not adopted by Duer[1088] who advanced the proposition that it was *"part of the contract"* of insurance that full disclosure should be made and all representations should be accurate, otherwise the contract would be avoided. This proposition was also exposed to criticisms, as not being the true ground upon which a contract of insurance would be avoided for material non-disclosure or misrepresentation, by Lord Esher in the Court of Appeal in *Blackburn v Vigors*[1089] who stated that

> *" ... if this [Duer's proposition]be correct, the contract should never be set aside or treated as void on the ground of concealment; the contract should stand and be treated as broken by the assured."*[1090]

Apparently, Lord Esher was in favour of Phillips' view[1091] classifying the right of avoidance as being grounded upon an implied condition of the contract of insurance that

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[1084] For works on this subject, see Khurshid, Salman. & Matthews, Paul., Tracing Confusion (1979) 95 LQR 78; Matthews, Paul., 'Uberrima Fides in Modern Insurance Law' in New Foundation for Insurance Law, (ed. by Rose), (1987) at p. 39-47; Davis, R., The origin of the duty of disclosure under insurance law (1991) 4 Ins.L.J. 71; Park, Semin., Origin of the duty of disclosure in English insurance contracts" in (1996) 25 Anglo American Law Review 221; Park, Semin. The duty of disclosure in insurance contract law, (1996), Ch. 3; Eggers & Foss, at paras.4.29-4.49; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, [1999] LMCLQ 165, at p. 180-97; Baatz, Yvonne., Utmost good faith in Marine Insurance Contracts, (undated) & (unpublished), p. 8-11; Aikens, Richard., *"STAR SEA"*: Continuing Duty of Utmost Good Faith, a paper presented at a conference entitled 'Insurance and Law' organised by Malcolm Clarke at St John's College, University of Cambridge in March 1999, at p. 4-10.

[1085] *Pawson v Watson* (1778) 2 Cowp. 785, per Lord Mansfield at p. 788; *Bize v Fletcher* (1779) 1 Dougl. 12n., [Marine], per Lord Mansfield. For more details about this case, see J. Park., A system of the law of marine insurance, 8th ed., (1842, reprinted 1987) Vol. 1, at p. 439-41, (hereafter Park, A system of the law of marine insurance) and *Flinn v Tobin* (1829) Moo & Mal. 367.

[1086] *Macdowall v Fraser* (1779) 1 Dougl. 260, per Lord Mansfield at p. 261-2; *Fitzherbert v Mather* (1785) 1 T.R. 12, per Lord Mansfield at p. 15; *Feise v Parkinson* (1812) 4 Taunt. 640, [Marine], per Gibbs J. at p. 641 and *Anderson v The pacific Fire & Marine Insurance Company* (1872) L.T. 7 C.P. 65, per Willes, J. at p. 68.

[1087] *Cornfoot v Fowke* (1840) 6 M. & W. 358, per Lord Abinger; *Elkin v Janson* (1845) 13 M. & W. 655, per Baron Parke; Arnould, J., Arnould's Law of Marine Insurance & Average, 2nd ed., (1857), Vol. 1, part 2, ch. 1, s. 2, para.196, p. 547-8 and para.208, p. 584.

[1088] Duer, The Law and Practice of Marine Insurance, (1848), Vol. 2, at s. 647-55, x. xiv. Also, see Vance, Handbook on The Law of Insurance, 3rd ed., (1951), at p. 100-1, where the view basing the duty upon fraud was rejected. This was pointed out as follows: *"[T]he rule thus derived, requiring that all material facts should be made known to the insurer, is not based upon the principle of fraud, as it might be easily possible for the insured to fail in his duty of disclosure, with no fraudulent purpose whatever."*

[1089] (1886) 17 Q.B.D. 553, [CA]. This was also the opinion of Lindley, L.J. at p. 578 and Lopes, L.J. at p. 583.

[1090] Ibid., at p. 561.

[1091] Phillips, A Treatise on the Law of Insurance, Vol. 1, at s. 537. The implied condition notion seems to have existed even earlier than the view expressed by Phillips. This was declared by Parke B. in *Moens v Heyworth* (1842) 10 M. & W. 147, where he stated, at p. 157, that *" ... the policies of insurance are made on implied contract between the parties that everything material to the insurer should be disclosed."* and by Cockburn, C.J. in *Proudfoot v Montefiore* (1867) L.R. 2 Q. B. 510, at p. 521-22.

there should be no misrepresentation or concealment. Lord Esher's agreement with this view was advanced as follows:

> *"[T]his seems to me to be the true doctrine. The freedom from misrepresentation or concealment is a condition precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract."*[1092]

The implied term doctrine was followed by the rest of the court's judges[1093] and was subsequently affirmed and adopted by the judgment of Lord Watson in the House of Lords[1094] with whose judgment Lord Fitzgerald and seemingly Lord Macnaghten were in agreement[1095].

Although that the implied condition's doctrine has received impressive support[1096], it seems to have lost strength after the enactment of the MIA 1906. This is because the wording of ss. 18(1) and 20(1) respectively state that *" ... the assured must disclose to the insurer, before the contract is concluded ... ."* and that *"[E]very material representation made by the assured or his agent to the insurer during the negotiation for the contract, and before the contract is concluded ... ."* No doubt, the use of the phrase *"before the contract is concluded"* in the formation of both sub-sections have thrown many doubts on the correctness of the implied condition doctrine. These doubts were in mind when Scott L.J. and Luxmoore L.J. in *Merchants & Manufacturers Insurance v Hunt*[1097], rejected the implied condition doctrine as representing the right analysis of the nature of the duty. In his judgment, Scott L.J. having expressed his disagreement with the opinion based upon an implied term[1098], declared that the MIA 1906 seems to treat the duty *"as existing outside the contract, and not as mere implication inside the contract... ."*[1099]

[1092] *Blackburn v Vigors* (1886) 17 Q.B.D. 553, [CA], at p. 562.
[1093] Ibid., per Lindley, L.J. at p. 578 and per Lopes, L.J. at p. 583.
[1094] *Blackburn v Vigors* (1887) 12 App. Cas. 531, [HL], at p. 539. However, the House overturned the Courts of Appeal's decision on the imputation of knowledge held by a former agent of the assured.
[1095] Ibid., at p. 542.
[1096] *Joel v Law Union & Crown Insurance Company* [1908] 2 K.B. 863, per Vaughan Williams L.J. at p. 878. Fletcher Moulton L.J., at p. 886, was however of the view that the duty of good faith *" ... is not contractual"*; *Pickersgill v London & Provincial Marine & General Insurance* [1912] 3 K.B. 614, [Marine], per Hamilton J. at p. 621; *Zurich General Accident & Liability v Morrison* [1942] 2 K.B. 53; This doctrine was also adopted, as being the proper ground on which to base the rule by Arnould's Law of Marine Insurance & Average, 16th ed., (1981) Vol. 2, part 2, Ch. 17 at para.595 and Ch. 18 at para.627, (hereafter Arnould, Vol. 2); Welford & Otter-Barry., The law relating to fire insurance, 4th ed., (1948) at p.5; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 183-5.
[1097] [1941] 1 K.B. 295, [Motor].
[1098] Ibid., at p. 313, where he said if the duty is to be categorised as an implied term of the contract *" ... it would not arise until the contract had been made; and then its sole operation would be to unmake the contract."*
[1099] Ibid., at p. 312-3. Luxmoore L.J. sharing with Scott L.J. the same view, stated, at p. 318, that *" ... the right to avoid a contract ... depends not on any implied term of the contract but arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition."*

The judgment of the Court of Appeal in *Merchants & Manufacturers Insurance v Hunt* was referred to with approval by May, J. in *March Cabaret v London Assurance*[1100], who came to the conclusion that

> *" ... the duty to disclose is not based upon an implied term in the contract of insurance at all; it arises outside the contract... ."*[1101]

Despite the amount of support which this new doctrine has received[1102], the conflict between the two doctrines continued to exist, for that there were still judgments, though not directly in point[1103], supporting the implied term formula. For instance, the judgment of Hirst J. in *the Litsion Pride*[1104] and that of Hobhouse, J. in *the Good Luck*[1105].

It was not until recently when the judgments of some important cases seem to have ended the clash between these two doctrines in favour of that classifying the duty as one arising outside the contract of insurance.[1106] This what was held in *Banque Keyser v Skandia (U.K.) Insurance*[1107], where Steyn J. refused the argument of the plaintiff based upon the decision of Hirst J. in *the Litsion Pride* that it was an implied term of the contract of insurance on which the duty of good faith was grounded. Relying on the judgment of May, J. in *March Cabaret v London Assurance*, Steyn J., further stated that the *uberrima fides* principle is a set of rules developed by the judges and they apply before the contract comes into existence and it is incorrect to categorise them as implied terms.[1108]

[1100] [1975] 1 Lloyd's Rep. 169, [Traders Combined].

[1101] Ibid., at p. 175.

[1102] In this regard, see *Joel v Law Union & Crown Insurance*, ibid., per Fletcher Moulton L.J., at p. 886, where he stated that the duty *"is not contractual"*; *Bell v Lever Brothers* [1931] AC 161, where Lord Atkin concerning the duty, mentioned, at p. 227, that *"... the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made... ."*; *New Hampshire Insurance v MGN* [1997] LRLR 24, [CA-Fidelity], where Staughton, L.J., at p. 62, said that the duty of disclosure in insurance contracts *" ... is imposed from outside by the law ... ."*; Colinvaux., The Law of Insurance, 4th ed., (1979), at p. 88, where it was stated that *"[T]he duty to disclose is not an implied term of the contract itself."*; Ivamy, General Principles of Insurance Law, 6th ed., (1993), at p. 142-3, where the decisions of *Merchants' & Manufacturers' Insurance v Hunt* and *March Cabaret Club v London Assurance* were cited as authorities and Bower, The Law relating to Actionable Non-Disclosure, 2nd ed., (1990), at p. 18-9, where it was ascertained that *"[I]t is an obligation laid by the law upon negotiators as incident to their negotiation, but not finding its origin in the contract itself."*; Aikens, Richard., *"STAR SEA"*: Continuing Duty of Utmost Good Faith, a paper presented at a conference entitled 'Insurance and Law' organised by Malcolm Clarke at St John's College, University of Cambridge in March 1999, at p. 10.

[1103] Both of these cases concerned with the nature of the post-contractual duty and based their judgments upon the implied condition doctrine.

[1104] [1985] 1 Lloyd's Rep. 437, where he stated, at p. 518-19, that *"I am prepared to hold that the duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good faith is an implied term of the policy, since I prefer the authority of Blackburn v Vigors in the Court of Appeal to the obiter dicta in the Merchants & Manufacturers case."*

[1105] [1988] 1 Lloyd's Rep. 514, where he, at p. 547, expressed his preference for the implied condition doctrine by saying *"[I]f one views the obligation of the utmost good faith at the time of the performance of the contract as arising from an implied term of the contract, which is the view that I prefer... ."*

[1106] The doctrine that the duty is one arising outside the contract of insurance was further supported by the Fifth Report of the Law Reform Committee: 'Conditions and Exceptions in Insurance Policies', Cmnd. 62, (1957), where it was announced, at para.4, that *"[T]he effect of non-disclosure may be considered first, since it is a consequence of the general law relating to insurance contracts and does not involve any express term or condition ... ."*

[1107] [1987] 2 WLR 1300.

[1108] Ibid., at p. 1329.

The case went to the Court of Appeal[1109] where Slade L.J., after considering the authorities in favour of both doctrines, approved and adopted the judgment of Steyn J. in this point in preference to that of Lord Esher in the Court of Appeal in *Blackburn v Vigors*[1110]. He stated his view as follows:

> *"[I]f the duty of disclosure were founded upon an implied term of the contract of insurance that each party had made full disclosure of all material facts to the other, we could see no reason in principle why the breach of such implied term should not give rise to a claim for damages. In our judgment, however, the weight of authority and of principle is against any such conclusion."*[1111]

The implied term doctrine theory was exposed to a third attack by the judgment of the Court of Appeal in *the Good Luck*[1112]. The judgment of the Court was delivered by May L.J. who depending upon the decision of Slade L.J. and the reasons given therein that the pre-formation duty arises by reason of the jurisdiction originally exercised by the courts of equity to prevent imposition and so it arises outside the contract and, as such, does not give rise to any action for damages, rejected to classify a breach of the post-contract duty as constituting a breach of an implied term.[1113] As far as one can infer, May L.J., in this case, was saying no more than that as the pre-duty was a condition arising outside the contract and did not support a claim for damages, the post-duty should be no difference.

Further support to this doctrine can also be found in the judgments expressed by Mance, J in two recent cases. In *Agnew v Lansforsakringsbolagens*[1114], he stated that

> *"I will however proceed on the basis that the duty of good faith exists ... as a mater of general law outside the contract."*[1115]

In the same manner, he stated in *Insurance Corporation of the Channel Islands v McHUGH & Royal Hotel*[1116], that

> *"[T]he duty, although it arises as a matter of general law outside the contract, gives in the event of its breach a right to avoid the contract."*[1117]

[1109] *Banque Keyser v Skandia* [1989] 3 WLR 25.
[1110] (1886) 17 Q.B.D. 553, at p. 562; affirmed by the House of Lords in this issue, but overruled on other issue, (1887) 12 App. Cas. 531.
[1111] *Banque Keyser v Skandia* [1989] 3 WLR 25, at p. 86.
[1112] [1990] 2 WLR 547.
[1113] Ibid., at p. 590-1, where he stated that *"[T]hose reasons seem to us to be equally persuasive against regarding breach of the obligation of utmost good faith, in a contract of insurance, so far as concerns a breach of the obligation occurring after the contract has been made and in the course of the contract, as constituting a breach of an implied term of the contract and as therefore capable of supporting a claim to damages."*
[1114] [1996] LRLR 392.
[1115] Ibid., at p. 397.
[1116] [1997] LRLR 94.
[1117] Ibid., at p. 138.

7.2.3.2. The juristic basis of the post-contractual duty[1118]

Unlike the current debate in the Courts on the true basis of the pre-contractual duty, the nature of the post-formation duty seems, to some extent, to be accepted as being an implied term of the contract of insurance; with the exception that its breach does not give rise to a right to claim damages. The judgment of Hirst, J. in *the Litsion Pride*, relying on the authority of the Court of Appeal in *Blackburn v Vigors*, seems to be the first decision to have held that the continuing duty of good faith was based upon an implied term of the contract of insurance. In that case, Hirst, J. held that

> *" ... the duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good faith is an implied term of the policy... ."*[1119]

This decision was referred to with approval by Evans, J. in *the Captain Panagos D.P.*[1120], where he stated that

> *" ... fraud, or other breach of what I will assume is continuing duty of utmost good faith in relation to the making of claim, also breaks an implied term of the contract ."*[1121]

The implied term doctrine was also the preferred view of Hobhouse, J. who expressed this opinion while giving judgment in *the Good Luck.*[1122]

> *"[I]f one views the obligation of the utmost good faith at the time of the performance of the contract as arising from an implied term of the contract, which is the view that I prefer... ."*[1123]

Another recent agreement with the implied term doctrine was also shown by the Court of Appeal in *Orakpo v Barclays Insurance*[1124], where Hoffmann, L.J., whose judgment was met with the approval of Sir Roger Parker[1125], expressed his full agreement with the implication of a duty not to make fraudulent claims in the contract of insurance. He further added that such a proposition was supported by both principle and authority.

> *" ... such a term is implied by law as one which, in the absence of contrary agreement, it would be reasonable to regard as forming part of a contract of insurance... ."*[1126]

[1118] For further consideration of this topic, see Eggers & Foss, at paras.4.29-4.49; Baatz, Yvonne., Utmost good faith in Marine Insurance Contracts, (undated) & (unpublished), p. 8-11; Aikens, Richard., *"STAR SEA"*: Continuing Duty of Utmost Good Faith, a paper presented at a conference entitled 'Insurance and Law' organised by Malcolm Clarke at St John's College, University of Cambridge in March 1999, at p. 4-10.

[1119] *Black king shipping Corporation v Massie* [1985] 1 Lloyd's Rep. 437, at p. 518-19; *New Medical Defence Union v Transport Industries Insurance* [1985] 4 NSWLR 107, per Rogers, J., at p. 110, where he stated that the post-contractual duty was an implied condition of every policy of insurance.

[1120] *Continental Illinois National Bank & Trust v Alliance Assurance* [1986] 2 Lloyd's Rep. 470, [Marine]; affirmed in [1989] 1 Lloyd's Rep. 33.

[1121] Ibid., at p. 511-12.

[1122] [1988] 1 Lloyd's Rep. 514.

[1123] Ibid., at p. 547.

[1124] [1995] LRLR 443.

[1125] However, Staugton, L.J., at p. 450-1, representing the minority view, was of the opinion that in the absence of any expressed term to this effect, the duty not to make fraudulent claims would not be implied by law.

[1126] Ibid., at p. 451.

It must be added that the validity of this doctrine is not only supported by such direct authorities, as mentioned above, but extra support can also be indirectly drawn from cases where no disagreement was shown. For instance, the judgment of the Court of Appeal in *Banque Keyser v Skandia (U. K.) Insurance*[1127], where Slade L.J. concerning the decision of Hirst J. in *the Litsion Pride*, stated that

> *"[I]t may be that on the particular facts of some cases (though by no means necessarily all) the duty of post-contractual disclosure can be said to arise under the terms of the preceding contract. However, it by no means follows that the duty of pre-contractual disclosure arises under the contract rather than the general law."*[1128]

In addition, there is the judgment of Leggatt, L.J. in the Court of appeal in *the Star Sea*.[1129] In his judgment concerning the duty not to make fraudulent claims, he expressed no strong preference for either doctrine, yet it seems as though he was in favour of the implied term principle. This was delivered as follows:

> *"[Y]et in principle although the protection of equity is required before a contract comes into being, once it has been made there is no reason why the parties should not protect themselves by express terms, supported by such other terms as it is necessary to imply. ... If the duty extends no further, it is coincident with the term to be implied by law, as forming part of a contract of insurance, that where fraud is proved in the making of a claim the insurer is discharged from all liability."*[1130]

However, a very forceful argument against the implied term doctrine was delivered by May L.J. in the Court of Appeal in *the Good Luck*.[1131] The judgment of the Court placed great reliance on the decision of Slade L.J. in the Court of Appeal in *Banque Keyser v Skandia (U. K.) Insurance*[1132] where he pointed out the court's reasons for rejecting both to categorise the pre-duty of utmost good faith as an implied term and to allow, as such, any claim for damages. May L.J. expressed the view of the Court as follows:

> *"[T]hose reasons seem to us to be equally persuasive against regarding breach of the obligation of utmost good faith, in a contract of insurance, so far as concerns a breach of the obligation occurring after the contract has been made and in the course of the contract, as constituting a breach of an implied term of the contract and as therefore capable of supporting a claim to damages. ... we see no reason why the source in law of the obligation, or the remedy for its breach, should be different after the contract is made from what it is at the pre-contract stage."*[1133]

In the light of the argument advanced above concerning the legal source of the pre-contractual duty of utmost good faith; especially the judgments of the Court of Appeal in *Banque Keyser* and *the Good luck*, it seems very obvious that the doctrine that the duty is a

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[1127] [1989] 3 WLR 25.
[1128] Ibid., at p. 85.
[1129] [1997] 1 Lloyd's Rep. 360.
[1130] Ibid., at p. 370.
[1131] [1989] 2 WLR 547. In this connection, see also *Agnew v Lansforsakringsbolagens* [1996] LRLR 392, at p. 397, where Mance, J supported the view that the duty exists as a matter of general law outside the contract.
[1132] [1989] 3 WLR 25, at p. 88-9.
[1133] *Bank of Nova Scotia v Hellenic Mutual War Risks (The Good Luck)*, ibid., at p. 591. The House of Lords, in [1991] 3 All ER 1; [1991] 2 WLR 1279, reversed the Court of Appeal's decision, but on a different regard.

condition arises outside the contract of insurance has become now an established law at any stage, at least, below the House of Lords.

However, with regard to the post-contractual duty, the situation is apparently different and has not been decisively settled yet. This is owing to the lack of authorities on one hand and to the existing contradiction amongst the available ones on the other. But, in the light of the number of the available authorities, it is very clear that the balance of previous authorities is weighted in favour of the view that the duty is an implied term of the contract of insurance and against that of a condition arises outside the contract, with the exception that its violation will not sound in damages[1134].

Despite all of that, it is admitted that the legal source of the duty will still exist as an unsettled issue until it is decided by the House of Lords. This is what can be inferred from the view announced by Lord Mustill in the House of Lords in *Pan Atlantic v Pine Top*[1135], where he stated that

> *"[T]o a great extent the source of the power to avoid has been made academic by the creation of the statutory power under the Act, but the controversy has still not been resolved."*[1136]

7.2.4. The scope of the continuing duty

It is now admitted that there is a continuing duty upon parties to a contract of marine insurance to observe the highest degree of good faith towards each other after the conclusion of the contract. Yet, unlike the situation in respect of the pre-contractual duty, there is still a degree of uncertainty concerning the exact ambit of the post-contractual duty; this sort of uncertainty may be attributed to lack of development. However, it could be concluded from the available cases that there are, so far, certain situations in the existence of which a duty of utmost good faith will arise. These situations are as follows:

7.2.4.1. In the context of claims[1137]

It is one of the established rules of insurance law that any claim presented to the underwriter by or on behalf of the assured must be honestly made. This duty was held in *Britton v Royal Insurance*[1138] to be in conformity with the requirement of good faith. In this case, which was about fire insurance, Wills J. stated that

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[1134] *Banque Keyser v Skandia (U.K.) Insurance* [1990] All ER 947, per Lord Templeman at p. 959, *" ... I agree with the Court of Appeal that a breach of the obligation does not sound in damages."* and per Lord Jauncey at p. 960, *"I agree with the compelling reasons of the Court of Appeal for rejecting the first proposition* [a breach of the duty sounded in damages] ... ."

[1135] [1994] 2 Lloyd's Rep. 427.

[1136] Ibid., at p. 449.

[1137] See Eggers & Foss, at Ch. 11; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 207-18; Baatz, Yvonne., Utmost good faith in Marine Insurance Contracts, (undated) & (unpublished), at p. 4-8.

[1138] (1866) 4 F & F 905. Also, see *Goulstone v Royal Insurance* (1858) 1 F. & F. 276, [Fire]; Welford & Otter-Barry., at p. 289-90; Ivamy, General Principle of Insurance Law, 6th ed., (1993), at p. 434.

> *"[T]he contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire polices conditions that they shall be void in the event of a fraudulent claim, and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy... ."*[1139]

This duty was referred to with approval by Hirst, J. in *the Litsion Pride* as being an application of the continuing duty of good faith; where he announced that

> *"I am prepared to hold that the duty not to make fraudulent claims in breach of the duty of utmost good faith is an implied term of the policy... ."*[1140]

In this case the plaintiffs contended that the duty must be confined to frauds affecting either the genuineness or the amount of the claim and the test of materiality to be applied as such was that the alleged fraud must relate to the claim itself. Hirst, J. refused to accept these contentions and stated that the duty would extend to any fraudulent statement influencing the decision of a prudent underwriter to accept, reject or compromise the claim.[1141]

On the other hand, although it was admitted by the judge that the precise ambit of this duty has not been developed by the authorities, he went further and extended it to culpable misrepresentation and non-disclosure.[1142] However, a contrary view was expressed by Tuckey, J. in *the Star Sea*[1143], where he refused to extend the scope of the duty at the claim's stage to be more than to refrain from making fraudulent claims[1144]. This wider scope of the duty, as contended by Hirst, J., in *the Litsion* Pride was considered a little bit further in *Royal Boskalis v Mountain.*[1145] In this case, Rix, J., after examining the judgment of Hirst, J. as being the only authority in this point, rejected the duty of good faith to be wider than the duty not to make fraudulent claims.[1146] Rix, J. further held that if the duty was to extend to non-fraudulent non-disclosure or misrepresentation, a conclusion in which he does not belief, it must be limited by the principles of materiality and inducement.[1147] As to the test of materiality, he accepted the submission of the plaintiffs that such a test should be narrower than that applied to the pre-contractual stage in the sense that the non-disclosure or misrepresentation of a fact would be material if it affected the underwriter's defence of the

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[1139] (1866) 4 F & F 905, at p. 909.
[1140] [1985] 1 Lloyd's Rep. 437, at 518. The duty was further approved and adopted by recent cases, such as *Continental Illinois National Bank & Trust v Alliance Assurance, The Captain Panagos D.P.* [1986] 2 Lloyd's Rep. 470, per Evans, J. at p. 511-2; affirmed in [1989] 1 Lloyd's Rep. 33; *Banque Financiere v Westgate Insurance* [1990] 2 All ER 947, [HL], per Lord Jauncey at p. 960; *National Oilwell (UK) v Davy Offshore* [1993] 2 Lloyd's Rep. 582, [Builders All Risks], per Colman, J. at p. 615-6; *Diggens v Sun Alliance & London Insurance* [1994] CLC 1146, [Building], per Evans L.J. at p. 1163-4; *Orakpo v Barclays Insurance* [1995] LRLR 443, per Hoffman, L.J. at p. 451-2; *Manifest Shipping v Uni-Polaris Insurance (The Star Sea)* [1995] 1 Lloyd's Rep. 651, per Tuckey, J. at 667-8; [1997] 1 Lloyd's Rep. 360, per Leggatt, L.J. at p. 371, [CA].
[1141] Ibid., at p. 513.
[1142] In this regard, see Eggers & Foss, at paras.11.80-11.96.
[1143] [1995] Lloyd's Rep. 651.
[1144] Ibid., at p. 668.
[1145] [1997] LRLR 523, [War Risks].
[1146] Ibid., at p. 596 & 601.

claim in debate.[1148] In respect of the test of inducement, Rix, J. was of the opinion that the pre-contractual test pronounced by the House of Lords in *Pan Atlantic Insurance v Pine Top Insurance*[1149] must also be established.[1150]

The question whether the duty of good faith at claim's stage is wider than the duty not to make fraudulent claims recently received a thoughtful examination by the Court of Appeal in *the Star Sea*[1151]. In his judgment, Leggatt, L.J. firstly approved the enlargement suggested by Hobhouse, J. in *the Good Luck*[1152] that the scope of the obligation not to make fraudulent claim includes the duty not to fraudulently prosecute a claim in litigation[1153]. Having done so, he went further to considered whether there was a notion of culpability as an intermediate position between innocent and fraud as contended by Hirst, J. and reached the conclusion that

> *" ... no enlargement of the duty not to make fraudulent claims, so as to encompass claims made "culpably", is warranted. Such statement as were made in The Litsion Pride to the contrary, were wrong. In our judgment there is no warrant for any widening of the duty so as to embrace "culpable" non-disclosure."*[1154]

Thus, it seems largely accepted that the scope of the obligation of the assured is no more than the duty not to present or prosecute any fraudulent claims.[1155] In this context, the term 'fraudulent claim' means that the claim must be wilfully false in any substantial respect[1156], which encompasses a claim made recklessly or regardless of whether it is true or false, seeking only to succeed in it[1157].

In conclusion, it is still to be said that the sphere of the fraudulent claim would not extend to any innocent non-disclosure or misrepresentation as long as there was no fraud[1158] in the claim. This notion was approved by Clarke in his book The Law of Insurance Contracts[1159] and was recently admitted and adopted as correctly stating the law[1160].

[1147] Ibid., at p. 601.
[1148] Ibid., at p. 598-9. For the issue of materiality in the context of claims, see Eggers & Foss, at paras.14.107-14.111.
[1149] [1994] 2 Lloyd's Rep. 427.
[1150] *Royal Boskalis v Mountain* [1997] LRLR 523, at p. 599. Also, see Eggers & Foss, at paras.14.112.
[1151] [1997] 1 Lloyd's Rep. 360. The case is now in the House of Lords and is expected to be heard soon.
[1152] [1988] 1 Lloyd's Rep. 514, at p. 545-6.
[1153] *The Star Sea* [1997] 1 Lloyd's Rep. 360, at p. 371.
[1154] Ibid., at p. 372.
[1155] Ibid., at p. 371-2.
[1156] *Goulstone v Royal Insurance* (1858) 1 F. & F. 276, at p. 279.
[1157] *Lek v Matthews* [1927] 29 Ll.L. Rep. 141, [HL-Theft], at p. 145 and *Bucks Printing Press v Prudential Assurance* [1994] 3 Re.L.R. 196, [Marine], per Saville, J., at p. 199-200. For further information, see sub-section: '7.2.6.1.1. Substantially fraudulent' below.
[1158] For a full discussion of what would constitute a fraudulent claim, see Eggers & Foss, at paras.11.07-11.79.
[1159] Clarke, M., The Law of Insurance Contracts, 2nd ed., (1994), at p. 708. He stated that *"... an innocent misrepresentation or non-disclosure in the claim does not defeat a claim; there must be fraud..."*
[1160] *Royal Boskalis Westminster v Mountain* [1997] LRLR 523, per Rix, J. at p. 596-7; affirmed by Leggatt, L.J. in *Manifest Shipping v Uni-Polaris Insurance* [1997] 1 Lloyd's Rep. 360, at p. 372.

7.2.4.2. In the context of held covered clauses[1161]

In general, the purpose of a held covered clause is to assist the assured in maintaining his cover, despite the occurrence of a change in the nature or amount of the risk insured which would otherwise automatically discharge the underwriter from any future liabilities.[1162] This, of course, would be subject to the underwriter being given prompt notice of such a change and, if there should be any, a higher premium or different conditions being agreed on by both parties. Accordingly, it is the duty of the assured invoking the benefit of such a clause to supply the underwriter with all new and material circumstances to enable him to make his decision in respect of the prospective risk. This duty has been held to be based upon the exercise of a continuing duty of utmost good faith.

This obligation seems to have been principally introduced by the judgment of McNair, J. in *Overseas Commodities v Style*[1163], where he refused to allow the plaintiffs to invoke the protection of the held covered clause contained in the policy and gave judgment for the defendant. In justification of his refusal, he advanced the following judgment:

> *"[T]o obtain the protection of the "held covered" clause, the assured must act with the utmost good faith towards the underwriters, this being an obligation which rests upon them throughout the currency of the policy."*[1164]

The accuracy and soundness of this continuing duty within the sphere of held covered clauses was approved and adopted, about nineteen years later, by the judgment of Donaldson, J. in *Liberian Insurance Agency v Mosse*[1165]. The judge, before attempting to announce his decision, deeply examined the application of the clause and reached, *inter alia*, the conclusion that

> *" ... (iii) the assured cannot take advantage of the clause if he has not acted in the utmost good faith. ..."*[1166]

The obligation received its final acceptance as a continuing duty after the conclusion of the contract by *the Litsion Pride*. In this case, which was about an additional premium clause[1167], Hirst, J heavily relied upon the authority of *Style* and *Liberian* cases and held that

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[1161] These include other provisions of similar nature such as those providing for additional premium. For further information, see Eggers & Foss, at paras.3.54-3.57 & 10.18-10.39; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, [1999] LMCLQ 165, at p. 202-7; Baatz, Yvonne., Utmost good faith in Marine Insurance Contracts, (undated) & (unpublished), at p. 5-8.

[1162] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (The Good Luck)* [1991] 2 WLR 1279.

[1163] [1958] 1 Ll.L.Rep. 546, [Marine].

[1164] Ibid., at p. 559.

[1165] [1977] 2 Lloyd's Rep. 560, [Marine].

[1166] Ibid., at p. 567-8.

[1167] This type of clauses will usually be activated to extend the current cover by the agreement on an additional premium to be paid to the underwriter. However, if the event to be held covered took place and no agreement was made in respect of the premium to be paid, according to ss. 31(2) of the MIA 1906, a reasonable additional premium would be fixed by the court. For additional discussion of the effect of ss. 31(2), see Eggers & Foss, at para.3.55.

" ... the duty of utmost good faith applied with its full rigour in relation to the giving of information of the voyage under the warranty."[1168]

On the other hand, would there be a similar duty upon the part of the assured where there exists a cancellation provision[1169] in the policy? In other words, does the existence of a cancellation clause in the policy impose a continuing duty of utmost good faith upon the assured to the extent of placing him under a duty to disclose those circumstances tempting the underwriter to practice his right under the said clause? In fact, this issue came under consideration in the Court of Appeal in *Commercial Union Assurance v The Niger*[1170] where Bankes, L.J. rejected the contention of the underwriters that since it was a continuing contract containing a cancellation provision, the assured was under an obligation to disclose those new and material circumstances altering the character of the risk, once he became aware of their existence, so as to enable the underwriters to exercise their right to terminate the contract by giving three months notice. The judge placing complete reliance on judgments[1171] restraining the scope of the duty of disclosure to the time at which the contract was concluded, refused to impose upon the assured a continuing duty of disclosure, simply because there was a right to cancel.[1172] The case was further taken to the House of Lords[1173] where the judgment of the Court of Appeal was upheld.

The same question arose in *the Litsion Pride*. In this case, Hirst, J. distinguished *Commercial Union Insurance v The Niger* and *Cory v Patton*, but expressed no firm judgment. However, he seemed to have preferred the view that the existence of a cancellation clause would nevertheless place the assured under a continuing duty of disclosure.[1174] This equivocal judgment was relied upon by the underwriter to establish a continuing duty of disclosure upon the part of the assured in *NSW Medical Defence Union v Transport Industries Insurance*[1175], a case which came before the Commercial Court of New South Wales and tried before Rogers, J. The judgments of both *the Litsion Pride* and *the Niger* were discussed and that of *the Litsion Pride* was distinguished upon the ground that there was an obligation to supply information to which the duty of utmost good faith could be attached. Accordingly, it was held, as it was in *the Niger Case*, that no such duty would arise.[1176]

[1168] *Black king shipping Corporation v Massie* [1985] 1 Lloyd's Rep. 437, at p. 512. This duty was further approved by the judgment of Lord Jauncey in the House of Lords in *Banque Financiere v Westgate Insurance* [1990] 2 All ER 947, at p. 960.
[1169] For further discussion, see Eggers & Foss, at paras.3.56 & 10.24-10.27.
[1170] [1921] 7 Ll.L. Rep. 239.
[1171] *Cory v Patton* (1872) L.R. 7 Q.B. 304, per Blackburn, J. at p. 308-9; affirmed in (1874) L.R. 9 Q.B. 577, per Cockburn, C. J. at p. 580; affirmed in *Lishman v The Northern Maritime Insurance* (1875) L.R 10 C.P. 179, per Bramwell, B. & Blackburn, J. at p. 180-2.
[1172] *Commercial Union Assurance v The Niger* ibid., at p. 245.
[1173] [1922] 13 Ll.L.Rep. 75, per Lord Atkinson at p. 79 and Lord Sumner at p. 82.
[1174] *Black king shipping Corporation v Massie* [1985] 1 Lloyd's Rep. 437, at p. 511.
[1175] [1985] 4 NSWLR 107.
[1176] Ibid., at p. 111-12.

This proposition was recently upheld as stating the law by the judgment of Potter, J. in *New Hampshire v MGN*[1177] in which the clause was deeply considered and discussed. Potter, J. distinguished *the Litsion Pride* on the same ground that mentioned by Rogers, J in *NSW Medical Defence Union v Transport Industries Insurance* and upon the observations of Lord Atkinson in the House of Lords in *the Niger Case* held that no duty of disclosure as such would exist for the sole reason that there was a cancellation clause in the contract.[1178]

The issue was also argued before Staughton, L.J. in the Court of Appeal in *New Hampshire v MGN*[1179] where he also rejected the authority of *the Litsion Pride* in this matter and made it clear that the judgment of *the Niger* was decisively stating the right law in this respect. Staughton, L.J. stated that as follows:

> *"[W]e should hesitate to enlarge the scope for oppression by establishing a duty to disclose throughout the period of a contract of insurance, merely because it contains (as is by no means uncommon) a right to cancellation for the insurer.*[1180] *... " ... there was no continuing duty of disclosure during the currency of any year of insurance by reason of the right to cancel. If and in so far as a contrary view was expressed in The Litsion Pride, we cannot agree."*[1181]

The reason behind the reluctance of the Courts to impose a duty of good faith on the assured where there is a cancellation clause in the contract entitling the underwriter to give notice of his intention to cancel it was clearly summarised by Eggers & Foss as follows:

> *"[S]uch notices, if given in accordance with an appropriate clause, are given as a matter of contractual right. The decision is one for the insurer. He has an absolute discretion whether the right should be exercised. He is not entitled to look to the assured for guidance nor need he have regard to the position of the assured in deciding whether to avail himself of the right."*[1182]

Ultimately, it is dominantly established that whenever there exists a clause, for instance held covered or additional premium area etc., requiring the assured to perform a duty after the conclusion of the contract, it ought to be performed with the utmost good faith. It also seems to be an established rule that the existence of a cancellation clause will not impose a similar duty upon the assured, unless there is an express provision in the policy to that effect.[1183] Moreover, it was suggested by Arnould[1184] that the assured was not required under a cancellation clause to disclose any material circumstances to the underwriter even if he was asked to do so; the only obligation he owed the underwriter, as it was submitted, was the duty not to make untrue statements[1185].

[1177] [1997] LRLR 24, [CA-Fidelity].
[1178] Ibid., at p. 46-8.
[1179] Ibid., at p. 51.
[1180] Ibid., at p. 61.
[1181] Ibid., at p. 62.
[1182] Eggers & Foss, at para.3.56.
[1183] *Commercial Union Assurance v The Niger* [1921] 7 Ll.L. Rep. 239, per Bankes L.J. at p. 245.
[1184] Arnould, Vol. 3, at para.579E.
[1185] *Iron Trades Mutual Insurance v Companhia de Seguros Imperio* [1992] 1 ReLR 213.

7.2.4.3. In the context of *"follow settlements"* clauses

The application of the post-contractual duty of utmost good faith has also been held to extend to *"follow settlements"* clauses.[1186] Accordingly, unless the settlement of the assured's claim was made in good faith, the reassured would not be able to invoke the clause and recover the sum paid thereunder. This principle was affirmed by the judgment of the Court of Appeal in *The Insurance Co. of Africa v Scor (U.K.) Reinsurance*[1187], where Robert Goff, L.J. announced that

> *" ... the effect of a clause binding reinsurers to follow settlements of the insurers, is that the reinsurers agree to indemnify insurers in the event that they settle a claim by their assured, i.e., when they dispose, or bind themselves to dispose, of a claim, whether by reason of admission or compromise, provided that the claim so recognized by them falls within the risks covered by the policy of reinsurance as a matter of law, and provided also that in settling the claim the insurers have acted honestly and have taken all proper and businesslike steps in making the settlement."*[1188]

7.2.4.4. In the context of endorsements or alterations to the terms of the policy

It was recently held by Potter, J. in the Court of Appeal in *New Hampshire v MGN*[1189] that a post-formation duty of utmost good faith would be attached to any negotiation leading to any endorsement of the policy or any alteration to its terms. This judgment, which was delivered as an answer to a question about the time at which the assured was under a duty to disclose, mentioned, *inter alia*, that

> *"[T]he assured companies under the contracts of insurance... were under a duty to disclose material matters to the insurers ... (c) When applying for and/or negotiating any endorsement or alteration to the terms of the insurance, such obligation of disclosure being limited to the material facts relating to the endorsement or alteration."*[1190]

The existence of a continuing duty of good faith in respect of endorsements or variations to the insurance contract was also reaffirmed by the same judge, Potter, L.J. in *the Shakir III*.[1191] In this case, the assured did not inform the underwriters until one month later that the final destination of the insured ship was altered to be Huangpu instead of Shanghai; both are ports in China. At the time when the variation was agreed, the assured did not inform the underwriters that the insured ship was in a perilous position, that it was involved in a slight collision and that she was highly likely to be caught by an approaching typhoon. The ship was afterwards caught by the typhoon and damaged. Potter, L.J. held that the

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[1186] This clause may be framed by using different words such as *"pay as may be paid thereon"*. It must also be mentioned that the nature and sphere of this duty is still unspecified by the cases.
[1187] [1985] 1 Lloyd's Rep. 312, [CA-Fire Reinsurance].
[1188] Ibid., at p. 330. In this connection, also see *Toomey v Eagle Star Insurance* [1994] 1 Lloyd's Rep. 516, [CA-Reinsurance], per Hobhouse, L.J. at p. 525; *Hill v The Mercantile & General Reinsurance* [1996] LRLR 341, [HL-Aviation]; Arnould, V. 3, at para.579E; Eggers & Foss, at paras.10.37-10.38.
[1189] [1997] LRLR 24.
[1190] Ibid., at p. 48. In this connection, also see *Lishman v The Northern Maritime Insurance* (1875) L.R. 10 C.P. 179, per Bramwell, B. at p. 181; *C.T.I. v Oceanus* [1982] 2 Lloyd's Rep. 178, per Lloyd, J. at p. 191-2.

underwriters were able to avoid *'the policy as varied'* because of material non-disclosure at the time of the variation. He expressed his decision as follows

> *"[T]he duty to disclose the circumstances material to the risk existed at the time the variation was concluded i.e. at the time the endorsement recording the agreement to the change of destination was recorded by the underwriters' scratches ... ."*[1192]

Similar view was also expressed by the Court of Appeal in *the Star Sea*[1193], where Leggatt, L.J. stated that

> *"[I]n relation to amendment a duty of disclosure of facts material to the amendment will exist ... ."*[1194]

Therefore, when there is an endorsement of or a variation to the terms of the original contract, there will arise a duty of good faith requiring the assured to make full and accurate disclosure of all material circumstances relating to the intended endorsement or variation.[1195]

7.2.5. The post-contractual test of materiality and inducement

Having established that under some circumstances there is a continuing duty of good faith after the conclusion of the contract, the question which is left to be determined is what is the test differentiating between what is material and, therefore, to be disclosed and what is not so? In fact, this question was answered by Hirst, J. in his judgment in *the Litsion Pride*[1196], where he stated that the test distinguishing whether a fact is material and, therefore, to be fully and accurately disclosed according to the requirement of the continuing duty of good faith is that contained in ss. 18(2) of the MIA 1906. This was expressed as follows:

> *"[S]o far as materiality is concerned, I accept Mr. Gilman's argument by analogy with s. 18(2) of the Act, that a circumstance is material, if it would influence the judgment of a prudent underwriter in making the relevant decision on topic to which the mis-representation or non-disclosure relates."*[1197]

The soundness of this test was further affirmed by the judgment of Potter, L.J. in *the Shakir III*[1198], who relying on the test of materiality set up by the House of Lords in *Pan Atlantic Insurance v Pine Top Insurance*[1199] said that

> *"[T]he duty to disclose the circumstances material to the risk existed at the time the variation was concluded ... . A material circumstance within the meaning of s. 18 of the MIA is one that, objectively assessed, would have an effect on the mind of a prudent insurer in estimating*

[1191] *Fraser Shipping v Colton* [1997] 1 Lloyd's Rep. 586.
[1192] Ibid., at p. 594.
[1193] *Manifest Shipping v Uni-Polaris Insurance* [1997] 1 Lloyd's Rep. 360.
[1194] Ibid., at p. 370.
[1195] In this respect, see Eggers & Foss, at paras.3.51-3.53 & 10.12-10.17; Baatz, Yvonne., Utmost good faith in Marine Insurance Contracts, (undated) & (unpublished), at p. 5-8.
[1196] *Black King Shipping Corporation v Mark Ranald Massie* [1985] 1 Lloyd's Rep. 437.
[1197] Ibid., at p. 511.
[1198] *Fraser Shipping v Colton* [1997] 1 Lloyd's Rep. 586.
[1199] [1994] 2 Lloyd's Rep. 427, at p. 440.

the risk proposed, without necessarily having a decisive influence on either his acceptance of that risk or the amount of premium demanded ... ."[1200]

As far as inducement is concerned, similar to the position prior to the conclusion of the contract, the establishment of the materiality of a non-disclosed or misrepresented fact will not in itself enable the underwriter to escape his liability under the policy. This is because he would also have to establish that he was personally induced by it to agree to amend or vary, or extend the concluded cover etc. The applicability of the requirement of inducement to the post-contractual duty of good faith was also confirmed by the decision of Potter, L.J. in *the Shakir III*[1201], where he required the underwriters to establish that they were induced to accept the endorsement of the policy by virtue of the non-disclosure of some material facts.[1202]

Consequently, by analogy with the pre-formation duty, in order for the underwriter to succeed in an action to avoid his liability, he has first to prove that the non-disclosed or misrepresented fact was material in the sense that if it was fully and accurately disclosed, it would affect the judgment of a prudent underwriter as to the decision he was about to made under the terms of the current policy. Secondly, the underwriter also has to prove that he was himself induced by the non-disclosure or misrepresentation to act in the same way he actually did.[1203]

In this connection, it is very crucial to note that the duty of the assured to supply the underwriter with additional information after the conclusion of the contract would arise if, and only if, the latter was to make further decision under the policy whether to amend, vary, endorse or extend it. The scope of this duty, unlike the pre-contractual duty, would be limited to the disclosure of facts which are relevant to the decision to be made and nothing else.[1204] Therefore, if the alleged non-disclosed or misrepresented fact was immaterial to the prospective decision to be made by the underwriter and was only material in the sense that it showed that the underwriter had made a bad bargain in the past, then there would be no obligation on the assured to disclose it.[1205] This duty would also arise at the claim's stage and, so, would apply to agreements of adjustment or payments of losses etc.[1206]

[1200] [1997] 1 Lloyd's Rep. 586, at p. 594. Also, see Eggers & Foss, at paras.10.12 & 14.79-14.81.
[1201] Ibid.
[1202] Ibid., at p. 596-7. Also, see Eggers & Foss, at paras.10.12 & 14.79-14.81.
[1203] Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 205.
[1204] *Lishman v The Northern Maritime Insurance* (1875) L.R. 10 C.P. 179. ExCh., at p. 181-2; *Commercial Union Assurance Company v The Niger* [1922] Ll.L. Rep. 75, at p. 77; *Iron Trades Mutual Insurance v Companhia De Seguros Imperio* [1991] 1 Re.L.R. 213; Eggers & Foss, at paras.10.13 & 14.79; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 205.
[1205] Ibid.

7.2.6. The remedies available for a breach of the post-formation duty

Undoubtedly, avoidance is the remedy for a breach of the pre-contractual duty by either party, and in cases where there is no fraud, the assured can claim his premium back. This what was held by Lord Mansfield more than two hundred years ago in *Carter v Boehm*[1207], which is now embodied in s. 17 of the MIA 1906. This section reads that

> *"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."*

The truthfulness of this principle has recently become under deep consideration by *Banque Keyser v Skandia (U.K.) Insurance*[1208] where the plaintiffs tried to establish that a breach of the duty of utmost good faith on the part of the underwriters could give rise to a claim for damages. Steyn, J., who tried the case, examined the dictum of Scrutton, J., delivered in *Glasgow Assurance Corporation v William Symondson* [1209] that non-disclosure would not give rise to a claim for damages[1210] and reached the conclusion that a breach of the duty of the utmost good faith would entitle the assured, if he was induced, to claim damages.[1211] This novel view, however, was overruled by the decision of the Court of Appeal delivered by Slade, L.J.[1212] with whose judgment the House of Lords[1213] was in full agreement. Accordingly, it is now an established law in respect of a breach of the pre-contractual duty that no damages can be claimed and avoidance is the only remedy.[1214]

On the other hand, as to the remedy of a breach of the post-contractual duty, the situation is apparently uncertain and, to a large extent, depends upon the type of breach being considered. This is, as it is the case with almost all aspects of the post-contractual duty, due to lack of development on one hand and the existence of contradicting authorities on the other one. Therefore, the available remedy for a breach of the duty will be considered as follows:

[1206] *Shepherd v Chewter* (1808) 1 Camp. 274; *Royal Boskalis Westminster v Mountain* [1997] LRLR 523, at p. 600; Eggers & Foss, at paras.11.164-11.169.

[1207] (1766) 3 Burr 1905, at p. 1909.

[1208] [1987] 2 WLR 1300.

[1209] (1911) 16 Com. Cas. 109.

[1210] Ibid., where he said at p. 121 that " ... *non-disclosure is not a breach of contract giving rise to a claim for damages, but a ground of avoiding a contract.*"

[1211] *Banque Keyser v Skandia (U.K.) Insurance* [1987] 2 WLR 1300, at p. 1333, " ... *in principle an insured can claim damages from an insurer arising from loss suffered by the insured as a result of a breach of the obligation of the utmost good faith by the insurer.*"

[1212] [1989] 3 WLR 25, per Slade, L.J. at p. 82-89.

[1213] [1990] All ER 947, per Lord Templeman at p. 959 & Lord Jauncey at p. 960. This principle was also referred to with approval by the Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) (The Good Luck)* [1990] 2 WLR 547, at p. 590-1.

[1214] For full discussion of the availability of damages at law in action of deceit or for breach of the duty of care or under the MA 1967, see 'Chapter [6]: 6.6.1. Damages under English law'.

7.2.6.1. In the claims' context

It is an established principle according to *Britton v Royal Insurance*[1215] that the failure of the assured to present to the underwriter an honest claim will entitle the latter to avoid the whole contract and all benefit under which will be forfeited, whether there is a condition to that effect or not. This issue came under extensive consideration in *the Litsion Pride*, where the plaintiffs sought to establish the proposition that a breach of the post-contractual duty would not avoid the policy *ab initio*, but would avoid it from the time at which the breach was committed, leaving untouched the policy and any valid claims already accrued or paid thereunder. This view was rejected by Hirst, J. holding that avoidance, according to s.17 is avoidance *ab initio* and this applies to a breach of both the pre and post-contractual duty of good faith.[1216] However, the judge further accepted the argument of the underwriters that in respect of a breach of the post-contractual duty, avoidance is not the only available remedy, for it is open to the underwriters to reject the fraudulent claim and leave the policy intact.[1217]

This new right of election vesting the underwriter with the authority to defend the claim without the need for avoidance was referred to with approval by Kershaw, J. in *Roadworks (1952) v Charman*[1218], Mance, J. in *Agnew v Lansforsakringsbolagens*[1219] and Evans, J. in *the Captain Panagos D.P.*[1220] It is noteworthy to mention that Evans, J., in his judgment, considered the situation where the assured presents two claims only one of which is fraudulent. In this case, he distinguished between the right of avoidance which would invalidate the whole policy and any claims made under it and the right to defend the bad claim without avoiding the contract which would not annul the innocent claim unless both claims are closely connected.[1221]

On the other hand, in *Orakpo v Barclays Insurance Services*[1222], Staughton, L.J. tried to introduce a new remedy when he announced the conception that a knowingly exaggerated claim would not, as a matter of law, disqualify the assured from recovering in respect of that part of the claim which he actually sustained. This, as he immediately commented, would be the law, unless the contract under consideration said otherwise.[1223] The majority of the Court

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[1215] (1866) 4 F. & F. 905, per Wills, J. at p. 909.
[1216] *Black king shipping Corporation v Massie* [1985] 1 Lloyd's Rep. 437, at p. 515.
[1217] Ibid., at p. 515-6. It must be mentioned that the judgments of Singleton, L.J. in *West v National Motor & Accident Insurance Union* [1955] 1 Lloyd's Rep. 207, at p. 210, and of Lord Trayner in *Reid v Employers' Accident & Livestock Insurance* (1899) 1 F. 1031, [Liability] were both considered.
[1218] [1994] 2 Lloyd's Rep. 99, at p. 107.
[1219] [1996] LRLR 392, at p. 402.
[1220] *Continental Illinois National Bank & Trust v Alliance Assurance* [1986] 2 Lloyd's Rep. 470, at p. 511-2. This right was also upheld by the same judge while delivering his judgment in *Diggens v Sun Alliance* [1994] CLC 1146, at p. 1164.
[1221] Ibid., at p. 512.
[1222] [1995] LRLR 443.
[1223] Ibid., at p. 450-1. The issue was subsequently pointed out by Evans L.J. in *Diggens v Sun Alliance* ibid., at p. 1165, but he expressed no opinion about it, save that the issue has not been decided yet.

of Appeal[1224] relying upon the authority of *Britton v Royal Insurance,* rejected this view and stated that a fraudulent claim should discharge the underwriter from all liability.[1225] *Orakpo v Barclays Insurance Services* was further considered by the Court of Appeal in *Galloway v Guardian Royal Exchange*[1226], where the judgment of Staughton, L.J. was again rejected. In this case, Lord Woolf distinctly stated that

> *" ... I am quite satisfied, in my judgment, that the view of the majority properly reflects the law in this country, and not that of Staughton, L.J. ... ."*[1227]

However, an exception to this conclusion was pointed out by Hoffmann, L.J. in *Orakpo v Barclays Insurance Services*, where he declared that an exaggerated claim presented by the assured would not be necessarily considered fraudulent and so entitle the underwriter to avoid the policy provided that nothing was concealed or misrepresented and *"the loss adjuster is in as good a position to form a view of the validity or value of the claim as the insured"*.[1228] The assured in this case, Hoffmann, L.J. proceeded, would be deemed as merely *"putting forward a starting figure for negotiation"*.[1229] Hoffmann was, in fact, doing no more than affirming the decisions reached in *Norton v Royal Fire & Life Assurance*[1230] where it was held that the mere fact that the assured made an inflated claim would not be deemed fraud and in *Ewer v National Employers' Mutual General Insurance Association*[1231] in which the assured's exaggerated claim was described as a bargaining figure. This exception seems, however, to be confined to the time at which the assured presents his claim to the underwriter for the first time[1232], for, it has been held, that if he persists in submitting his exaggerated claim at the trial, he will be seen in breach of the continuing duty of utmost good faith[1233].

Thus, apart from the right to avoid the policy *ab initio*, the decision of the majority of the Court of Appeal in *Orakpo v Barclays Insurance* did not seem to have recognised any other remedies for presenting a fraudulent claim.[1234] This was also the attitude of *the Star Sea* in both the Court of First Instance, when Tuckey, J. ascertained that avoidance was the only specified remedy for a breach of the duty[1235] and in the Court of Appeal, where Leggatt, L.J., admitted as being the law, at least since *Britton v The Royal Insurance*, that a fraudulent

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[1224] Composed of Hoffmann L.J. & Roger Parker.
[1225] *Orakpo v Barclays Insurance Services*, at p. 451-2.
[1226] [1999] Lloyd's Rep. I.R. 209, [CA-Household Contents].
[1227] Ibid., at p. 212.
[1228] *Orakpo v Barclays Insurance,* ibid., at p. 451.
[1229] Ibid., at p. 451. Also, see *Goulstone v Royal Insurance* (1858) 1 F. & F. 276. For a contrary decision where the presentation of an exaggerating claim was held to be fraud see *Central Bank of India v Guardian* [1936] 54 Ll.L. Rep. 247, [Fire].
[1230] (1886) 1 T.L.R. 460, [Fire].
[1231] [1937] 2 All ER 193, [Fire], at p. 203.
[1232] *Norton v Royal Fire & Life Assurance* (1886) 1 T.L.R. 460.
[1233] *Transthene v Royal Insurance* [1996] LRLR 32, [Property (Fire & Perils)], per Kershaw, J. at p. 44-5.
[1234] *Orakpo v Barclays Insurance Services*, ibid., at p. 452.

claim would avoid the whole contract, and not merely the bad claim.[1236] Moreover, a similar view was adopted by Clarke in his book, The Law of Insurance Contracts[1237], Rix, J. in *Royal Boskalis Westminster v Mountain*[1238], Mance, J. in *Insurance Corporation of the Channel Islands v McHUGH & Royal Hotel*[1239] and in *Galloway v Guardian Royal Exchange*[1240].

In the light of what has been said above, it must now be right to say that avoidance of the policy *ab initio* is the remedy for a breach of the pre-and post-contractual duty. It has been further submitted that, with regard to the post-contractual duty, the underwriter could also have the right to defend the claim without the need for avoiding the whole contract. This right, nevertheless, does not seem to be in conformity with the judgment of Lord Templeman in the House of Lords in *Banque Financiere v Westgate Insurance*[1241], the decision of the Court of Appeal in *the Good Luck*[1242] and the observation of Tuckey, J. in *the Star Sea*[1243]. Moreover, this remedy does not even accord with recent judgments given in *Orakpo v Barclays Insurance Services*[1244], *the Star Sea*[1245], *Royal Boskalis Westminster v Mountain*[1246], *Insurance Corporation of the Channel Islands v McHUGH & Royal Hotel*[1247] and *Galloway v Guardian Royal Exchange*[1248] where the remedy of the breach of the post-contractual duty was considerably examined and found to only be the entitlement of the underwriter to exercise the right of avoidance. However, the establishment of this remedy as the only one available to the underwriter at the claim's stage seems to continue being in doubt till it is either approved or rejected by the decision of the House of Lords.[1249]

7.2.6.1.1. Substantially fraudulent

Apart from that, it is left to further discuss the test applied when determining the degree of exaggeration required before holding a claim to be fraudulent. In *Orakpo v*

[1235] *Manifest Shipping v Uni-Polaris Insurance* [1995] Lloyd's Rep. 651, at p. 667.
[1236] [1997] 1 Lloyd's Rep. 360, at p. 369.
[1237] First Supplement to the 2nd ed., (1996), at p. 95.
[1238] [1997] LRLR 523, at p. 599-600.
[1239] [1997] LRLR. 94, at p. 138. Also, see Eggers & Foss, at para.11.130.
[1240] [1999] Lloyd's Rep. I.R. 209, at p. 212-4. In this regard, also see Baatz, Yvonne., Utmost good faith in Marine Insurance Contracts, (undated) & (unpublished), where she stated, at p. 16, that " ... *it is clear that breach of utmost good faith in presenting a fraudulent claim avoids the whole policy*".
[1241] [1990] 2 All ER 947, in which he said, at p. 959, " ... *I agree with the Court of Appeal that a breach of the obligation does not sound in damages. The only remedy open to the insured is to rescind the policy and recover the premium.*"
[1242] *Bank of Nova Scotia v Hellenic* [1990] 2 WLR 547, where May, L.J. stated, at p. 591, that *"[A]ssuming that the obligation can continue, we see no reason why the source in law of the obligation, or the remedy for its breach, should be different after the contract is made from what it is at the pre-contract stage."*
[1243] *Manifest Shipping v Uni-Polaris Insurance* [1995] 1 Lloyd's Rep. 651, when he said, at p. 667, concerning the duty of good faith that " ... *the only specified remedy for breach is avoidance.*"
[1244] [1995] LRLR 443.
[1245] [1997] 1 Lloyd's Rep. 360, at p. 369.
[1246] [1997] LRLR 523, at p. 599-600.
[1247] [1997] LRLR. 94, at p. 138.
[1248] [1999] Lloyd's Rep. I.R. 209, at p. 212-4.

Barclays Insurance Services[1250], Hoffmann, L.J. was of the view that a claim would be fraudulent if it was *"substantially fraudulent"*, whereas Roger Parker was of the view that a claim would be considered fraudulent if it was *"fraudulent to a substantial extent"*. No further explanation was given as to what is meant by either *"substantially fraudulent"* or *"fraudulent to a substantial extent"*.

Shortly afterwards, the issue of fraudulent claims arose again in *Transthene v Royal Insurance*[1251] which was about a fire at the factory of the assured. The claim presented by the assured included the full replacement value of a Bielloni printing press. It was proved by evidence that the printing machine had never been working properly and its real value was much less than the amount claimed. The underwriters rejected the claim on the ground that it was fraudulent. In his judgment, Kershaw, J. pointed out that a known departure from literal and absolute truth in a claim would not necessarily constitute fraud.[1252] However, he held that the action of the assured of claiming the full replacement value of the printing machine, which had never been working accurately before the fire, was fraudulent.[1253]

The question of the degree of fraud required in a claim before it could be deemed fraudulent and, so, entitle the underwriter to avoid the contract came again under consideration in the Court of Appeal in *Galloway v Guardian Royal Exchange*.[1254] In this case, the assured claimed the cost of his goods which were lost by burglary at his premises. The assured took advantage of this claim to falsely claim the cost of a computer which he had never had before. The underwriters rejected the claim and a verdict was accordingly entered from them. One of the important issues discussed by the Court in this case was the test to be applied in order to determine the degree of exaggeration which would make a claim fraudulent. Lord Woolf argued that a claim would not be deemed fraudulent if it included an immaterial fraudulent non-disclosure. The test to determine whether the fraud was material or not, he further argued, was by looking at the whole of the claim. Subsequently, he held the degree of the fraud in the claim of the assured for the loss of the computer, which amounted to about 10 per cent of the whole claim, to be substantial and therefore an amount to taints the whole.[1255]

Millett, L.J. who was one of the judges before whom this case was tried rejected the mathematical proportion's test[1256] advanced by Lord Woolf, for if this was the right test, he argued, it would *"lead to the absurd conclusion that the greater the genuine loss, the larger*

[1249] This is expected to be in *the Star Sea* case.
[1250] [1995] LRLR 443.
[1251] [1996] LRLR 32.
[1252] Ibid., at p. 44.
[1253] Ibid.
[1254] [1999] Lloyd's Rep. I.R. 209.
[1255] Ibid., at p. 213-4.
[1256] Merkin, R., Colinvaux's Law of Insurance, First Supplement to the Seventh Edition, (1998), at para.9-45.

the fraudulent claim which may be made at the same time without penalty".[1257] In fact, he was of the opinion that the right test was first to consider the fraudulent claim within its own circumstances and secondly to consider whether the action of the assured in presenting it to the underwriter would be sufficiently serious to justify stigmatising it as a breach of the duty of good faith entitling the underwriter to avoid the policy.[1258]

The test announced by Millett, L.J. was subsequently acknowledge by many highly regarded authorities to be the right one whenever the question of whether a claim is substantially fraudulent or not.[1259]

7.2.6.2. In the context of held covered clauses

It is generally agreed that, in respect of held covered clauses, the remedy for a breach is always avoidance of the policy. This was the remedy granted by McNair, J. in *Overseas Commodities v Style*[1260] and, subsequently upheld by Donaldson, J. in *Liberian Insurance v Mosse*[1261]. A different view was however expressed by Mance, J. in *Agnew v Lansforsakringsbolagens*[1262] in which he briefly stated that the remedy for breach is usually avoidance of the extension only. This was also the view of Bennett in his book the Law of Marine Insurance[1263] where he criticized the dictum of McNair, J. as being unreasonable and unjustified. He made a strong argument against the right of avoidance and suggested that if the assured did not comply with the requirements of the held cover clause, the underwriter should only be allowed to set aside the extension of cover and continue to be liable for preceding claims.[1264]

Having taken both remedies into account, it may be suggested that, till the contrary view becomes established, the authority of *Overseas Commodities v Style* and *Liberian Insurance v Mosse* will be considered as representing the current state of law, since it accords with both the remedy provided for by s. 17 of the MIA 1906 and recent judgments[1265].

[1257] *Galloway v Guardian Royal Exchange*, ibid., at p. 214.
[1258] Ibid.
[1259] Clarke, M., The Law of Insurance Contracts, First Supplement to the Third Edition, (1999), at para.27-2C; Merkin, R., Colinvaux's Law of Insurance, First Supplement to the Seventh Edition, (1998), at para.9-45; Eggers & Foss, at paras.11.57-11.61; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 209.
[1260] [1958] Ll.L.Rep. 546, where he announced, at p. 558, that *" ... I have no option but to hold that the breach of the express warranty affords the underwriters a complete defence in this action."*
[1261] [1977] 2 Lloyd's Rep. 560, in which he held, at p. 568, that *"[T]he claim to take advantage of the held covered clause therefore fails and underwriters were, in my judgment, entitled to repudiate all liability under the policy."*
[1262] [1996] LRLR 392, at p. 402.
[1263] Bennett, (1996).
[1264] Ibid., at p. 315-6. This also was the view he expressed in his recent article entitled 'Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 205.
[1265] The judgment of Lord Templeman in The House of Lords in *Banque Financiere v Westgate Insurance* [1990] 2 All ER 947, at p. 959; the decision of the Court of Appeal in *the Good Luck* [1990] 2 WLR 547, at p. 591 and the observation of Tuckey, J., in *the Star Sea* [1995] 1 Lloyd's Rep. 651, at p. 667.

7.2.6.3. In the context of *"follow settlements"* clauses and amendments

It is clear, as it was held by Bigham, J. in *Western Assurance v Poole*[1266], that non-compliance with the duty of good faith under the *"follow settlements"* clause would only entitled the reinsurer to reject the settlement itself.[1267] But the matter is less clear in connection with a breach in the context of alterations or amendments to the original contract. This is owing to the fact that it was decided by Blackburn, J. in *Lishman v Northern Maritime Insurance*[1268] that avoidance of the contract would be the remedy open to the underwriter. This was also the decision delivered by Potter, L.J. in *the Shakir III.*[1269], where he held the underwriters entitled to avoid the *'the policy as varied'*, because of the assured's non-disclosure which induced the underwriters to agree to the endorsement of the policy.

Whereas, in the Court of Appeal in *the Star Sea*, although Leggatt, L.J. admitted that there was no clear law in point, he argued that avoidance of the amendment should be the only remedy permitted.[1270] Leggatt, L.J.'s judgment in this point was subsequently relied on by MacGillivray[1271] to support the view that the remedy available to the underwriter for a breach of the duty of utmost good faith in the context of the variation of cover is the avoidance of the varied or amended cover only. This was laid down as follows:

> *"[I]t is submitted that the insurers' remedy for non-disclosure of facts material to the variation in cover is avoidance of the amended cover, not of the entire contract of insurance."*[1272]

However, as a solution, it was suggested by Eggers & Foss that if the amendment can easily be separated from the whole of the contract, a breach of the duty of utmost good faith in this regard should entitle the underwriter to avoid the amendment only. However, if the amendment sought is very substantial as to go to the root of the contract in question, in case there is a violation of the duty of utmost good faith, the underwriter should be able to avoid the whole contract.[1273]

7.2.7. The duration of the duty[1274]

Generally, a breach of the post-contractual duty entitles the underwriter to avoid the whole contract and all benefits under it. The draconian nature of the consequences of the

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[1266] [1903] 1 K.B. 376, [Marine].
[1267] Ibid., at p. 386.
[1268] (1875) L.R. 10 C.P. 179, at p. 182.
[1269] *Fraser Shipping v Colton* [1997] 1 Lloyd's Rep. 586.
[1270] *Manifest Shipping v Uni-Polaris Insurance* [1997] Lloyd's Rep. 360, [CA], at p. 370.
[1271] Legh-Jones, Nicholas. & Others., MacGillivray on Insurance Law, 9th ed., (1997).
[1272] Ibid., at para.17-22.
[1273] Eggers & Foss, at para.10.17.
[1274] For authorities discussing the duration of the continuing duty of good faith, see Clarke, 3rd ed., at paras.27-1A-27-1A2; Eggers & Foss, at paras.3.68-3.70 & 11.109-11.119; Aikens, Richard., *"STAR SEA"*: Continuing Duty of Utmost Good Faith, a paper presented at a conference entitled 'Insurance and Law' organised by

breach of the post-contractual duty of good faith has caused the English Courts to become very concerned about its scope and duration.[1275] This concern was initially expressed by Evans, L.J. in *Diggens v Sun Alliance*[1276], where he doubted whether the duty would amount to a duty requiring full disclosure of all material facts when the claim becomes the subject of a commercial negotiation.[1277] This doubt has recently been discussed by Clarke who advanced the theory that *"the duty of good faith continues throughout the contractual relationship at a level appropriate to the moment. ... The degree of disclosure, however, varies according to the phase in the relationship."*[1278]

Therefore, the degree of the power of the application of the duty will materially vary according to the circumstances to which it applies. This theory gained support from Tuckey, J. in *the Star Sea*[1279], who after quoting the first sentence of the above-mentioned passage described it as making sense.[1280] In this case, Tuckey, J. after approving Clarke's theory proceeded to consider the question of the duration of the duty of good faith and wondered whether there would come a time during which the duty could no longer be invoked.[1281] In his judgment, he further relied upon another passage quoted from Clarke's book[1282] and the authority of *Rego v Connecticut Insurance*[1283] cited by Clarke, to draw the conclusion that the duty of utmost good faith in respect of a claim ceases to apply when an action is brought by the assured to enforce his claim against the underwriter.

> *"I think, as a matter of principle, that the English Courts should hold that once insurers have rejected a claim, the duty of utmost good faith in relation to that claim comes to an end. There is a logic to this which was well summarized by the Court in Connecticut."*[1284]

Apparently, the ground upon which this argument is based is that when the underwriter rejects the claim of the assured, the nature of the relationship between them has changed and they have, as such, become adversaries and their case is governed by the law of perjury and the procedural regime of the Rules of the Supreme Court rather than the common law duty of utmost good faith[1285]. These rules, as Tuckey, J. further advanced,

> *" ... are designed to ensure that a fair trial of the issues between the parties can take place. There is no reason why they should be supplemented by a continuing duty arising out of the*

Malcolm Clarke at St John's College, University of Cambridge in March 1999, at p. 16-7; Bennett, H., Mapping the doctrine of utmost good faith in insurance contract law, (1999) LMCLQ 165, at p. 216-7.

[1275] *Manifest Shipping v Uni-Polaris Insurance (The Star Sea)* [1995] Lloyd's Rep. 651, at p. 667; *Royal Boskalis Westminster v Mountain* [1997] LRLR 523, [War Risks], per Rix, J. at p. 596.

[1276] [1994] CLC 1146.

[1277] Ibid., at p. 1165.

[1278] The Law of Insurance Contracts, 2nd ed., (1994), at para.27-1A; 3rd ed., (1997), at paras.27-1A-27-1A2.

[1279] *Manifest Shipping v Uni-Polaris Insurance* [1995] 1 Lloyd's Rep. 651.

[1280] Ibid., at p. 667.

[1281] Ibid., at p. 667-8.

[1282] The Law of Insurance Contracts, 2nd ed., (1994), at para.27-1A; 3rd ed., (1997), at paras.27-1A-27-1A2.

[1283] 593 A.2d 491 (Conn.1991), [Fire], [American Case].

[1284] *Manifest Shipping v Uni-Polaris Insurance (The Star Sea)* [1995] 1 Lloyd's Rep. 651, at p. 667.

[1285] Ibid., at p. 667-8.

relationship between insured and insurer. The parties become plaintiff and defendant just like any other litigant."[1286]

In fact, the question of the duration of the duty was initially considered in *American Paint Service v The Home Insurance Company*[1287], where Kalodner, C.J., in the Court of Appeal refused the judgment of the Court of First Instance that the duty of good faith was to apply to testimony being heard at the trial. A thorough statement of the rational underlying the refusal of the Court was further provided as follows:

> *"[T]he fraud and false swearing clause is one beneficial to the insurer and it reasonably extends to protect the insurer during the period of settlement or adjustment of the claim. When settlement fails and suit is filed, the parties no longer deal on the non-adversary level required by the fraud and false swearing clause. If the insurer denies liability and compels the insured to bring suit, the rights of the parties are fixed as of that time for it is assumed that the insurer, in good faith, then has sound reasons based upon the terms of the policy for denying the claim of the insured. To permit the insurer to await the testimony at trial to create a further ground for escape from its contractual obligation is inconsistent with the function the trial normally serves. It is at the trial that the insurer must display, not manufacture, its case. Certainly the courts do not condone perjury by an insured, and appropriate criminal action against such a perjurer is always available."*[1288]

Although there were minority judgments to the contrary[1289], the decision of *American Paint Service v The Home Insurance Company* was upheld and adopted as representing the decision of the majority by the Supreme Court of Connecticut in *Rego v Connecticut Insurance*[1290].

Apart from the contrary decision of Kershaw, J. in *Transthene v Royal Insurance*[1291], where he held that the assured was in breach of the post -contractual duty of utmost good faith by claming and persisting in submitting an inflated claim in the trial[1292], the incorporation of the decision of *Connecticut* into the English Law by Tuckey, J. was met with the approval of Rix, J. in *Royal Boskalis Westminster v Mountain*[1293] and Potter, J. in the Court of Appeal in *New Hampshire v MGN*[1294].

The theory of Clarke based on the decision of *Connecticut* was finally affirmed by the judgment of Leggatt, L.J. in the Court of Appeal in *the Star Sea*[1295], where he described it as correctly stating the law. He further commented that the duty of good faith which usually governs the relationship existing between the underwriter and the assured would, once a writ was issued, be *"supplanted by the procedural regime of the rules of the Supreme Court ...*

[1286] Ibid., at p. 668.
[1287] 246 F.2d 91 (3d Cir.1957), [Fire], [American Case].
[1288] Ibid., at p. 94.
[1289] *Lomartira v American Automobile Insurance Company* 245 F.Supp. 124 (D. Conn.1965), [Fire], [American Case], per Timbers, C. J. at p. 131; affirmed, 371 F.2d 550 (2d Cir. 1967) per Lumbard, C. J. at p. 553-4.
[1290] 593 A.2d 491 (Conn.1991), [Fire], [American Case], per Callahan, J., at p. 497.
[1291] [1996] LRLR 32.
[1292] Ibid., at p. 44-5.
[1293] [1997] LRLR 523, at p. 596-7.
[1294] [1997] LRLR 25, at p. 46.
[1295] *Manifest Shipping v Uni-Polaris Insurance* [1997] 1 Lloyd's Rep. 360, at p. 372.

. "[1296] However, since *the Star Sea* is now in the House of Lords and is expected to be heard in the near future, the judgment of the Court of Appeal in *the Star Sea* seems to be representing the temporary state of the law in this respect until it is either overruled or affirmed.

7.3. The continuing doctrine under Egyptian law

As outlined earlier and unlike the English law, the idea that the duty of good faith is to continue to apply to circumstances affecting the risk insured after the conclusion of the contract is distinctly regulated by the Egyptian law. This duty is enforced by s. 361 of the MTL 1990 [Egypt] which states that

> *"[T]he insured ... shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance. The insured shall also apprise the insurer, during the insurance validity, of all increase in such risks, within the limits of his awareness thereof."*

Similar to the pre-contractual duty, the post-contractual one also finds its origin in the wording of s. 361 of the MTL 1990. According to this statutory obligation, it will be the duty of the assured to inform the underwriter of all circumstances occurring after the conclusion of the contract if they affect the nature or the scope of the insured risk in the sense that they will increase it or make it more cumbersome for the underwriter. The reason behind imposing such an obligation on the assured after the conclusion of the contract was said to be based upon the fact that since at the time the contract was effected each party knew with certainty what his rights and obligations were, it would be inequitable after its inception to make the underwriter be liable for any increase in the extent or nature of the risk which he had no intention to cover whether at the same premium or conditions, or at all.[1297] As such, it would seem just in the light of any change in the circumstances surrounding the original risk to make the underwriter aware of it in order to allow him to reconsider his position and decide whether to refuse to insure the increased risk or continue to do so at the same rates and terms or on different ones.[1298]

[1296] Ibid., at p. 372.

[1297] Al Sanhuri, Abdur Razzaq., Al Wasit Fi Sharh Al Qanun Al Madany Al Jadyd, (The intermediary in the Elucidation of the Civil Code – in Arabic), 2nd ed., (1990), Vol. 7 (Part 2), at para.617, (hereafter Al Sanhuri, Vol. 7/2); Lutfi, Mohammed. Husam. Mahmud., Al Ahkam Al 'amah L Aaqd At Ta'myn, (The General Rules of The Insurance Contract – in Arabic), 2nd ed., (1991), at p. 184-5, (hereafter Lutfi); Arafa, Mohammed. Ali., Sharh Al Qanun Al Madany Al Jadyd Fi At Ta'myn Wa Al Aaqud Al Saghirah, (The Elucidation of the New Civil Code in Insurance and Small Contracts – in Arabic), 2nd ed., (1950), at p. 149-151, (hereafter Arafa); Mustafa, Abu Zayid. Abdul Baaqi., At Ta'myn, (The Insurance – in Arabic), (1984), at p. 213-4, (hereafter Mustafa); Hijazi, Abdul Haai., At Ta'myn, (The Insurance – in Arabic), (1958), at para.160, (hereafter Hijazi); Al Badrawi, Abdul Mun'am., At Ta'myn (The Insurance – in Arabic), (1981), at para.128, (hereafter Al Badrawi).

[1298] Ibrahim, Jalal. Mohammed., At Ta'myn: Dirash Muqaranh (Insurance: A Comparative Study – in Arabic), (1989), at para.348, (hreafter Ibrahim); Sharaf Al Diyn, Ahmed., Ahkam At Ta'myn, (Insurance Rules – in Arabic), 3rd ed., (1991), at paras.228-233, (hereafter Sharaf Al Diyn); Zahrah, Mohammed., Ahkam Aaqd At Ta'myn Tabbqann Li Nusus Al Taqniyn Al Madany Wa Ahkam Al Qada, (The Rules of The Insurance Contract

7.3.1. The scope of the continuing duty

7.3.1.1. The duty during the performance of the contract

According to s. 361 of the MTL 1990, the assured is required to *"apprise the insurer, during the insurance validity, of all increase"* in the magnitude of the risk or risks originally accepted *"within the limits of his awareness thereof"*. So, clearly the effect of last part of s. 361 is not to impose upon the assured an extensive duty of disclosure as that one existing before the conclusion of the contract where it is his duty to disclose full and accurate facts affecting the risk to be insured. All that is required of the assured after the conclusion of the contract is the disclosure of any new change if, and only if, it increases the risk already insured.[1299] It was submitted that the change would be held to have the nature of increasing the risk if its effect was either to increase the possibility of the occurrence of the insured risk or make the consequences of the loss, if it happened, greater and more destructive than it would otherwise have been had there been no change in the risk as such.[1300] It follows that any change in the nature of the risk is not disclosable if it will not increase the percentage of the occurrence of the risk insured or if it will not make the resulted loss graver than it is normally expected to be.[1301]

On the other hand, it ought to be made clear that the duty of the assured will nevertheless be limited to the disclosure of any new change increasing the risk covered by the policy.[1302] So, if the new circumstance concerns a risk which is not covered under the policy or is about a matter not related to the subject-matter insured, then there is no violation of the duty of good faith will result from its non-disclosure or misrepresentation. Likewise, if the alleged non-disclosed or misrepresented change did exist at the time the risk was incipiently insured, it would not be within the assured's duty to make it known to the underwriter.[1303] This is because such a circumstance should have been fully and accurately disclosed when

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According to The Provisions of the Civil Code and The Case Law – in Arabic), (1984-1985), at p. 208-210, (hereafter Zahrah).

[1299] Al Sanhuri, Vol. 7/2, at para.618; Sharaf Al Diyn, at para.225. Also, see Civil Cassation 25/5/1981, Collection of Cassation judgments, Year 47, No. 286, p. 1583, [Burglary], where the Court held, at p. 1584, that it would be the duty of the assured to make the underwriter aware of any change in the circumstances of the risk, taking place after the conclusion of the contract, if it was likely to increase the insured risk; Civil Cassation 24/2/1955, Collection of Cassation judgments, Year 21, No. 95, p. 723, [Fire], where it was held, at p. 728-9, that if there was a change in the place in which the insured goods were stored and was of the nature that it would increase the scope of the contemplated risk, the assured must communicate it to the underwriter.

[1300] Al Mahdi, Nazih. Mohammed Al Sadiq., Aaqd At Ta'myn, (The Insurance Contract – in Arabic), (undated), at p. 260, (hereafter Al Mahdi); Al Badrawi, at para.129; Hijazi, at para.161; Mursi, Mohammed. Kamil., Sharh Al Qanun Al Madany Al Jadyd, Al Aaqud Al Musammat, Al Juzau Al Thalith, Aaqd At Ta'myn, (The Elucidation of the New Civil Code, The Named Contracts, Part three, The Insurance Contract – in Arabic), (1952), at para.119, (hereafter Mursi); Lutfi, at p. 184-5; Al Sanhuri, V. 7/2, at para.618.

[1301] Al Mahdi, at p. 260; Al Badrawi, at para.129; Hijazi, at para.161.

[1302] Ss. 348 (1) *"The insured party shall notify the insurer of all conditions coming up during the validity of the insurance, which are likely to increase the risk as covered by the insurer ... ."* Also, see Al Mahdi, at p. 260.

the risk was first accepted by the underwriter and not after its inception.[1304] By the same token, the assured is however not accountable for the non-disclosure or misrepresentation of changes taking place following the acceptance of the risk by the underwriter if they do not increase the covered risk or if they lessen its graveness.[1305]

Moreover, as it is the case with the pre-contractual duty[1306], it would not avail the assured who had not informed the underwriter of the existence of a change increasing the magnitude of the risk, to contend that there was no causal connection between the non-disclosed or misrepresented change and the loss sustained.[1307] The duty of the assured to disclose any post-contractual changes affecting the size of the risk is an absolute and independent one existing and applying regardless of whether there is a connection between its violation and the real cause of the loss.[1308] Accordingly, it was held by the Mixed Court of Appeal that if, in a marine policy, the insured vessel suffered partial damages while she was carrying goods exceeding its registered tonnage, the insurance company would not be liable for this loss even if the additional weight increasing the risk insured did not cause the partial loss.[1309] Also, in a motor policy, it was stated that it would be void if the number of passengers exceeded the agreed one which was two persons. While the insured car was carrying three passengers, it was involved in an accident which caused the death of one of the passengers. The insurance company rejected the claim contending that the assured did not inform it of the fact that the car was to carry three passengers instead of two a fact which increased the insured risk. The assured's counterclaim was based on the plea that the fact that the car was carrying three passengers did not affect the amount of loss sustained, for that the resulted loss was the death of one of the passengers only. This allegation was subsequently rejected by the by Mixed Court of Appeal which held that the duty of the assured was an absolute one irrespective of whether the non-compliance with it contributed to the loss suffered or not.[1310]

Furthermore, the assured is only required to disclose any increase in the risk insured if he is aware of it.[1311] This is clearly laid down by s. 361 of the MTL 1990 which states that the assured is to apprise the underwriter of all increase in the insured risk *"within the limits of his*

[1303] Sharaf Al Diyn, at para.234; Arafa, at p. 151.
[1304] Hijazi, at para.161; Ibrahim, at para.351; Lutfi, at p. 185.
[1305] Ibid., at p. 262.
[1306] Ss. 347(2) of the MTL 1990.
[1307] Al Badrawi, at para.129; Hijazi, at para.161; Arafa, at p. 153; Ibrahim, at para.352; Al Sanhuri, Vol. 7/2, at para.618.
[1308] Ibrahim, at para.352; Lutfi, at p. 188-9.
[1309] Mixed Appeal 25/3/1942, Civil Collection, Year No. 54, p. 150, [Marine]. To the same effect, also see Mixed Appeal 15/6/1932, Civil Collection, Year No. 44, p. 376, [Marine].
[1310] Mixed Appeal 2/3/1927, Civil Collection, Year No. 39, p. 290, [Motor].
[1311] Al Sanhuri, Vol. 7/2, at para.618; Yihya, Abdul Wadood., Al Mujaz Fi Aaqd At Ta'myn, (The Concise in the Contract of Insurance – in Arabic), (undated), at p. 160; (hereafter Yihya); Mursi, at para.120, Al Mahdi, at p. 264, Al Badrawi, at para.133; Lutfi, at p. 188-9; Arafa, at p. 155-6; Mustafa, at p. 218-9; Ibrahim, at para.358; Sharaf Al Diyn, at para.234.

awareness thereof". Thus, if there exists a circumstance increasing the risk and the assured is ignorant of it, he will not be bound to disclose it and he will not be in breach of his post-contractual duty of good faith if he does not do so. In this respect, it was submitted by Yihya[1312] that the knowledge required on the part of the assured before being held accountable for not disclosing or misrepresenting a new circumstance is actual knowledge. Therefore, there is no room to argue that although an increase in the risk was not actually known to the assured, he was nevertheless to disclose it if it ought to have been known to him. Equally, Yihya submitted that there would also be no duty on the assured to make investigations or institute enquiries to ascertain or locate any new circumstances which may increase the covered risk in order to disclose them to the underwriter.[1313] Consequently, all that he is required to do in order to comply with his post-contractual duty is to disclose any new changes tending to increase the risk if they are within his actual knowledge. However, this should be subject to the *'turning a blind eye'* rule. Therefore, if the assured suspected the existence of circumstances which might increase the risk insured and he nevertheless refused to make inquires to ascertain them, these circumstances would be deemed within his actual knowledge if it was subsequently proved that they increased the risk. It also goes without saying that if the increase of the risk is already known to the underwriter, no duty of disclosure will arise on the part of the assured in respect of this matter.[1314]

In the long run, admittedly, the duty of the assured to make post-contractual disclosure is not an open-ended one. It is rather a limited duty to disclose limited information. Put another way, it is only any increase in the risk insured occurring after the conclusion of the contract which is actually known to the assured, but not to the underwriter which must be disclosed in conformity with the post-contractual duty of good faith.

It seems very crucial to be borne in mind that when it is said that it is the duty of the assured to disclose to the underwriter any post-formation changes which increase or are likely to increase the extent of the risk already covered, this does not mean that the latter is entitled to such disclosure in order to reassess his position after the inception of the contract and to decide whether to proceed with it or not. His entitlement, as such, is because there is a remarkable change in the magnitude of the risk in question and which did not exist or were not taken into account at the time when the contract was concluded.[1315] Therefore, if the parties to the contract expected or planed a future increase in the insured risk, there would be

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[1312] Yihya, at p. 160. Also, see Arafa, at p. 155-6; Mixed Appeal 12/6/1924, Civil Collection, Year No. 36, p. 458, where it was held that the assured was only required to disclose circumstances which he knew.
[1313] Yihya, at p. 160.
[1314] Lutfi, at p. 189-90; Sharaf Al Diyn, at para.234; Yihya, at p. 160.
[1315] Sharaf Al Diyn, at para.225; Ibrahim, at para.348; Hijazi, at para.161.

no duty upon the assured to make any disclosure thereabouts[1316], for that there would be no new increase in the risk to which the duty of good faith could be attached[1317].

7.3.1.1.1. The test of materiality and inducement determining when a change increasing the risk is disclosable

Having acknowledge that it is the duty of the assured to keep the underwriter aware of any increase in the scope of the risk already insured, what is the criteria according to which a change or an alteration could be classified as having the nature of increasing the risk and therefore to be disclosed? Although no answer is provided by s. 361 or by any other provisions of the MTL 1990, according to the general opinion of the Egyptian jurisprudence this question is to be answered by reference to the judgment of the actual underwriter.[1318] So, whatever he views as increasing the risk insured will be deemed material and must be disclosed. This, of course, as it is the case with the pre-contractual duty, is subject to the test of inducement which must be satisfied before the underwriter could be said to be entitled to repudiate the contract. The inducement's test is satisfied by reference to the judgment of the actual underwriter at the time when the risk was first assessed.[1319] So, if the increase of the risk would lead the underwriter to either refuse to insure at all or nevertheless to accept to insure, but at a higher premium including different terms, then the increase is material and its non-disclosure or misrepresentation will entitle the underwriter to repudiate the contract.[1320]

Conformably, it was held by the Mixed Court of Appeal that the fact that the assured rented out the insured shop to a person trading in petroleum or other dangerous materials was a material fact under fire insurance, for that it increased the contemplated risk.[1321] Also, it was held by the same Court that the construction of a new store for the purpose of storing highly inflammable substances next to the building insured against fire was a change increasing the risk insured and must have been disclosed.[1322] Moreover, it was held in burglary insurance that the fact that the assured abandoned the insured place for a long time was material for it increased the possibility of the place being burglarised.[1323]

[1316] Hijazi, at para.161; Sharaf Al Diyn, at para.234.
[1317] Arafa, at p. 151.
[1318] Hijazi, at para.161; Al Sanhuri, Vol. 7/2, at para.618; Yihya, at p. 159; Mursi, at para.119, Al Mahdi, at p. 264-5, Al Badrawi, at para.129; Arafa, at p. 154; Mustafa, at p. 217; Ibrahim, at para.351; Sharaf Al Diyn, at para.234.
[1319] Hijazi, at para.161.
[1320] Hijazi, at para.161; Al Sanhuri, Vol. 7/2, at para.618; Yihya, at p. 159; Mursi, at para.119, Al Mahdi, at p. 264-5, Al Badrawi, at para.129; Arafa, at p. 154; Mustafa, at p. 217; Ibrahim, at para.351; Sharaf Al Diyn, at para.234.
[1321] Mixed Appeal 29/11/1913, Civil Collection, Year No. 26, p. 26, [Fire].
[1322] Mixed Appeal 11/12/1912, Civil Collection, Year No. 25, p. 57, [Fire].
[1323] Mixed Appeal 6/11/1941, Civil Collection, Year No. 54, p. 7, [Burglary]. Also, see Mixed Appeal 2/3/1927, Civil Collection, Year No. 39, p. 290, [Motor] and Mixed Appeal 15/6/1932, Civil Collection, Year No. 44, p. 376, [Motor], where it was held that the change of the area where the insured car was to be driven from the countryside to the capital was a material fact increasing the risk insured and ought to have been disclosed.

7.3.1.1.2. The time within which an increase in the risk must be disclosed

The time within which any alteration or change which increases the risk insured or tends to do so must be notified to the underwriter is laid down in ss. 348(1) of the MTL 1990 which reads as follows:

> *"[T]he insured party shall notify the insurer of all conditions coming up during the validity of the insurance, which are likely to increase the risk as covered by the insurer, providing such notification shall take place within three working days from the date the insured party learns thereof. If the notification is not made within that date, the insurer may then repudiate the contract."*

Accordingly, it is the duty of the assured to inform the underwriter of any increase in the risk insured within three working days starting from the date at which he becomes aware about the increase. Any failure to make disclosure within three working days would entitle the underwriter to repudiate the policy. This seems to be the case irrespective of whether the cause of the increase was the act of the assured or a foreign reason. Also, as ss. 348(1) states that the duty of the assured to disclose is conditional upon him being aware of the increase in the risk, it follows that no breach of the continuing duty of good faith would arise on his part if he was unaware of the said increase until after the expiry of the cover or the occurrence of a loss[1324].

7.3.1.1.3. The consequences of giving a notification of an increase in the risk

As stated above, ss. 348(1) of the MTL 1990 requires the assured to notify the underwriter of any change making the risk insured higher than it originally is within three working days counted from the date he first becomes aware thereof. Failing that will enable the underwriter to repudiate the contract. Given that within the time limit the assured has notified the underwriter that there was an increase in the risk insured, what would be the consequences following such notification? The answer of this question is dealt with by ss. 348(2) of the MTL 1990 which in fact differentiates between whether the increase in the graveness of the risk was caused by the act of the assured or by a foreign reason. This was stated as follows:

> *"[I]f the notification takes place within the time prescribed in the foregoing clause [ss. 348(1)], and it transpires that the danger so increased has not been a result of an act by the insured party, the insurance shall remain valid, however, against increasing the insurance premium. In case the increase in the risk is resulting from an act of the insured party, the insurer may then repudiate the contract within three working days from the date he is notified of the increased risk, or maintain the insurance deed along with requiring an increase in the insurance premium against increasing the risk. in the former case, the court may, upon the request of the insurer, pass a ruling for paying amount equivalent to the insurance premium."*

[1324] Sharaf Al Diyn, at para.240.

Accordingly, if the increase is not caused by the assured, the insurance cover will not be affected and all that to which the underwriter is entitled is the payment of an additional premium in order to cover the increased risk.[1325] Whereas, if the risk is increased by the act of the assured as if he agreed to carry dangerous goods in his vessel beside other normal goods, then the underwriter is entitled to a right of election[1326]. He can either repudiate the contract or maintain it untouched and claim the payment of an additional premium because of the new increase in the magnitude of the original risk.[1327]

If the underwriter elects to repudiate the contract, he must do so within three working days running from the time at which he is informed that there has been an increase in the insured risk. Having repudiated the contract, the underwriter will ceases to be liable for any future losses and if the premium is detachable, he must repay the assured the equivalent premium to any future period left uncovered.[1328] Also, the assured will not have to pay back any money received for previous losses and the underwriter will continue being liable for any unsettled or settled, but unpaid ones.[1329] Moreover, as an additional remedy, the underwriter is entitled to claim damages which should be an amount equivalent to the insurance premium. The entitlement of the underwriter to damages according to ss. 348(2) of the MTL 1990 is conditional on him requesting the court to do so.[1330]

On the other hand, if he elects to maintain the contract and accept to insure the risk as increased, he will be entitled to ask for an additional premium because of the new increase in the risk insured.[1331] This means that the contract will be unaffected and the increased risk will be covered as from the time when there was an increase in the original risk.[1332]

In this regard, it must be borne in mind that whenever there is an increase in the insured risk by the act of the assured followed by a notification to the underwriter as to the same within the time limit, up to and until the underwriter makes his decision whether to repudiate the contract and claim damages or to accept such an increase and ask for an additional premium, the assured will still be covered by his original cover.[1333] So, if before

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[1325] Ss. 348(2) of the MTL 1990. Also, see Ta Ha, Mustafa. Kamal., Al Qanun Al Bahry Al Jadyd, (The New Maritime Law - in Arabic), (1995), at para.676, (hereafter Ta Ha); Qayid, Mohammed. B., Al Aaqud Al Bahryah, (The Marine Contracts – in Arabic), 1st ed., (1996), at para.336, (hereafter Qayid).

[1326] Ibrahim, at para.368.

[1327] Ss. 348(2) of the MTL 1990. Also, see Ta Ha, at para.676; Qayid, at para.336.

[1328] Al Badrawi, at para.134; Al Mahdi, at p. 269-71; Sharaf Al Diyn, at para.241; Ibrahim, at para.368; Al Sanhuri, Vol. 7/2, at para.622; Yihya, at p. 159; Mursi, at para.119, Arafa, at p. 154; Mustafa, at p. 224-5; Zahrah, at p. 221-2.

[1329] Ibid.

[1330] Ta Ha, at para.676; Qayid, at para.336.

[1331] Al Sanhuri, Vol. 7/2, at para.623; Zahrah, at p. 223-5; Ibrahim, at para.373; Lutfi, at p. 199-200; Al Mahdi, at p. 271-3; Mustafa, at p. 223-4; Yihya, at p. 165-6.

[1332] Ibid.

[1333] Sharaf Al Diyn, at para.240; Yihya, at p. 163-4; Al Mahdi, at p. 268-9; Al Badrawi, at para.134; Al Sanhuri, Vol. 7/2, at para.621; Mustafa, at p. 222; Ibrahim, at para.365; Zahrah, at p. 218-9; Lutfi, at p. 196.

the underwriter made his decision, the insured object suffered loss, he would be liable for such loss even if it was caused by the new change increasing the risk.[1334]

Although it is the duty of the underwriter, if he elects to repudiate the contract, to make his decision within three working days, no such time limit is imposed upon him by ss. 348(2) of the MTL 1990 if he elects to proceed with the contract. This, it could be argued, will lead to the inference that if the decision of the underwriter to repudiate was not made within three working days, his decision would be that he accepted to continue insuring the risk as increased. In any case, the consent of the underwriter to continue insuring the increased risk can be made expressly as if he sends a letter to the assured informing him that he will proceed with the risk as increased or impliedly as if he after being informed of the change in the circumstances surrounding the risk accepts the premium without reservation or as if he with such knowledge accepts to pay the assured's loss.[1335]

7.3.1.1.4. The remedy of the breach of the duty during the performance of the policy

Having discussed the consequences of the notification of the assured that there is an increase in the risk insured, what would be the consequence if the assured non-disclosed or misrepresented the fact that there was an increase in the risk? Pursuant to ss. 348(1) of the MTL 1990, if the assured did not disclosed that there was an increase in the risk insured, the underwriter would be entitled to repudiate the contract.[1336] This is clearly laid down as follows:

> *"[T]he insured party shall notify the insurer of all conditions coming up during the validity of the insurance, which are likely to increase the risk as covered by the insurer, providing such notification shall take place within three working days from the date the insured party learns thereof. If the notification is not made within that date, the insurer may then repudiate the contract."*

Apparently, if there was a violation of the post-formation duty of good faith by not disclosing or misrepresenting the fact that there had been an increase in the insured risk, the contract would not be directly repudiated, but it would be deemed valid and effective until the underwriter decides to repudiate it. So, if he elects to waive the violation, the contract will continue being binding. Whereas, if he elects to repudiate it, the contract will ceases to be binding from the moment at which it was repudiated. It follows that the underwriter will not be liable for any future losses, but he must repay the assured the premium of the period left uncovered. Any losses genuinely sustained before the repudiation of the contract would be

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[1334] Ibid.
[1335] Ibrahim, at para.369; Al Sanhuri, Vol. 7/2, at para.622; Al Badrawi, at para.134; Al Mahdi, at p. 270; Mustafa, at p. 224; Zahrah, at p. 221.
[1336] Ta Ha, at para.676; Qayid, at para.336.

unaffected by it and must still be paid irrespective of whether they were settled or not. In addition, the assured will not have to pay back any money received for previous losses.[1337]

7.3.1.2. The duty in the claim's context and the remedy for its breach

Besides requiring the assured to observe utmost good faith throughout the performance of the contract in the sense that he has to disclose to the underwriter any alteration in the circumstances of the insured risk which is likely to increase its graveness, the MTL 1990 also imposes a similar duty upon him at the time when he presents a claim for loss to the underwriter. This duty is enforced by s. 370 which states that

> *"[I]f the insured gives a mala fide statement non-conforming to the truth in connection with the accident, and a harm results therefrom to the insurer, a court ruling may be pronounced and passed to extinguish his right to the insurance amount, wholly or partly."*

Although that the apparent effect of s. 370 is that the assured is only required not to make misrepresentations in his claim to the underwriter, it is argued that the real ambit of the duty at the claim's stage ought to be wider than this inactive rule in that it should be the task of the assured to place in front of the underwriter full and accurate account of all the circumstances surrounding the loss in question.

According to the wording of s. 370, if the assured was in breach of his duty, the underwriter's remedy would be to request the court to issue a ruling to the effect that all or part of the value of the insurance is to be forfeited. However, in order for the underwriter to succeed in his request, he must satisfy the court as to two conditions, namely the misrepresentation or non-disclosure of the assured must be fraudulent and he (the underwriter) must suffer loss as a result of such misrepresentation. The absence of any of which will not entitle the underwriter to escape his liability to pay the insured claim.

In this sense, there appears to be a similarity between the English and Egyptian laws as to the effect of fraud on the claim of the assured. This is because under both laws if there was no fraud in the claim of the assured, the mere fact that there was non-fraudulent misrepresentation or non-disclosure would not, in itself, preclude the assured from recovering under the policy.

7.3.1.3. The duty in the context of settlements and the remedy for its breach

The MTL 1990 also places the assured under a continuing duty of good faith when a settlement of a loss is being agreed between him and the underwriter. However, the scope of this duty at this stage is confined to the disclosure of whether the same risk is insured with

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[1337] Al Badrawi, at para.134; Al Mahdi, at p. 269-71; Sharaf Al Diyn, at para.241; Ibrahim, at para.368; Al Sanhuri, Vol. 7/2, at para.622; Yihya, at p. 159; Mursi, at para.119, Arafa, at p. 154; Mustafa, at p. 224-5; Zahrah, at p. 221-2.

any other underwriters in which case it will be the duty of the assured to disclose all relevant information in this regard. Failing that would give the underwriter the right to reject the settlement. This is the effect of ss. 352(2) of the MTL 1990 which states that

> *"[A]n insured party who claims a settlement of the damage caused thereto shall reveal to the insurer all other existing insurance contracts that he learns of, otherwise his claim shall not be acceptable."*

The obvious reason behind imposing such a duty on the assured seems, as submitted by Ta Ha[1338], to be for the purpose of making the underwriter aware, before he agrees to any settlement, of whether there is more than one policy on the same risk or not and, if so, whether the amount insured thereunder is exceeding the actual value of the insured item or not. Having such knowledge will, of course, enable him to discover whether there is fraud in the claim of the assured and, if not, to make him take into account any amounts paid to the assured for the damage or loss of the same subject-matter when he agrees to the proposed settlement. This is actually clear from the wording of ss. 352(1) of the MTL 1990 which declares that

> *"[E]xcept for deception and fraudulent cases, if the risk is covered by several insurance deeds, whether they were concluded on the same or different dates, with the total amount of insurance as mentioned in these contracts, being more than the value of the object insured thereby, all insurance contracts as concluded thereof, shall be considered valid, and the insured party may then have remedy thereof within limits of the damage, providing it does not exceed the value of the object insured thereby-over whoever he chooses of the multiple insurers, without any joint liability among them, in the ratio of the insurance amount wherewith they are each committed to the real value of the object insured thereby."*

7.3.1.4. The duty when a notice of abandonment is given and the remedy for its breach

Similar duty is also required of the assured who has to make full disclosure of all other insurance contracts which he has effected on the subject-matter concerning which he intends to give a notice of abandonment to the underwriter.[1339] This duty is regulated by s. 369 of the MTL 1990 which announces that

> *"[W]hen the insured advices the insurer about his desire to give up the object insured, he must declare and give a statement about all the insurance policies and contracts which he has concluded or which is aware of and those which he knows about."*

So, it is the duty of the assured whenever he suffers an actual or constructive total loss and before he gives a notice of abandonment to the underwriter to make the latter acquainted with all insurance policies effected on the insured item. The imposition of this duty seems, as argued by Ta Ha[1340], to be for the same reason which requires its imposition in the context of settlement. This is to say that to make the underwriter aware, before he accepts the notice of

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[1338] Ta Ha, at para.702.
[1339] Ibid.
[1340] Ibid.

abandonment, of whether the assured is trying to recover more than he is in fact entitled to or not and, if so, whether that could constitute fraud on his part.

Although s. 369 does not state what would be the remedy available to the underwriter if the assured was in violation of this duty, Ta Ha is of the view that that would not annul the notice or the contract, but it would rather give the underwriter the right to refuse to pay the amount of the insurance until full disclosure is made. This, in fact, what was the remedy available to the underwriter under s. 217 of the repealed MTL 1883 [Egypt] and there seems to be no contrary view, as Ta Ha further argued, to forbid applying it to the violation of the duty contained in s. 369 of the MTL 1990.[1341]

7.3.2. The duration of the continuing duty

Unfortunately, this issue does not seem to have arisen before under the Egyptian law and so no authority can be found in point. However, it could be argued that the duration of the duty would depend on, as the English law, the stage at which it is invoked. Thus, the duty to inform the underwriter of any changes increasing the original risk during the performance of the contract which is regulated by s. 361 should cease to apply once the policy expires or the insured subject-matter is safely arrived or is lost and the assured claims its actual or constructive total loss. This should be understandable for that in any of the foregoing cases there would be no risk to which this duty is attached.

The duty of good faith at the time when the assured negotiates a settlement with the underwriter which is regulated by ss. 352(2) should also come to an end once the settlement between the assured and the underwriter is accurately agreed. Also, the duty of the assured when he gives a notice of abandonment of the subject-matter insured should extinguish once all insurances effected on the same subject-matter are fully and accurately disclosed.

Likewise, the moment at which the duty of good faith in the claim's context is to cease applying should also be when the assured gives the underwriter a full account of all the details of the loss or damage giving rise to the claim in question. Therefore, if for any reason the underwriter is still not satisfied and therefore chooses to resist the claim and if, on the other hand, the assured institutes legal action against the underwriter to enforce his claim, then, as it is under the English law, there is no reason why the duty of good faith should continue applying to this stage. It is the procedural rules of the court, which should govern the behavior of the parties at this stage and not those of the duty of good faith.

[1341] Ibid.

7.4. The continuing doctrine under Saudi Arabian law

As very briefly summarised at the beginning of this chapter, unlike the English and Egyptian laws, the CCL 1931 does not seem to have clearly recognised any coherent post-contractual doctrine of utmost good faith requiring the assured to comply with its rules in respect of circumstances occurring after the inception of the contract. Instead, the CCL 1931 deals with the duty through several, but isolated, sections each of which separately imposes on the assured a duty to make further disclosure or to act honestly in respect of matters occurring during the currency of the policy or when a claim for loss is presented.[1342] Therefore, the examination of the this duty under the CCL 1931 will be as follows:

7.4.1. The scope of the duty

7.4.1.1. The duty in the context of claims and the remedy for its breach

According to s. 376 of the CCL 1931, whenever the assured sustains a loss, before he could be able to claim his loss from the underwriter he has to place in front of him a full account of all the facts of the loss which will enable the latter to estimate the extent of his liability. This duty is enforced by the following terms

> *"[B]efore bringing an action to recover the insurance amounts, the insured shall communicate to the insurer all documents and other things that prove the shipment and the occurrence of the loss."*

However, what would happen if the assured did not comply with this duty? In other words, if the assured non-disclosed or misrepresented one of the facts relating to the loss or damage sustained, would the remedy available to the underwriter be his entitlement to avoid the contract altogether or only the claim in question or his remedy would be something different? Surprisingly, although s. 376 did place the assured under a broad obligation to acquaint the underwriter with all circumstances proving his loss and therefore his eligibility to be indemnified in that regard, it failed to prescribe the remedy should the duty be violated.

However, reference must, in this case, be made to the case law where the remedy of the violation of the post-contractual duty at the time when a claim for a loss is presented by the assured was discussed in several cases. In a house insurance case[1343], when the assured claimed to be indemnified against the loss of his valuable carpets and jewellers, the insurance company rejected his claim on several grounds amongst which was that the real value of the

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[1342] The principle that the doctrine of utmost good faith will, in some cases, continue to apply to the conduct of the assured after the conclusion of the contract and while he is performing some post-contractual obligations was acknowledge in many cases such as Arbitral award 18/5/1993, [Fire], at p. 16-20; Arbitral award 22/12/1986, [House], at p. 15-6; Arbitral award 14/10/1987, [Reinsurance], at p. 14; Arbitral award 7/12/1996, [Fire], at p. 21; Arbitral award 5/3/1988, [Burglary], at p. 14; Arbitral award 11/6/1996, [Fire], at p. 10-11; Arbitral award 29/3/1997, [Fire], at p. 16-8; Arbitral award 29/3/1997, [Motor], at p. 8-10.

[1343] Arbitral award 22/12/1986, [House].

loss was fraudulently exaggerated. Although the contention of the insurance company was subsequently rejected and a judgment was entered for the assured, in its decision, the arbitral panel was of the view that had there been a fraudulent claim, the remedy of the insurance company would have been the right to avoid the contract *ab initio*.[1344]

About fifteen months latter, the issue of fraudulent claims arose again in a policy of burglary insurance.[1345] The facts of this case were that the assured effected a burglary insurance on his valuable carpets. The insured carpets were stolen while they were being shipped from one country to another. The assured claimed his loss, but the insurance company rejected his claim on the ground, *inter alia*, that the loss was exaggerated and the claim was fraudulently presented. The arbitral panel held that there were none as such and accordingly gave judgment for the assured. However, before giving its judgment the panel made some important remarks about the remedy available to the insurance company whenever an exaggerated claim is presented by the assured. It was of the view that the remedy would in all cases depend on whether there was fraud in the claim or not. So, if the assured intended to deceive the insurance company by claiming that which he knew that he was not entitled to, the insurance company would be entitled to avoid the contract *ab initio*.[1346] Whereas, if the claim was innocently exaggerated, although the contract would not be avoided, the assured would only be allowed to claim his actual loss and nothing else.[1347]

The view that the remedy of fraudulent claims would be the avoidance of the policy *ab initio* was recently supported by the judgment of the arbitral panel given in a fire insurance case.[1348] In this case, the assured in support of his claim for loss presented fraudulent information and forged documents. There was a term in the policy stating that if the assured presented a fraudulent claim, all rights under the policy will be forfeited. The arbitral panel therefore rejected the claim of the assured and entered judgment for the insurance company.[1349]

Accordingly, it seems established from the above authorities that the remedy for the breach of the duty at the claim's stage would depend on whether fraud was involved or not. If the assured in good faith non-disclosed or misrepresented one of the circumstances of the loss or exaggerated the value of his loss, the remedy of the underwriter would be restricted to his

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[1344] Ibid., at p. 15-6.
[1345] Arbitral award 5/3/1988, [Burglary].
[1346] Ibid., at p. 15.
[1347] Ibid. Also, see Arbitral award 9/6/1997, [Fire], where the arbitral panel, at p. 21, was of the opinion that if there was a fraudulent exaggeration in the claim, the remedy of the insurance company would be the avoidance of the contract, whereas if the exaggeration was not fraudulent, the contract would stand and the assured would only recover what he had in fact lost.
[1348] Arbitral award 11/6/1996, [Fire].
[1349] Ibid., at p. 10-11. Also, see Arbitral award 1/7/1997, [Fire], where the assured insured his store and its contents against fire and following a fire in the insured store, the assured claimed his loss. The insurance company refused the claim asserting, amongst others, that the claim was fraudulently exaggerated. The arbitral panel found the claim to be so and held the insurance company entitled to avoid the policy.

right to reduced the amount payable under the insurance to the real loss sustained. However, if fraud was in presence, the remedy of the underwriter would be the avoidance of the contract *ab initio*.

7.4.1.2. The duty in the context of abandonment and the remedy for its breach[1350]

7.4.1.2.1. Disclosure of risks which may lead to the abandonment of the insured item

Another illustration of the post-contractual duty of good faith is given by s. 367 of the CCL 1931. According to this section, it is the obligation of the assured whenever there occurs a risk which may lead to the insured object being abandoned to the underwriter to inform the latter of this matter within three days from the time he is in possession of such knowledge[1351]. This is announced as follows:

> *"[T]he occurrence of risks necessitating the abandonment of the insured items or that are deemed as maritime disasters shall, if affecting the insurer, be officially reported to him by the insured person within three days of receiving notice thereof."*

Although s. 367 imposes on the assured an obligation to make full and accurate disclosure of the existence of any risk which may lead to the abandonment of the insured object to the underwriter, like the duty in the claim's context, it omitted to set up any remedy should it be violated. Unfortunately, no help can be sought from the case law, for that there is no case can be found where such a duty was discussed. However, it could be suggested that the remedy ought to be the entitlement of the underwriter to reject any future notice of abandonment should the assured give any.

7.4.1.2.2. Disclosure of all insurances on the object being abandoned

Similar to the duty of the assured abandoning the subject-mater insured under the Egyptian law, the assured making the same under the Saudi Arabian law has, according to s. 372 of the CCL 1931, to acquaint the underwriter, at the time he gives a notice of abandonment, with all information about all insurance policies effected on the same subject-matter being abandoned and all marine loans obtained by him before his notice can be deemed effective. This is distinctly declared as follows:

[1350] In this regard, see Haberbeck, Andreas., & Galloway, Mark., Saudi Shipping Law, (1990), at p. 243-7.

[1351] S. 363 of the CCL 1931 gives a list of incidents after the occurrence of which the assured may abandon the subject-matter insured to the underwriter. These incidents are listed as follows: *"[I]f the vessel sinks as a result of a sea disaster or if it strikes land and suffers breakage or becomes unseaworthy or if it is captured by enemies or pirates, or confiscated by a foreign state or is arrested before the commencement of the voyage by an order of the Arab Hijazi Government* [it should now be changed to the Saudi Arabian Government] *or if the insured items perish or are damaged and the amount of the losses equals at least three-quarters of the insured amount, such insured property and items may be abandoned by the owner in favour of the insurer ... ."* It must be emphasised that according to s. 367 of the CCL 1931, the notice of abandonment given in pursuance of s. 363 of the CCL 1931 must still be given by the assured to the underwriter within three days.

"[O]n exercising the abandonment, the insured person shall give particulars of all insurances made by him directly or through intermediaries or insurances which he ordered to be made on the vessel or the goods, as well as of all marine loans obtained by him; failing which, the time limit to be considered, from the date of the abandonment case for recovering the prescribed insurance amounts, shall be suspended until the date of giving the foregoing particulars, but in order to do so, it shall not be necessary to fix the time prescribed for submitting the petition of the abandonment case."

Thus, the failure of the assured to comply with this duty would mean that his notice of abandonment would be ineffective and, so, the time limit after the expiry of which the assured would be entitled to recover the amount of the insurance would be suspended until full compliance with the requirement of disclosure in this respect was obtained. This time, if not specified by the insurance policy, will be within three months starting from the date on which a valid notice of abandonment is given to the underwriter.[1352] This suspension would not, of course, affect the time limit within which the notice of abandonment was to be given.[1353] It follows that if the assured was late in informing the underwriter of all insurances on the insured subject-matter until the time within which a notice of abandonment ought to be given expired, he would lose his right to abandon.[1354]

However, if the assured makes fraudulent disclosure about the existence of other insurance policies on the object he seeks to abandon, he will be deprived of all benefits under the contract and will be forced to bring back any marine loans obtained by him. This will be the result of his fraud even if he has in fact suffered loss. This remedy is regulated by s. 373 of the CCL 1931 which makes it clear that

"[I]f in showing the foregoing particulars the insured practises fraud, he may not take advantage of the insurance, and shall further be required to repay any marine loans he may have obtained, even though the vessel had been lost, usurped or seized."

7.4.1.2.3. Disclosure of the fact that the insured vessel or goods are seized or arrested

Another duty to observe good faith after the conclusion of the contract is also imposed on the assured by s. 380 of the CCL 1931. According to which, if the insured vessel or goods were seized or arrested by another country, the assured would be obliged to communicate such a fact to the underwriter within three days of his becoming aware of it. This duty is stated as follows:

[1352] S. 375 *"If the insurance policy does not fix a time for payment of the insured sums, the insurer shall pay the said sums within three months of the notification date of the abandonment; if he fails to pay the same, he shall have to pay the proper profit as well and the abandoned items shall be deemed to be a lien on such debts."*

[1353] The specified time limit within which a valid notice of abandonment must be given is clearly laid down by s. 366 which states that *"[A]bandonment of items to the insurers shall be effected within six months, one or two years, according to the places that will be cited hereinafter, ie. if the vessel is lost and perishes in the ports or coasts of Europe, Asia or Africa and in the Black and Mediterranean Seas: the vessel or insured cargo shall be abandoned within six months as of the date on which the insured becomes aware of the same or from the date of receiving the news of sending the vessel to the foregoing ports and places, if usurped or confiscated therein; but if the vessel is lost and perishes or if usurped and confiscated on the Azores Coast, the Canary Islands, Maryland, West Africa and East America: abandonment shall take effect within one year from the date of learning of the loss and dispatch to said places; if the vessel is lost or confiscated in other remote places of the earth, abandonment shall be within two years of the date of learning of the loss and dispatch to such places; after the expiry of the foregoing time limits, abandonment by the insured shall not be accepted."*

[1354] S. 366 of the CCL 1931.

"[I]f the vessel is seized and arrested by a state, the insured shall communicate the fact to the insurer within three days of his becoming aware of the fact ... ."

Apparently, the purpose behind the imposition of this duty is to make the underwriter aware of the occurrence of a matter which may make him liable to the assured for its loss. This is evident by the rest of s. 380 which elaborates on the time limits within which a notice of the abandonment of the seized or arrested vessel or goods has to be given to the underwriter.[1355]

Should the assured fail to disclose to the underwriter the fact that the insured ship or goods were seized or arrested within three days, the only remedy mentioned by s. 380 is that the time limits after the expiry of which the assured is allowed to abandoned the insured subject-matter will be suspended. This is clearly explained by s. 380 which announces that the *"said time limits to run from the date on which notice of the seizure and arrest is given ... ."* This obviously means that the period of three months which is required by s. 375 before the assured is allowed to recover the insurance amount following a valid notice of abandonment will also be suspended.

Thereupon, until full and accurate disclosure of the circumstances surrounding the seized or arrested vessel or goods is revealed to the underwriter, no notice of abandonment is deemed effective. Also, the time limit for abandonment specified by s. 380 will not run and, of course, no payment for such loss is payable by the underwriter.

7.4.1.2.4. Disclosure if the vessel carrying the insured goods has become unseaworthy

In the same manner, according to s. 383 of the CCL 1931, it is the duty of the assured to inform the underwriter if the vessel on board of which his insured goods are shipped has become unseaworthy. This fact must be communicated to the underwriter within three days starting from the time when he first becomes aware of it. This post-contractual duty is formulated as follows

"[I]f experts certify that the vessel is not capable of making the voyage, the person who insured her cargo shall communicate this fact to the insurer within three days of becoming aware of the same."

The reason justifying the imposition of this duty on the assured seems, as it is the case with almost all the application of the Saudi Arabian continuing duty of good faith, to be in order to enable the underwriter to monitor an accident which may eventually end up with the insured property being abandoned to him.

[1355] *" ... if the seized items shall have been seized and arrested in the seas of Europe, the Mediterranean Sea or the Baltic, they may be abandoned to the insurer within six months; if the same takes place in places farther than these places, the abandonment time shall be one year; said time limits to run from the date on which notice of the seizure and arrest is given; if the seized items are perishables, the time limits shall be reduced to one and a half months, in the first case, and to three months, in the second case."*

Despite the fact that s. 383 does not specify what would happen if the required notification was not given within three days, it seems that the remedy available to the underwriter in this case will be the prevention of the assured from the right to abandon the insured goods in case he intends to do so. It must finally be emphasised that this duty is only imposed on the assured who owns the insured goods and no similar notification is required of the owner of the unseaworthy ship. This seems to be due to the fact that his duty to tender such a notification is caouhgt by the general application of s. 367 of the CCL 1931.

7.4.2. The post-contractual test of materiality and inducement

As it is the case with other aspects of the continuing duty of good faith, there are no guidelines in the provisions of the CCL 1931 about what the test determining the materiality of a circumstance after the formation of the contract is? The problem is aggravated by the absence of any cases or authorities on this issue. However, it could be argued that a fact should be material and so be disclosed if its full and accurate disclosure will affect the judgment of the particular underwriter in respect of the decision he is about to make under the policy. So, if any fact was of the nature that if disclosed would not affect the judgment of the actual underwriter as to the decision he was to make, it would not be considered material and there was no need for its disclosure.

It is further argued that the establishment of the materiality of a fact should not in itself entitle the underwriter to seek the remedy specified for its misrepresentation or non-disclosure. The underwriter must also satisfy the test of inducement. This is to say that the misrepresented or non-disclosed fact must have a decisive effect on the judgment of the actual underwriter in that had it been fully and accurately disclosed, he would not have made the same decision or would do so, but on different and more favorable terms or premiums to himself or at a reduction in the insurance amount to be paid, if he was asked to accept a notice of abandonment, or to pay or settle a claim for loss.

7.4.3. The duration of the continuing duty

Similar to the position under the Egyptian law, the question of when does the duty of good faith come to an end does not seem to have been discussed before under the Saudi Arabian law neither by the CCL 1931, nor by the decided cases, nor by any other authorities. In this case, as it was suggested under the Egyptian law and as it is the case under the English law, the duration of the duty would depend on the context in which it is applied. Consequently, in the context of claims, the duty should cease requiring the assured to make any disclosure once the underwriter rejects the claim and legal proceedings are taken against him by the assured. This would be for the same justification advanced for this view under the

English and Egyptian laws which is that the relationship between the assured and the underwriter once the claim is rejected and legal proceedings is instituted does not require the existence of the duty of good faith any longer and it ought to be governed by the procedural rules of the court.

As far as the duration of the duty in the context of abandonment is concerned, the duty should stop applying once the time limit within which the assured ought to give his notice to the underwriter expires. This is because after the expiry of that time no further duty to make disclosure is required to which the duty to observe utmost good faith is attributed.

7.5. General comments

In the light of what has been discussed above, all of the three legal systems have evidently recognised that the duty of good faith does not stop at the time when the contract is concluded, but it rather continues after that point to control circumstances taking place during the currency of the policy and at the time when the subject-matter insured is abandoned or a claim for loss is presented to the underwriter.

However, they all differ in the way by which this post-contractual duty is applied. While the MTL 1990 [Egypt] imposes upon the assured a general duty to act according to utmost good faith during the performance of the contract, neither the MIA 1906 [UK], nor the CCL 1931 [SA] has any duty as such. The application of the English duty is restricted to those situations in respect of which the underwriter needs to make a decision under the insurance policy and therefore there is a real need for him to seek further disclosure from the assured. It follows that if there is no need for the underwriter to make any decision under the policy, there will be no obligation on the assured to make any additional disclosure. A similar restricted duty also exists under the CCL 1931 [SA] with the exception that it is narrower in scope than the English one and it applies to rather limited events.

As far as the remedies for the violation of the duty are concerned, each of the three legal systems differs from the others and, so, has its own remedies. Under the English law, the remedy available to the underwriter would, depending on the context in which the duty was breached, be the avoidance of the whole policy *ab initio* or only the contaminated claim or the obtained extension of the risk or the agreed settlement, or amendment.

Concerning the Saudi Arabian law, as a general rule, the underwriters is not entitled to avoid the policy, unless and, only unless, fraud is involved. In the absence of fraud, the remedy available to him would vary and depend on the circumstances in which the duty was breached. However, in general terms, it would be nothing at all or the payment of the actual loss, or the suspension of the time limits which must usually expire before the assured could abandon the insured object or recover under the policy.

The attitude of the Egyptian law towards remedies is totally different from that of the English or the Saudi Arabian. This is because the MTL 1990 [Egypt] does not seem to have recognised that the contract could ever be avoided *ab initio* even if fraud is involved and that it is the only law which allows the contract to be repudiated from the moment of the breach. Also, in the cliams' context, the assured is not actionable for the presentation of any false claims, unless there is fraud, in which case the remedy available to the underwriter will be the forfeiture of the whole or part of the insurance amount. But, if there is no fraud, the underwriter has no right, but to pay the loss.

Of the remedies available to the underwriter under the MTL 1990 is also the right to reject the contaminated settlement or to refuse to make any payment under the policy until full disclosure is made of the circumstances surrounding the incident leading to the abandonment of the insured object.

Apart from that, all the three jurisdictions seem to agree with each other that innocent misrepresentation or non-disclosure in the claim's context is not actionable and that the breach of the post-contractual duty of good faith does not sound in damages.

Ultimately, aside from the Egyptian law, the scope and precise application of the post-contractual duty of good faith are matters which are still in doubt and unclear and awaiting further consideration and determination under the English law and a major amendment under the Saudi Arabian law.

Chapter [8]: Conclusions and Reformative Recommendations

8.1. Introduction

Having in the previous chapters subjected the doctrine of utmost good faith in the field of marine insurance to such an extensive and analytical comparison and shown throughout this thesis how it is applied under three different legal systems, the aim of this last chapter is to present the most important findings of the comparison and, as one of the objectives of this research, to prepare a set of reformative recommendations for adoption in Saudi Arabia and then to make final remarks.

8.2. The most important findings

8.2.1. In respect of the pre-formation duty

Although there is very high probability that the notion of good faith in all the three jurisdictions is derived from the same source, namely *the Roles of Oleron* and *Consolato del Mare*, its application under each of them is different. While, the legal basis of the Egyptian and Saudi Arabian doctrines are said to be s. 361 of the MTL 1990 [Egypt] and s. 342 of the CCL 1931 [SA] respectively, its basis under the English law is still a controversial matter. In fact, this controversy is not only true in respect of the pre-contractual duty, but it is also so in respect of the post-contractual one.[1356] Irrespective of whether the duty is classified as an implied condition of the contract of insurance or as a condition arising outside the contract, the legal basis of the duty in the context of marine insurance ought to be s. 17 of the MIA 1906 [UK].

One of the most important features which differentiates the duty of good faith in the English law from the other two is its comprehensive and overriding application which enables it not only to govern those cases of non-disclosure or misrepresentation, but also to monitor those which contain elements of bad faith. Leaving cases of fraud aside, this deficiency in the operation of the duty under the Saudi Arabian and Egyptian laws will undoubtedly confine its application to cases of pure material non-disclosure or misrepresentation only.

In regard to the duty of disclosure, there is a noticeable difference between its scope under the CCL 1931 [SA] on one hand and under the MIA 1906 [UK] and MTL 1990 [Egypt] on the other. The assured insuring under the CCL 1931 [SA] is under a much lighter

[1356] For further discussion of this issue, see Chapter [7].

duty of disclosure than his counterparts insuring under the MIA 1906 [UK] and MTL 1990 [Egypt]. This is because s. 342 of the CCL 1931 [SA] does not place him under a duty to make full disclosure of all material facts within his knowledge as to the risk under contemplation. All that he is bound to disclose is those material facts which are specifically required by s. 325 of the CCL and, if the insurance is effected on cargo, the particulars of the cargo as stated in the bill of lading. If the assured satisfies the requirement of s. 325, no further disclosure of any facts is required of him irrespective of their materiality to the decision of the underwriter. Assertively, this abnormally circumscribed duty will expose underwriters, especially those who are not fully aware of the exact application of the Saudi Arabian duty of disclosure, to the risk of finding themselves insuring risks which they would never have insured had they been protected by a full duty of disclosure as that available under ss. 18(1) of the MIA 1906 [UK] or s. 361 of the MTL 1990 [Egypt].

The position in respect of the duty of representation is totally different. This is because all the three laws seem to have similar understanding about its application in the sense that it is part of the assured's duty when he negotiates a contract of marine insurance with the underwriter to ensure that all his material representations are accurate and true. This understanding is shown by the imposition of a clear and distinct duty on the assured in this respect. The only important and apparent difference in the application of the duty which exists between the English law on one hand and the Saudi Arabian and Egyptian on the other is in respect of the classification of representations. While the MIA 1906 [UK] divides representations into more than one type and allocates the appropriate remedy for the misrepresentation of each one, the MTL 1990 [Egypt] and CCL 1931 [SA] do not recognise any similar classification and naturally designate only one remedy for any misrepresentation.

Another significant difference in the application of the doctrine between the English law on one side and the Egyptian and Saudi Arabian on the other appears in the complete absence of any rules specifically regulating the duty of the assured's agent if it happens that the policy is effected by him. The graveness of this lack seems to be cured or minimised under the Egyptian law by the application of ss. 104(1) and 104(2) of the CC 1948 [Egypt] which impose on the agent the duty to make full and accurate disclosure of those facts known to him and to his principal whenever he is to effect a contract on the principal's behalf. The situation under the Saudi Arabian law is rather different. While the Shari'a law requires the agent not to make misrepresentations when he effects a contract on his principal's behalf, it imposes on him a very limited duty of disclosure which is only confined to the disclosure of those material facts which his principal has communicated to him in order to communicate to

the underwriter. This limited duty, which does not extend to the disclosure of what is material within the agent's knowledge, is due to the fact that there is no general duty of disclosure under the Shari'a law.

As far as the concepts of materiality and inducement are concerned, there is a considerable difference between the approach adopted by the Saudi Arabian and Egyptian laws and that adopted by the English. The English law differentiates between the materiality of a fact and the right of the actual underwriter to avoid the contract. So, in order to determine whether a fact is material or not, it attaches considerable weight to the view of the hypothetical prudent underwriter. Whereas, such weight is attached to the view of the actual underwriter when the question of avoidance is to be resolved. In this regard, the actual underwriter is assisted under the English law by the adoption of the actual inducement presumption. On the contrary, the Egyptian and Saudi Arabian laws do not recognise any such division between materiality and the right of avoidance. They both consider the right of avoidance as an integral part of materiality the establishment of which means the availability of the right of avoidance. Therefore, great emphasis is placed on the effect which a misrepresented or non-disclosed fact would produce on the judgment of the actual underwriter. This subjective test deems materiality established if it is proved that the actual underwriter would not insure at all or would do but not on the same terms or at the same premiums if he was aware of the true and complete picture of the risk. Also, unlike the English test, the establishment of the materiality of a fact means the entitlement of the actual underwriter to his right to avoid the contract without the need for any further burden to be discharged.

No doubt, the combined approach adopted by the English law would surely be for the benefit of both the assured and the underwriter. On one hand, it will minimise those cases in which the actual, but careless, underwriters would be able to avoid lawfully concluded contracts and will, on the other hand, encourage underwriters to observe and follow the rules of proper underwriting and be more vigilant and careful when conducting their insurance business. This, of course, will decrease the number of those negligent underwriters and will doubtlessly be for the benefit of the insurance market. However, the only problem which may heavily hinder the English approach is the general adoption of the presumption of actual inducement. This presumption will effectively reverse the onus of proof and make it the duty of the assured to prove that the actual underwriter was not induced to grant the policy in question by the material non-disclosure or misrepresentation. Evidently, this will reduce, if not abolish, the aim behind the introduction of the actual inducement test. This situation

would never arise if the presumption of the actual inducement is viewed as an exceptional rule and is also applied as such.

In connection with remedies, all of the three legal systems agree with each other that if the underwriter is induced to insure by a material non-disclosure or misrepresentation, he will be entitled to avoid the contract *ab initio*. Nevertheless, if the remedy sought is damages, each of them has got its own legal approach towards it. On one hand, the MIA 1906 [UK] does not recognise any right to claim damages regardless of whether the misrepresentation or non-disclosure was fraudulent or innocent. However, damages could still be awarded to aggrieved underwriters either under the general law by an action in tort of deceit if there was fraudulent misrepresentation or non-disclosure or by ss. 2(1) of the MA 1967 [UK] if the violation involved innocent misrepresentation. On the other hand, the approach of the MTL 1990 [Egypt] allows the underwriter to claim damages for any violation of the duty of utmost good faith and irrespective of whether it is fraudulent or innocent. But, the maximum to which the underwriter is entitled will be a sum equivalent to the amount of a full premium. As to damages under the Saudi Arabian law, the position is neither conservative like the English law, nor liberal like the Egyptian law, it is rather novel and complex. First, according to s. 342 of the CCL 1931 [SA], the underwriter will directly be entitled to forfeit the premium if the contract is avoided on the basis of material misrepresentation or non-disclosure and irrespective of whether there is fraud or not. Secondly, if fraud is involved, the underwrite will be able to claim supplementary damages, but the ground on which they will be awarded depends on the kind of facts misrepresented or non-disclosed. If the facts are about the value, quantity, or quality of the subject-matter insured, the underwriter's action to recover damages will be based on s. 329 of the CCL 1931. For any other facts, the underwriter must have resort to the rules of the general law through an action in tort of deceit. No doubt, this ambivalent and complicated system for the award of damages where the underwriter could either get excessive damages or only nominal ones, would not be for the benefit of both parties to the contract, nor the development of Saudi Arabian marine insurance business.

Apart from the remedy of damages, another topic which seems to be worthy commenting upon here is the time within which the underwriter is obliged to make his election whether to avoid or affirm the voidable contract. Although the three legal systems require that the election must be made within reasonable time, they all differ over the solution when long time is expired and no election has been made by the underwriter. While underwriters insuring under the Saudi Arabian law will be able to delay their action of

avoidance for a year, those insuring under the Egyptian law will be entitled to a three years period from the time when the violation was first discovered or, at the utmost, to a period of 15 years from the conclusion of the contract irrespective of whether the violation was discovered or not. The position of the English law is rather different and irresolute. Although it does require the underwriter to make his election within reasonable time, if no election was made and reasonable time expired, the mere fact that reasonable time expired would not in itself affect the right of the underwriter to avoid. Notwithstanding, the underwriter will lose his right to avoid if, at the time he decides to do so, the position of the assured has already altered or the rights of third parties have intervened or his action has been taken so late so that the court regarded the delay as clear evidence that the underwriter has in fact decided to affirm the contract.

At length, apart from the remedy of damages and some other differences, all the three legal systems seem to apply similar rules to the remedies available to the underwriter for a violation of the doctrine of utmost good faith.

8.2.2. In respect of the post-formation duty

Regardless of the basis on which the English post-formation duty is grounded, admittedly all of the three jurisdictions have recognised that the duty of good faith does not stop at the time when the contract is concluded, but it continues after that point to circumstances arising during the currency of the policy and at the time when a claim for loss is presented to the underwriter. Notwithstanding, they all differ in the legal approach adopted to deal with it. The MTL 1990 [Egypt], the most developed one in this respect, imposes upon the assured a duty to act according to utmost good faith from the conclusion of the contract up and until either its expiry or a claim for loss is presented. The MIA 1906 [UK] and the CCL 1931 [SA] are less developed and do not have any exhaustive duty as such. This is due to the fact that the application of the English duty is exceptional and comes into operation only when there are circumstances under which the underwriter needs to make a post-formation decision which is essentially necessary for the future performance of the policy. It follows that if there is no need for the underwriter to make any decision as such, there will be no ground on which the application of the duty can be based. The same restricted application also exists under the CCL 1931 with the exception that the events to which it applies are restrictively designated.

Concerning the violation of the duty, since as a matter of fact each jurisdiction has its own approach to the application of the duty, it is not surprise to find that none of the three

legal systems has consistent and harmonised remedies for the duty's breach. In fact, remedies vary and depend on the province in which the duty is breached and the legal system under which it is discussed. But, it is very interesting to notice that while avoidance of the contract *ab initio* is almost a general remedy under the English law, it is only granted if there is fraud under the Saudi Arabian law and it does not seem to be available at all under the Egyptian law even if there is fraud. Also, the Egyptian law seems to be the only jurisdiction which allows the repudiation of the policy from the moment of the breach as a general rule. The only matter upon which the rules of all the three laws seem to have agreed is that innocent misrepresentation or non-disclosure in the claim's context is not actionable.

In conclusion, it must be admitted that, apart from the Egyptian duty whose scope and application seem to be rather consistent, the scope and precise application of the duty are matters which are still in doubt and unclear and awaiting further consideration and determination under the English law and unquestionably a major amendment under the Saudi Arabian law.

8.3. Reformative recommendations

As it has been indicated before, it is one of the main objectives of this thesis to consider how the doctrine of utmost good faith operates under the Saudi Arabian law, then to distinctly identify any deficiencies in its application and, as a final step, to modestly suggest some recommendations to assist the Reforming Committee in its attempt to develop the CCL 1931. Truly, as an old and out of date law, the CCL 1931 may have many deficient areas to be looked at. But, since it is not within the limited scope of this modest thesis to attempt making a comprehensive reform, this thesis will exclusively focus its attention on the development of those principles on which the application of the doctrine essentially depends.

8.3.1. The introduction of a general obligation to observe utmost good faith

It is one of the defects of the CCL 1931 that it has no single provision imposing a general obligation of utmost good faith under the umbrella of which all other principles operate. The main goal of the introduction of such an obligation will be to govern those situations where there is apparent bad faith on the part of the assured, but the application of s. 342 of the CCL cannot be invoked. An example of such a situation under the Saudi Arabian law will be when the assured intentionally refrains from disclosing a material fact which he is not obliged, according to the narrow duty of disclosure imposed by s. 342, to make the underwriter aware of. In order to make the introduction of this provision much easier, it is suggested that s. 17 of the MIA 1906 [UK] can be taken as an example.

8.3.2. The expansion of the scope of the duty of disclosure

The duty of disclosure is one of those crucially important areas in which there is a need for substantial modification. The Saudi Arabian legislator cannot reasonably expect that the underwriter is protected under the present state of law by merely imposing a misleading duty which only requires the disclosure of very limited material facts while leaving countless number of likely material facts outside its scope. Therefore, the duty of the assured should be broadened to be his duty to make full disclosure of those material facts which are within his knowledge and which are relevant to the risk being insured. In this respect, unlike the English duty, the scope of the proposed duty should be restricted to the disclosure of those material facts which are within the actual knowledge of the assured only. This will exclude from the ambit of the duty the disclosure of any material facts which the assured does not actually know, provided that they are not within the application of what it may be called *'turning a blind eye'* notion.

8.3.3. The reformulation of the duty to make accurate representations

Although that the application of the duty to make accurate representations enforced by s. 342 of the CCL 1931 [SA] seems to be satisfactory and in conformity with its counterparts embodied in ss. 20(1) of the MIA 1906 [UK] and s. 361 of the MTL 1990 [Egypt], the duty should be developed by having it expressed in clearer and more distinct terms than those contained in s. 342. In this regard, s. 20 of the MIA 1906 may be used as an illustration.

8.3.4. The imposition of the doctrine of utmost good faith on the assured's agents

The absence of any provisions dealing with the duty of the agent to make full and accurate disclosure to the underwriter when he effects the contract on behalf of the assured is also one of the most crucial deficiencies from which the CCL 1931 suffers. This, as indicated before, is appreciated in the light of the increasing trend in the field of marine insurance business that policies are usually effected through the modem of brokers. Although this lack of enactment is minimised to some extent by the rules of agency under the Shari'a law, the scope of the duty of disclosure is still not satisfactory. Therefore, a duty to make full and correct disclosure of all material facts should be imposed on the agent of the assured within the field of marine insurance. The ambit of material facts to be disclosed should encompass not only those communicated to him by his principal, but also those of their existence he is aware and regardless of whether they are known to his principal or not. Also, similar to the duty of the assured, actual knowledge is what should be regarded when judging the fulfilment

of the duty of disclosure of the agent. The terms of s. 19 of the MIA 1906 [UK] seems to be an appropriate instance for the introduction of this provision.

8.3.5. The development of the concepts of materiality and actual inducement

Although the subjective approach towards materiality adopted by the CCL 1931, which does not differentiate between materiality and the right of avoidance, may seem adequate from the actual underwriter's point of view, it may not seem so from the assured's. This is because such an approach will make the actual underwriter be the victim and the judge at the same time. No doubt, this will increase the number of cases in which careless underwriters will attempt to escape their liability by setting up the defence of material non-disclosure or misrepresentation. This will also encourage the business of bad underwriting to spread out rapidly. Therefore, in order to overcome these potential problems, it seems very vital that the CCL 1931 [SA] should adopt a similar approach to that adopted by ss. 18(2) and 20(2) of the MIA 1906 [UK] and so draw a distinction between the concept of materiality and the right of avoidance. In so doing, materiality should be objectively determined according to the decision of a prudent underwriter and the right of avoidance should not be granted unless the test of inducement is subjectively satisfied according to the judgment of the actual underwriter.

However, as far as the presumption of actual inducement is concerned, unlike the English law, the CCL 1931 [SA] should avoid introducing it to the application of the test, unless as an exceptional rule to be applied in very restrictive circumstances when for a reason or another, the actual underwriter is prevented from proving his actual inducement and the assured has no evidence to the contrary.

8.3.6. The development of the remedies of the doctrine's violation

Apart from the remedy of avoidance for material non-disclosure or misrepresentation which is satisfactory, the present system of the remedy of damages under the CCL 1931 [SA] is inconsistent and may lead to undesirable results. There is no justification for allowing the underwriter to forfeit the premium if the misrepresentation or non-disclosure was innocent and he suffered no loss. Also, there is no apparent ground why the application of fraud leading to the award of damages should be confined by s. 329 to the fraudulent disclosure of the value, quantity, or quality of the subject-matter insured and leaving other fraudulent facts to be dealt with and compensated by the general law. Any proposed development should not completely disallow the award of damages as it is the case under the MIA 1906 [UK] or generously grant it for any violation of the doctrine as it is the case under the MTL 1990

[Egypt]. Therefore, the CCL 1931 [SA] should first oblige the underwriter whenever he avoids the policy to pay the premium back, unless there is fraud. Secondly, the underwriter should not be allowed to claim damages for innocent misrepresentation or non-disclosure. Thirdly, damages should only be allowed if the underwriter suffered loss as a result of the assured's fraud. For this purpose, s. 329 should be expanded in scope in order to include other facts besides the value, quantity, or quality of the subject-matter insured.

8.3.7. The introduction of a coherent continuing doctrine of utmost good faith

Due to the fact that the application of the post-contractual duty is very limited and only operates in respect of so restrictive cases and that the remedies available for its breach are not in harmony with each other and, therefore, do not offer the required protection to the underwriter, it needs to be substantially developed. Any attempt to reform the duty should bear in mind that the purpose of the duty after the conclusion of the contract is not to impose a similar duty as that existing before its conclusion, but it is rather to ensure that the contract which was validly concluded is performed in good faith. Therefore, in order to fulfil this aim and impose a balanced duty, the following matters should be taken into account. As far the scope of the duty is concerned, similar to s. 361 of the MTL 1990 [Egypt], the CCL 1931 [SA] should require the assured during the performance of the contract to communicate to the underwriter any change increasing the nature of the insured risk and which may greaten the responsibility of the underwriter. It should also be the duty of the assured to act with utmost good faith when any amendment or extension to the insured risk is intended and when any settlement of losses is to be agreed. Moreover, the assured should abstain from making false claims and if a claim for loss is presented, it must be presented in good faith. The duration of the duty should cover the period starting from the moment at which the contract is concluded until the expiry of the contract or a claim for loss is honestly made. As to the tests of materiality and inducement, there is no obvious reason why they should not apply to the post-contractual duty as they do to the pre-contractual one.

As far as remedies are concerned, if the assured was in breach of his duty to inform the underwriter of a change increasing the risk insured, like ss. 348(1) of the MTL 1990 [Egypt], the remedy should be the repudiation of the contract from the time of the breach onwards. If the assured innocently presented a false claim, his claim should not be affected and he should get the actual amount of his loss. But, if the claim is fraudulent, the remedy should be the avoidance of the whole contract. Also, if the consent of the underwriter to amend, extend or settle a claim was obtained by non-disclosure or misrepresentation, the remedy should be the avoidance of the amendment, extension or settlement alone. On the

other hand, damages should only be available to the underwriter if he sustains loss as a result of the assured's fraud.

8.4. Final remarks

It must be admitted that although each of the three legal systems has its own approach towards the doctrine of utmost good faith, the manner in which the doctrine operates under each of them is in general the same and in some matters, such as the duty not to make misrepresentation, is identical.

It is hoped that the comparative approach utilised in this thesis has been very helpful in illustrating the similarities and differences amongst the three jurisdictions and will provide the would be reader of this thesis with a clear idea of the application of the doctrine of utmost good faith in one significant area away from stereotyping and misunderstanding.

Admittedly, in attempting to frame or reform a law, comparison with foreign laws is always an essential branch of the operation. It does not only enable one to fill up gaps and to form an opinion on doubtful propositions, but it also enables him to see what are the really fundamental propositions of his own law, which require to be put in the forefront.

However, the comparison has been particularly beneficial for the Saudi Arabian law itself as it provides an excellent opportunity to discover more of its special features. It is one of the aims of comparative studies that one could appreciate his own legal system before discovering other systems. Hence, it is only through comparison that the advantages of any legal system can be appreciated and its disadvantages can be realised.

Therefore, it is hoped that this research has been able to offer an objective analysis of the approaches adopted by the English, Egyptian and Saudi Arabian laws towards the doctrine of utmost good faith in the kingdom of marine insurance and to bring to light their pitfalls and potentials. It is also hoped that it provides a clear picture of one important area of the CCL 1931 [SA] to Western readers away from misconception and stereotyping. It is optimistically expected that this thesis will serve the current and future Saudi Arabian reformative attempts with inspiration for the development and improvement of the CCL 1931 [SA] in a significant area as the present one. It is finally anticipated that this research would only be the first step which would be followed by further studies in this and other fields of marine insurance law.

Appendix [1]

The provisions regulating the doctrine of utmost good faith under the English MIA 1906

Disclosure and Representations

S. 17. Insurance is uberrimae fidei

"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."

S. 18. Disclosure by assured

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

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

(3) *In the absence of inquiry the following circumstances need not be disclosed, namely:*

> ***(a)*** *Any circumstance which diminishes the risk;*
>
> ***(b)*** *Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;*
>
> ***(c)*** *Any circumstance as to which information is waived by the insurer;*
>
> ***(d)*** *Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.*

(4) *Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.*

(5) *The term 'circumstance' includes any communication made to, or information received by, the assured."*

S. 19. Disclosure by agent effecting insurance

"Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-

(a) *Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and*

(b) *Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."*

S. 20. Representations pending negotiation of contract

(1) *"Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.*

(2) *A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.*

(3) *A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.*

(4) *A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.*

(5) *A representation as to a matter of expectation or belief is true if it be made in good faith.*

(6) *A representation may be withdrawn or corrected before the contract is concluded.*

(7) *Whether a particular representation be material or not is, in each case, a question of fact."*

S. 21. When contract is deemed to be concluded

"A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract ..."

Appendix [2]

The provisions regulating the doctrine of utmost good faith under the Egyptian MTL 1990

S. 347

(1) *"The insurer may ask for a court ruling which invalidates the insurance deed if it is established that the insured party has submitted incorrect data, however, not in bad faith, or failed to submit the data as related to the insurance thus held, such that the insurer, in both cases has estimated the risk at less than it really is.*

(2) *Invalidating the insurance deed shall take place even though the incorrect data or refraining from submitting the data does not have any link with the damage and harm occurred to the object covered by insurance.*

(3) *The court, with due consideration to all conditions, may issue a ruling in favour of the insurer against the insured party, in the cases specified in the foregoing two clauses, for payment of an amount equal to the insurance premium if the insurer can establish there has been an ill will on the part of the insured party, or the payment of an amount equivalent to half that premium if no ill will has been established."*

S. 348

(1) *"The insured party shall notify the insurer of all conditions coming up during the validity of the insurance, which are likely to increase the risk as covered by the insurer, providing such notification shall take place within three working days from the date the insured party learns thereof. If the notification is not made within that date, the insurer may then repudiate the contract.*

(2) *If the notification takes place within the time prescribed in the foregoing clause, and it transpires that the danger so increased has not been a result of an act by the insured party, the insurance shall remain valid, however, against increasing the insurance premium. In case the increase in the risk is resulting from an act of the insured party, the insurer may then repudiate the contract within three working days from the date he is notified of the increased risk, or maintain the insurance deed along with requiring an increase in the insurance premium against increasing the risk. In the former case, the court may, upon the request of the insurer, pass a ruling for paying amount equivalent to the insurance premium."*

S. 350

(1) *"An insurance contract concluded after deterioration and waste of the objects insured thereby, or after the arrival of such objects shall be null and invalid, if it is established that news about the arrival or destruction of such objects had reached the contract signing place or the place where the insured party or insurer is found, before the insurance contract was signed.*

(2) *If the insurance contract is concluded on the proviso of good or bad news, it shall not be invalidated unless the insured party is established to have been aware personally, and before signing the insurance contract, of the destruction and waste of the object insured under the contract, or that the insurer was personally aware, before concluding the contract, of the arrival of the object insured thereby."*

S. 352

(1) *"Except for deception and fraudulent cases, if the risk is covered by several insurance deeds, whether they were concluded on the same or different dates, with the total amount of insurance as mentioned in these contracts, being more than the value of the object insured thereby, all insurance contracts as concluded thereof, shall be considered valid, and the insured party may then have remedy thereof within limits of the damage, providing it does not exceed the value of the object insured thereby-over whoever he chooses of the multiple insurers, without any joint liability among them, in the ratio of the insurance amount wherewith they are each committed to the real value of the object insured thereby.*

(2) *An insured party who claims a settlement of the damage caused thereto shall reveal to the insurer all other existing insurance contracts that he learns of, otherwise his claim shall not be acceptable."*

S. 361

"The insured must pay the insurance premium and expenses at the place and time agreed upon. He shall exert a reasonable degree of care towards preserving the object insured, and shall give correct data, in signing the contract, on the conditions and status of which he is aware and which are considered sufficient to enable the insurer to estimate the risks as covered with insurance. The insured shall also apprise the insurer, during the insurance validity, of all increase in such risks, within the limits of his awareness thereof."

S. 369

"When the insured advices the insurer about his desire to give up the object insured, he must declare and give a statement about all the insurance policies and contracts which he has concluded or which is aware of and those which he knows about."

S. 370

"If the insured gives a mala fide statement non-conforming to the truth in connection with the accident, and a harm results therefrom to the insurer, a court ruling may be pronounced and passed to extinguish his right to the insurance amount, wholly or partly."

Appendix [3]

The provisions regulating the doctrine of utmost good faith under the Saudi Arabian CCL 1931

S. 325

"An insurance policy may be either official or made between both parties only, and prepared without leaving blank spaces and stating the following particulars: ***(1)*** *the year, month, day and hour of signature and sealing;* ***(2)*** *the name, surname and domicile of the insured, and the capacity in which he signs as owner or commission agent;* ***(3)*** *the nature and price or estimated value of the insured goods and items, and the amount of the insurance;* ***(4)*** *the risks covered by the insurer,* ***(5)*** *the time and date of commencement and expiry of the risks covered with regard to the insurer;* ***(6)*** *the insurance consideration;* ***(7)*** *the name of the master and name and name and type of the vessel;* ***(8)*** *the name of the place from which the goods are, or will be, shipped;* ***(9)*** *the name of the port to which the vessel has proceeded; or will proceed;* ***(10)*** *the ports and quays from which the vessel shall load or unload goods, or which the vessel will enter or approach;* ***(11)*** *the fact that both parties have agreed to refer any dispute that may arise to arbitration, if applicable, for settlement;* ***(12)*** *all conditions agreed between the parties."*

S. 329

"If trickery is used in stating the value of the insured goods and items, or if false statements are made as to the quantity and amounts, or if a forgery is committed in the shipping documents, the insurer may require that an inspection be made on the said goods and an assessment of the value thereof be made; in addition, he may bring a civil action against the insured for damages, and a prosecution for committing the felony or misdemeanour."

S. 330

"If the insured does not know the name of the vessel carrying the goods and items which he is expecting from a foreign country, he shall be relieved from giving the name of the vessel and the master; however, he shall mention this fact in the document and quote the date of the last letter and the authorised signature on the order in which case the insurance shall be for a certain specified time."

S. 331

"If the insured does not know the kind of goods and value of the items consigned to him, he may have them insured in their general name, ie. as goods only, without mentioning or otherwise showing such goods and items in the document, but he must state the name of the consignee or person who is to receive the goods, save when there is a condition to the contrary in the policy; such insurance of a general nature may not be made to cover gold and silver coins or ingots, diamonds, pearls, jewellery or military equipment."

S. 342

"If the insured keeps silent about or gives different particulars than those he should mention in the insurance policy, or if the particulars do not conform to those shown in the bill of lading, and if the insurer discovers the true nature thereof, regardless of whether the risk is not as grave as that which appears to result from such silence or statement, or the risk, other than supposed risk results, which is a risk nullifying the policy or which would have resulted in the policy being made on different terms, the insurance policy made out shall in respect to the insurer be deemed to be null and void; such silence, or false statement or difference shall cause the insurance policy to lapse, even though an event occurs to cause the loss and perishing of the insured items."

S. 349

"The particulars of perishable items, such as wheat, and soluble items, such as salt, and items that are subject to seepage, such as honey and vinegar, shall be so stated in the bill of lading, failing which the insurer shall not be liable for any loss or damage to such items, save when the person taking out the policy was unaware of the kind of goods shipped at the time of preparing the bill of lading."

S. 359

"If insurance is purchased after the perishing and loss of the goods or after reaching the agreed destination, and the insured knows that they had perished and were lost, or if the insurer is not aware that the goods have reached their destination, or if it is probable that the insured had received news of their loss and perishing, or the insurer had received news that the goods have reached their destination, before they sign the policy, such insurance shall be deemed null and void."

S. 360

"If the vessel is lost or perished and it is ascertained that news could have come from the place where the vessel perished or arrived, or the place which receives news of her perishing, to the place where the insurance policy had been made before signing the same, the probability set down in the preceding Article shall stand."

S. 361

"If the insurance is conditional on good or bad news, the probability set down in the preceding Articles shall not stand and the said policy shall not be rescinded unless it is proved that the insured was aware of the loss of the insured items or if news is received by the insurer about the vessel's arrival at destination, before the policy is signed."

S. 363

"If the vessel sinks as a result of a sea disaster or if it strikes land and suffers breakage or becomes unseaworthy or if it is captured by enemies or pirates, or confiscated by a foreign state or is arrested before the commencement of the voyage by an order of the Arab Hijazi Government or if the insured items perish or are damaged and the amount of the losses equals at least three-quarters of the insured amount, such insured property and items may be abandoned by the owner in favour of the insurer; however, neither the vessel nor the goods may be abandoned unless the operation of perils of the sea as stated in Article 319 is proved."

S. 366

"Abandonment of items to the insurers shall be effected within six months, one or two years, according to the places that will be cited hereinafter, ie. if the vessel is lost and perishes in the ports or coasts of Europe, Asia or Africa and in the Black and Mediterranean Seas: the vessel or insured cargo shall be abandoned within six months as of the date on which the insured becomes aware of the same or from the date of receiving the news of sending the vessel to the foregoing ports and places, if usurped or confiscated therein; but if the vessel is lost and perishes or if usurped and confiscated on the Azores Coast, the Canary Islands, Maryland, West Africa and East America: abandonment shall take effect within one year from the date of learning of the loss and dispatch to said places; if the vessel is lost or confiscated in other remote places of the earth, abandonment shall be within two years of the date of learning of the loss and dispatch to such places; after the expiry of the foregoing time limits, abandonment by the insured shall not be accepted."

S. 367

"The occurrence of risks necessitating the abandonment of the insured items or that are deemed as maritime disasters shall, if affecting the insurer, be officially reported to him by the insured person within three days of receiving notice thereof."

S. 372

"On exercising the abandonment, the insured person shall give particulars of all insurances made by him directly or through intermediaries or insurances which he ordered to be made on the vessel or the goods, as well as of all marine loans obtained by him; failing which, the time limit to be considered, from the date of the abandonment case for recovering the prescribed insurance amounts, shall be suspended until the date of giving the foregoing particulars, but in order to do so, it shall not be necessary to fix the time prescribed for submitting the petition of the abandonment case."

S. 373

"If in showing the foregoing particulars the insured practises fraud, he may not take advantage of the insurance, and shall further be required to repay any marine loans he may have obtained, even though the vessel had been lost, usurped or seized."

S. 375

"If the insurance policy does not fix a time for payment of the insured sums, the insurer shall pay the said sums within three months of the notification date of the abandonment; if he fails to pay the same, he shall have to pay the proper profit as well and the abandoned items shall be deemed to be a lien on such debts."

S. 376

"Before bringing an action to recover the insurance amounts, the insured shall communicate to the insurer all documents and other things that prove the shipment and the occurrence of the loss."

S. 380

"If the vessel is seized and arrested by a state, the insured shall communicate the fact to the insurer within three days of his becoming aware of the fact; if the seized items shall have been seized and arrested in the seas of Europe, the Mediterranean Sea or the Baltic, they may be abandoned to the insurer within six months; if the same takes place in places farther than these places, the abandonment time limit shall be one year; said time limits to run from

the date on which notice of the seizure and arrest is given; if the seized items are perishables, the time limits shall be reduced to one and a half months, in the first case, and to three months, in the second case."

S. 383

"If experts certify that the vessel is not capable of making the voyage, the person who insured her cargo shall communicate this fact to the insurer within three days of becoming aware of the same."

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