REFORM OF THE DOCTRINE OF UTMOST GOOD FAITH: A COMPARATIVE STUDY BETWEEN THE UK AND SAUDI ARABIA

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ABSTRACT

In the UK and Saudi Arabia, it is necessary for the contracting parties in insurance contracts to comply with the requirement of the doctrine of utmost good faith. In recent years, the doctrine of utmost good faith and the mutual duties of the contracting parties have developed in different ways in each jurisdiction. Both jurisdictions provide consumer protection in insurance markets by *Consumer Insurance (Disclosure and Representation) Act* 2012 in the UK and Insurance Consumer Protection Principles 2014 in Saudi Arabia. However, there are many differences between the conduct of each jurisdiction since the coming into force of the *Insurance Act* 2015 in the UK, which revolutionised the insurance law in several key areas. This thesis particularly aims to critically analyse the reform of the doctrine of utmost good faith and looks at how the current reform impacts on the interpretation of this doctrine between the UK and Saudi jurisdictions. This study critically analyses the insureds' pre-contractual duties for consumers and businesses in the UK with a comparison to Saudi jurisdiction. Uncertainty of mutual duties especially for specific insurers' pre and post-contractual duties and the insureds' post-contractual duties can easily be found in both jurisdictions. Accordingly, this study critically analyses the mutual duties of insurers and insureds. Finally, this thesis intends to develop recommendations to fill legal gaps, significantly, for the Saudi jurisdiction in respect of the doctrine of utmost good faith which should respectively contribute to developing insurance law in Saudi Arabia. Several outcomes for the UK jurisdiction are produced to contribute towards developing insurance law with respect to the doctrine of utmost good faith.

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Insurance Act 2015, c. 4

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Unfair Terms in Consumer Contracts Regulations 1999, No. 2083

USA

The Uniform Commercial Code 1951

LIST OF ABBREVIATIONS

ABI	Association of British Insurers
AFR	Anti-Fraud Regulation
AXA	AXA Corporate Solutions Assurance
CCL	Commercial Court Law
CHIL	Cooperative Health Insurance Law
CIDRA	Consumer Insurance (Disclosure and Representations) Act 2012
CRIDV	Committees for Resolution Insurance Disputes and Violations
CSIS	Council of Senior Islamic Scholars
FOS	Financial Ombudsman Service
IA	Insurance Act 2015
ICA	Insurance Contracts Act 1984 (Cth)
ICPP	Insurance Consumer Protection Principles
ICOBS	Insurance Conduct of Business Sourcebook
IFA	Islamic Fiqh Academy
IMCCR	Insurance Market Code of Conduct Regulation
IRCHIL	Implementing Regulation of Cooperative Health Insurance Law
IRLSCIC	Implementing Regulation of the Law on Supervision of Cooperative Insurance Companies
IUA	International Underwriting Association
LSCIC	Law on Supervision of Cooperative Insurance Companies
MIA	Marine Insurance Act 1906
OIAR	Online Insurance Activities Regulation
PCSRI	Permanent Committee for Scholarly Research and Ifta'
RSA	Royal & Sun Alliance Insurance plc
SAMA	Saudi Arabian Monetary Authority
SR	Saudi Riyal
UCMIP	Unified Compulsory Motor Insurance Policy
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999

CHAPTER 1

INTRODUCTION

1.1. Background

Insurance contracts are based upon the doctrine of utmost good faith, which imposes duties on both parties but more significantly on insureds, prior to the conclusion of the contract and during the performance of the contract. The insured was assumed to voluntarily disclose material facts to the insurer before the conclusion of the contract. The insurer was not expected to play any positive role in respect of the insured's compliance with duty of disclosure, for example, by asking specific questions. Insurance contract law was crticisied as 'archaic, unclear, and unfair'[1]. Another criticism was the harshness of the insurer's remedy of avoidance of the contract for a breach of the doctrine of utmost good faith[2] especially for innocent insureds.[3] It was also described as a 'draconian'[4].

The case law[5], literature[6], academic discussions[7], a number of the Law Commission Reports[8], and consumer association[9] had criticised the regime in the UK and called

[1] Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 45. See also, *Drake Insurance plc v Provident Insurance plc* [2004] QB 601.

[2] Hasson R, 'The Doctrine of *Uberrima Fides* in Insurance Law: A Critical Evaluation' (1969) 32 MLR 615. See also, *Cox v Bankside Members' Agency Limited* [1995] 2 Lloyd's Rep 437.

[3]The Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (Law Com No 182, Scot Law Com No 134, 2007).

[4] *Drake Insurance plc v Provident Insurance plc* [2004] QB 601.

[5] *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 486 (CA) 491, and *Drake Insurance plc v Provident Insurance plc* [2004] QB 601.

[6] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017); Peter MacDonald Eggers & Patrick Foss, *Good Faith and Insurance Contracts* (LLP Reference Publishing, 1998); John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011); and John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016).

[7] Howard Bennet, 'Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law' [1999] LMCLQ 165; John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60(1) CLP 338; Hasson R, 'The Doctrine of *Uberrima Fides* in Insurance Law: A Critical Evaluation' (1969) 32 MLR 615; and John Lowry & Philip Rawlings, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099.

[8] For example, The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353, Scot Law Com No 238, 2014).

[9] National Consumer Council, *Insurance Law Reform: the consumer case for review of insurance law* (May 1997).

to have legislative reform of sections 17-20 of *Marine Insurance Act* 1906 (MIA). Discussions about the Law Commissions proposals were undertaken by Soyer[10], Eggers[11], and Merkin and Lowry[12]. The attempts to reform the law were to recognise the growing need to have a satisfactory and fair result. Therefore, insurance contracts law has developed in recent years to accommodate modern changes through the coming into force of specific legislation for consumer insurance, *Consumer Insurance (Disclosure and Representations) Act* 2012 (CIDRA), and business insurance, *Insurance Act* 2015 (IA).

It is important to highlight that the wording of s 17 of MIA is not limited to only pre-contractual duties; but the extent to which the doctrine of utmost good faith includes post-contractual duties is questionable. The post-contractual duties were acknowledged in case law[13], by the Law Commissions[14], and in academic debates[15]. Both CIDRA and IA fail to include any provisions covering post-contractual duties except fraudulent claims by IA. The basis of fraudulent claims and related remedies had been discussed in case law[16], by the Law Commissions[17], and in academic discussions[18]. After IA, there is a separation between fraudulent claims and the doctrine of utmost good faith.

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[10] Baris Soyer, **'**Reforming Pre-Contractual Information Duties in Business Insurance Contracts: One Reform too Many?' (2009) 1 JBL 15; and Baris Soyer, 'Reforming the Assured's Pre-Contractual Duty of Utmost Good Faith in Insurance Contracts for Consumers: Are the Law Commissions on the Right Track?' (2008) 5 JBL 385.

[11] Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211.

[12] Robert Merkin & John Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' (2008) 71(1) MLR 95; and John Lowry 'Whither the Duty of Good Faith in UK Insurance Contracts' (2009) 16(1) UCILJ 97.

[13] For example, *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437; *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others (the star sea)* [2003] 1 AC 469; and *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* (*The Mercandian Continent*) [2001] CLC 1836.

[14] The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010); and the Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues, A Joint Consultation Paper* (Law Com CP No 201, Scot Law Com DP No 152, 2011).

[15] Baris Soyer, **'**Continuing Duty of Utmost Good Faith in Insurance Contracts: Still Alive?' [2003] LMCLQ 39; and John Lowry & Philip Rawlings 'Insurers, Claims, and the Boundaries of Good Faith' (2005) 68 MLR 82.

[16] For example, *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others (the star sea)* [2003] 1 AC 469; *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209; and *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437.

[17] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353, Scot Law Com No 238, 2014).

[18] John Lowry & Philip Rawlings 'Fraudulent Claims: Framing the Appropriate Remedy' [2006] JBL 338.

After the coming into force of CIDRA and IA, there is a significant need to analyse and critique the current law in the UK to explore the changes in this area of law. Academic debates consider many significant aspects especially in respect of IA, as IA leads the main changes in the insurance law. Numerous academic authors consider the meaning of the doctrine of utmost good faith[19], pre-contractual duties in business insurance[20], consumer insurance[21], fraudulent claims[22], contracting out and basis of contract clauses[23]. Significantly, several writings have been updated to recognise the current changes in the law.[24]

Insurance law is one of the most controversial areas of contract law in Saudi Arabia. Insurance contracts are allowed but based on different premises. In Saudi jurisdiction which applies Sharia, Takaful or cooperative insurance is permitted only and conventional insurance is prohibited. Discussion of the doctrine of utmost good faith in insurance contracts is rarely discussed in Saudi insurance literature, and the lack of academic literature in respect of insurance law, generally, is remarkable.[25] Therefore, to a limited extent, this study will examine other Arab legal literature.

The growth of the insurance sector in Saudi Arabia is noticeable. The Saudi Arabian Monetary Authority (SAMA) is controller of licensed financial institutions including insurance and re-insurance companies, and SAMA is deemed to be responsible for the insurance sector. SAMA issues an annual report regarding the size of the insurance industry in Saudi Arabia. The latest published report in 2017

[19] Baris Soyer, 'Mapping (Utmost) Good Faith in Insurance Law- Future Conditional?' [2016] Law Q Rev 132, 618; Özlem Gürses, 'What Does 'Utmost Good Faith' Mean?' (2016) 27 Insurance Law Journal 124; and Yong Qiang Han, 'Good Faith in Insurance Law: General and Independent, Not a Duty but an Interpretative Principle' (2016) 28 Insurance Law Journal 95.

[20] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017); Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004; and Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017).

[21] Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013).

[22] Philip Rawling & John Lowry, 'Insurance Fraud: The "Convoluted and Confused" State of the Law' [2016] Law Q Rev 132.

[23] James Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) 27 Insurance Law Journal 247.

[24] Peter MacDonald Eggers & Simon Picken, *Good Faith and Insurance Contracts* (4th edn, Informa Law from Routledge 2017); Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017); and John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015).

[25] Richard Price & Andreas Haberbeck, *The Maritime Laws of the Arabian Gulf Cooperations Council States* (Graham and Trotman 1986).

indicated that the value of subscribed insurance premiums in the Saudi insurance market was 30.855 billion Saudi Riyal (SR), about £5.7 billion.[26] The report showed that health insurance was the largest active area accounting for 60.5% of the insurance industry, 18.630 billion SR, about £3.497 billion.[27] This clearly demonstrates the size of the Saudi insurance industry, which requires efficient laws and regulations.

The importance of this study is established through the following points. In 2014, Insurance Consumer Protection Principles (ICPP) were applied by SAMA, and, in 2017, decisions of the Committees for Resolution Insurance Disputes and Violations (CRIDV) were first published[28], no other Saudi study has been conducted to study the law of consumer insurance in Saudi Arabia, on the one hand, and on the other hand, to analyse and reference a large number of CRIDV decisions. The literature and the academic studies usually focus on studying the reasons behind the prohibition of conventional insurance and permitting cooperative insurance.[29]

Accordingly, the significance and the value of conducting this study is obvious. On the one hand, this thesis is going to fill different gaps in the law and its analysis and the contribution of this study shall be essential, particularly, for Saudi literature, which has a significant and remarkable lack in legal and academic up to date sources.

On the other hand, by comparing the Saudi position to the UK insurance law after the UK's reform of the doctrine of utmost good faith will be important. As the UK's reform in some areas is very clear and straightforward, the uncertainty of other areas in relation to the interpretation of the doctrine of utmost good faith, the insurers' duties, the insured's post-contractual duties, contracting out, and remedies can be easily seen. Several academics have tried to clarify the uncertainty of the recent reform. However, the importance of conducting this study is because this study

[26] Saudi Arabian Mandatory Agency, 'Saudi Insurance Market Report' (2017) <http://www.sama.gov.sa/ar-sa/EconomicReports/AnnualReport/التقرير%20السنوي%20الثالث%20والخمسون.pdf> accessed 1st May 2018.
[27] Ibid.
[28] Committees for Resolution Insurance Disputes and Violations, 'Committees Decisions' <http://www.idc.gov.sa/en-us/CommitteesDecisions/Pages/Riyadh.aspx> accessed 1st May 2018.
[29] Mohammed Ahmed Alsaleh, *Altameen Bain Alhazr O Alebaha* (Al-Riyadh 2004); Mohammed AlJurf, *Altameen mn Manzor Islami* (King Abdul-Aziz University 2007); and Mohammed AlJurf, *Altameen O Altakaful: Bain Alsharia O Alqanoon* (Dar Alqahira 2010).

focuses in depth on s 17 of MIA and examines the role of the doctrine of utmost good faith in all related aspects. It provides detailed discussions about the possible interpretation of the doctrine of utmost good faith by referencing modern cases, literature, and other commonwealth jurisdictions such as Canada, Australia, and New Zealand. Accordingly, this study can add valuable analysis of insurance law in the UK.

1.2. Aim and Objectives

There are many challenges for Saudi Arabian insurance laws and regulations, especially, regarding the interpretation of the doctrine of utmost good faith and the level of clarity, limitations, and remedies upon the breach of a duty of utmost good faith. Significantly, these challenges have an impact on the interpretation of insurance cover and contractual obligations on the one hand, and on the other hand, the continuity of insurance contracts.

Accordingly, this thesis aims to provide a comparative analysis of the doctrine of utmost good faith and mutual duties of the insurer and the insured between the UK and Saudi insurance laws and regulations. Furthermore, this comparison will contribute to the development of recommendations for Saudi insurance laws and regulations in respect of the doctrine of utmost good faith. To achieve this aim, examining the UK experience as a world leading expert would be valuable guidance for Saudi Arabia especially where the Saudi experience remains modest[30] by comparison with the UK. Making such a vague doctrine understandable and accessible would help CRIDV interpret this doctrine and related duties properly, and clarifying this doctrine to the contracting parties would allow them to comply with it and its associated obligations. This should be done taking into account the conflict between the different Islamic schools in this field. Another contribution this work will make is to assist the legislator in order to make insurance law and regulations more clear, specific, certain, and predictable, which would add value to the Saudi insurance industry as a whole.

[30] It is important to highlight that the first official insurance law which is regulated the modern insurance market is the Law On Supervision of Cooperative Insurance Companies' By the Royal Decree M/32 dated 1/8/2003; and the Implementing Regulations are promulgated by the decision of the Minister of Finance No 569/1 dated 21/4/2004.

The objectives of this study to achieve this comprehensive aim are, as follows: Firstly, to analyse in-depth the concept, limitations, and possibilities of the doctrine of utmost good faith in both the UK and Saudi Arabia. Secondly, to illustrate and analyse criticisms of the doctrine of utmost good faith in the UK and Saudi insurance laws and regulations. Thirdly, to examine the difference between the impact of the doctrine of good faith and the doctrine of utmost good faith in order to find which one should be applied. Fourthly, to analyse the differentiation between consumer and business insurance in the UK, the generated duties, and related issues of each type of insurance contract. This should significantly help develop the main recommendations for Saudi insurance law and regulations especially in regard to the distinction between business and consumer insurance. Fifthly, to examine and analyse closely the possible legal remedies available upon breach of the doctrine of utmost good faith in the UK and Saudi Arabia. Finally, to develop recommendations for Saudi insurance laws and regulations based on the in-depth analysis and comparison with the UK insurance laws.

1.3. Scope and Research Questions

To achieve the proposed aim and objectives, this study is limited to insurance contract law and not general contract law, nor the historical aspects of utmost good faith, or the general principles in Islamic law including the conflict around the acceptance of conventional insurance contracts. However, providing brief discussions about these aspects is necessary for the following chapters' analysis. There is a further limitation with reference to Islamic law, in addition, by not identifying all Islamic madhabs and schools except for the *Hanbali* madhab that is generally accepted in Saudi Arabia.

The focus of the research is on the recent reform of the doctrine of utmost good faith in insurance contracts and recent applications in both the UK and Saudi Arabia for insurers and insureds but it is further restricted to disregard the intermediaries' rules, third parties, and changes in specific type of insurance contracts such as life insurance and the case of group insurance.

These limits are set to allow discussion of the main thesis questions that are:

1. What are the meaning, limitations, exclusions, and possibilities of the doctrine of utmost good faith in the UK and Saudi insurance laws and regulations?

2. What are the major criticisms of the doctrine of utmost good faith in the UK and Saudi laws and regulations?

3. How do the UK and Saudi insurance laws and regulations distinguish between the doctrine of good faith and the doctrine of utmost good faith?

4. What are the legal remedies for breach of the doctrine of utmost good faith in the UK and Saudi laws and regulations?

5. Who is the consumer in the UK insurance Law? What is the duty of reasonable care to not make misrepresentation and its limitation? How do Saudi regulations apply consumer insurance?

6. What are the similarities and differences between consumer and non-consumer insurance contracts in related to the doctrine of utmost good faith?

7. What is the position of the duty of disclosure, misrepresentation, and the duty of fair presentation in business insurance in the UK and Saudi Arabia?

8. Is there any need to differentiate between provisions of consumer and non-consumer insurance contracts in Saudi Arabia?

9. What are the insured's post-contractual duties in both the UK and Saudi Arabia? What are major criticisms of these duties?

10. What are the insurer's pre-contractual duties in the UK and Saudi jurisdictions? What are major criticisms of these duties?

11. What are the insurer's post-contractual duties in both the UK and Saudi Arabia? What are major criticisms of these duties?

12. How can Saudi laws and regulations learn lessons from the UK approach by moving toward consumer and business insurance and away from applying principles to binding provisions?

1.4. Methodology and Structure

This study is doctrinal. This is because it focuses on the doctrine of utmost good faith in insurance law in both the UK and Saudi Arabia. According to Chynoweth, doctrinal research is 'concerned with the formulation of legal 'doctrines' through the analysis of legal rules… deciding on which rules to apply in a particular situation is made easier by the existence of legal doctrines'[31]. Further, the role of formulations is to 'clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules'[32]. From another perspective, it was clarified that doctrinal study was where 'arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications'[33].

Since the aim of this study is to develop recommendations mainly for Saudi insurance law by learning lessons from the UK experience and to propose recommendations for the UK insurance law in respect of the doctrine of utmost good faith and related duties, the study employs a critical analytical comparative law methodology. Terry Hutchinson illustrated this method, as follows[34]:

> Doctrinal researchers have tended to continue to work within the parameters of the discipline in order to make recommendations for reform. They have confined their research to a critical analysis… The essential features of doctrinal scholarship involve 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'… This 'conceptual analysis critique' is based on an understanding of the rules of precedent between the court jurisdictions, the rules of statutory interpretation.

The comparative method is important to show how various jurisdictions deal with the same legal concept. According to the analysis of Hoecke, who examined the differences between comparative legal methods, the analytical comparative method 'studied the logical relation between the different sub-concepts of 'right' and other concepts, such as 'duty'…For example, if one has the right to do A, there can be no duty not to do A'[35]. This will be followed in this study as it examines and analyses the doctrine of utmost good faith and other related concepts and duties in both

[31] Paul Chynoweth, 'Legal Research' in Les Ruddock & Andrew Knight (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29.
[32] Ibid.
[33] Rob Van Gestel, & Hans-Wolfgang Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What about Methodology?* (European University Institute Working Papers Law 2011) 26.
[34] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) Erasmus Law Review 130, 130 - 131.
[35] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [December 2015] Law and Method.

systems. Related legal concepts and duties are deducted from laws, regulations, and judicial decisions; then, the researcher shall compare, analyse and assess similarities and differences to reach the objectives of this study.

It is understandable choice to compare the UK and Saudi Arabia. In comparing the Saudi and the UK jurisdictions and analysing in-depth the impact of the related concepts and duties especially after the modern reform will contribute to filling legal gaps that have been recognised. This is especially because the common law has not yet dealt in-depth with the modern reform based on enforcing CIDRA and IA in the UK. Many issues are left to the common law which needs yet to be further analysed by academics and practitioners. Therefore, this present analysis will be useful for proposed further solutions on issues that CIDRA and IA are silent about such as the post-contractual duties of the insurer and insured. However, the strength of the UK experience in the insurance market remains extant and the wealth of this experience can be found through its case law and academic literature. Saudi Arabia would gain benefits from both analysing its own insurance law and regulations as there is a lack of Saudi academic literature in insurance law, and from analysing the UK insurance law to learn from the UK experience. This would fill gaps that are recognised in this area of law for all academics, practitioners, regulators, and supporting committees' members.

Since this study is a doctrinal and comparative study, it is advised to start with primary resources including legislations, courts decisions, and secondary resources including academic books and articles.[36] Accordingly, this study is going to analyse and use primary resources such as laws, regulations, judicial decisions, Law Commissions reports, the Holy Quran; and secondary resources including academic literature that are elaborated in books and journal articles. The researcher's opinions and analysis are employed through this work. Other commonwealth jurisdictions such as Canada, Australia, and New Zealand shall be used to interpret the common law position of the doctrine of utmost good faith and those jurisdictions are provided as examples to share a similar experience to the UK insurance law. Choosing those jurisdictions is supported as well by the Law Commissions which

[36] Mathias Siems, *Comparative Law* (Cambridge University Press 2014).

explored and used them in their reports through the last reform regarding the interpretation of the doctrine of utmost good faith and the related duties.[37]

This methodology shall achieve the aim of the thesis by investigating how Saudi insurance law can learn lessons from the UK experience. Analysing the UK insurance law will contribute towards finding some answers and filling some legal gaps in the UK which have been generated after the coming into force of CIDRA and IA. In its conclusions, this work shall contribute to academic knowledge by giving a significant analysis for each jurisdiction on the reform of the doctrine of utmost good faith, focusing on s 17 of MIA in the UK and related duties. Finally, this work is going to give recommendations for Saudi insurance law to develop properly.

According to Siems, four steps are suggested to be followed in a comparative analysis study that are: (1) start with determining research questions and the choice of legal systems, (2) describe the laws of these countries, (3) compare and find similarities and differences, and, (4) critically evaluate the results to make possible recommendations.[38] Accordingly, to achieve the purpose of this study, the structure of this work is divided into nine chapters.

Chapter one, this chapter, provides an overview of the research, the significance of the study, aims, objectives, research questions and methodology.

Chapter two will explore the background of the UK and Saudi insurance laws by looking at how reform has been conducted in both jurisdictions. Also, it will provide insight about the Saudi legal structure and the accepted insurance model in Saudi Arabia. The importance of this chapter is that, as is illustrated by Siems, it is interesting to consider the sources of law upon which the legal rules are based and differences in legal styles and concepts.[39]

Chapter three looks at the doctrine of utmost good faith. This chapter is going to give an analysis of the fundamental basis of the doctrine of utmost good faith and

[37] See for example, The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353, Scot Law Com No 238, 2014); and The Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009).
[38] Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 13.
[39] Ibid 20.

justification of the meaning and the significance of this doctrine in both jurisdictions.

Chapter four criticises the doctrine of utmost good faith. This chapter will focus on analysing the main criticisms that impact the doctrine of utmost good faith in each system in order to allow a suitable analysis of those criticisms including those of the judgment in *Carter v Boehm*[40] and MIA in the UK, on the one hand, and criticisms based on Takaful insurance in Saudi Arabia, on the other. Significantly, this chapter shall attempt to answer whether insurance law should apply the doctrine of 'utmost good faith' or 'good faith' in both jurisdictions.

Chapter five covers the insured's pre-contractual duties for consumer insurance. The focus of this chapter is to analyse and identify the distinction between the doctrine of utmost good faith and the insured's pre-contractual duties in consumer insurance in the UK, and shall analyse the impact of this by illustrating and identifying who the consumer is and what the related duties are in consumer insurance. This chapter shall analyse the new duty that has been introduced in CIDRA. The chapter will answer how Saudi regulations can be developed in a way that reflects the modern reform in the UK.

Chapter six shall examine the insured's pre-contractual duties for business insurance. Again, the focus of this chapter is to analyse and identify the distinction between the doctrine of utmost good faith and the insured's pre-contractual duties for business insurance in the UK, and to analyse how the previous duty of disclosure and misrepresentation are still relevant and to what extent. Significantly, this chapter shall analyse the new duty addressed in IA. In comparison, Saudi regulations do not recognise a differentiation between consumer and business insurance. This should lead to development of significant recommendations in the conclusion of this chapter.

Chapter seven looks at the insured's post-contractual duties. Chapter eight shall look at the insurer's pre-contractual duties. Chapter nine covers the the insurer's post-contractual duties. These three chapters apply the same methodology to achieve their purposes. These chapters analyse the potential duties that may be introduced in both jurisdictions. Additionally, these chapters use the

[40] (1766) 3 Burr 1905.

commonwealth jurisdictions to properly analyse the UK side as legal gaps have been noticed in those situations where there may be utmost good faith possibilities. Saudi law would benefit from analysing its laws and regulations and considering the findings of analysis of the UK side through a collaboration with the commonwealth jurisdictions.

The final conclusion of the whole study shall provide recommendations that meet the aim of this study.

CHAPTER 2

BACKGROUND OF THE DOCTRINE OF GOOD FAITH IN THE UK AND SAUDI INSURANCE LAWS

2.1. The Developments of the Doctrine of Good Faith in the General Law of Contracts in the UK

The duty of good faith is not recognised in the UK contract law[41] because of three principal reasons [42] except in specific types of contracts[43], for example contracts of employment, partnership, and any contract of a fiduciary nature. Furthermore, the position of the duty of good faith is unlike its position in insurance contracts where it is accepted and well-recognised. Although this study limits to the insurance law, the consideration of the recent developments of the duty of good faith in the general contract law should allow understanding how the duty of good faith is currently more considerable.

There are three main reasons to not recognise the duty of good faith. The first reason considers specific rules rather than applying a broad principle. The second reason is the possibility of uncertainty and the third reason is the protection of the contracting parties' interests at the negotiation stage and during the performance of the contract. The UK position is uncommon as there is wide recognition of this doctrine among civil law jurisdictions[44] and some of the common law jurisdictions,

[41] See *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), [248] – [51], [255].
[42] For further discussion, *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [124].
[43] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265*; Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm); and *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [696].
[44] *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1988] 2 WLR 615, [1989] QB 433, [433].

such as USA[45], and the Islamic law[46]. However, there have been some recent attempts to recognise this duty in some modern cases[47], which are analysed below.

A significant attempt to recognise the duty of good faith as an implied term especially for long-term 'relational' contracts, for instance, franchise and long-term distributorship agreements was made in *Yam Seng Pte Ltd v International Trade Corp Ltd*[48]. However, in this case, Leggatt J did not provide a detailed justification for the need of this duty in such contracts unless there was a need for honesty and cooperation between contracting parties in 'relational' contracts. Similarly, in *Bristol Groundschool Ltd b Intelligent Data Capture Ltd*[49], the England and Wales High Court affirmed the Leggatt J judgment by implying the duty of good faith in an agreement for the EU Joint Aviation Authority training course as a 'relational' contract[50].

Two major issues were recognised by Leggatt J as difficulties in applying the duty of good faith. Uncertainty of the existence of the duty of good faith as an implied term and the willingness of the English law to interpret the duty. Leggatt J had well-illustrated the position of the duty of good faith. On the one hand, there was an attempt to recognise the duty whilst recognising that English Law would be hesitant to do, as Leggatt J stated that 'English law could and should recognise an implied doctrine of good faith and fair dealing in the performance of contracts'.[51]

The uncertainty was the cause for a further long illustration made by Leggatt J about the position of good faith in contracts nowadays in the USA, New Zealand, Australia, Canada, and the UK to identify the different positions of the common law jurisdictions.[52] Importantly, Leggatt J found the need for the existence of the doctrine of good faith as an implied term is formed in any commercial contracts.[53]

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[45] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [695]. See section 1-203 of The Uniform Commercial Code 1951, and *Wigand v Bachmann-Bechtel Brewing Co*. (1918) 222 NY 272, 118 NE 618, 277, where The New York Court of Appeals held that 'every contract implies good faith and fair dealing between the parties to it'.
[46] See below in section 2.4.
[47] See *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); *Monde Petroleum SA v Western Zagros Ltd* [2016] EWHC 1472 (Comm); and *National Private Air Transport Services Co (National Air Services) Ltd v Creditrade LLP* [2016] EWHC 2144 (Comm).
[48] [2013] EWHC 111 (QB), [698].
[49] [2014] EWHC 2145 (Ch).
[50] Ibid [196].
[51] [2013] EWHC 111 (QB), [664].
[52] Ibid [126] – [132].
[53] Ibid [664].

Leggatt J recognised a difficulty of applying the duty of good faith which is 'sensitive to context', and this difficulty would differ based on the facts of each case.[54] In addition, Leggatt J specified the objective test to examine the duty of good faith is 'commercially unacceptable by reasonable and honest people'.[55] A considerable element of the duty of good faith is honesty, which is similar to the judgment of the Canadian Supreme Court in *Bhasin v Hrynew*[56], where the Canadian Supreme Court held that 'there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations'[57].

On the other hand, Leggatt J argued there was an unwillingness of the English law to consider and interpret the duty of good faith due to uncertainty in the interpretation of this duty.[58] It was held that the fear to challenge the existence of the duty of good faith and fair dealing was unjustified as there was 'nothing unduly vague or unworkable about the concept'[59].

Recent cases that recognised Leggatt J judgment attempted to exclude the implied duty of good faith from specific types of long-term contracts. For example, there were successful attempts to exclude from the implication of the duty of good faith a contract between distributors of financial products and an independent financial adviser[60], an exclusive supply agreement[61], and long-term franchising agreements. This was based on the terms of the contract, such as in *Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace*[62], Henderson J held that although the contract was a long-term franchise contract, it did not consider the duty of good faith.[63] This decision gave the space for more interpretation regarding interpretation of the contractual terms. In *Apollo Window Blinds Limited v Mr McNeil, Mr Taylor*[64], the court held that although the duty of good faith might be implied, it rejected allowing the duty of good faith as an implied term in franchise agreements

[54] Ibid [145].
[55] Ibid.
[56] 2014 SCC 71, [2014] 3 SCR 494.
[57] Ibid.
[58] [2013] EWHC 111 (QB), [701].
[59] Ibid.
[60] *Acer Investment Management Ltd and another v The Mansion Group Ltd* [2014] EWHC 3011 (QB), [109].
[61] *Globe Motors, Inc (a corporation incorporated in Delaware, USA), Globe Motors Portugal-Material Electrico Para A Industria Automovel LDA, Safran USA Inc v TRW Lucas Varity Electric Steering Limited, TRW Limited*, [2016] EWCA Civ 396, [68].
[62] [2014] EWHC 2313 (Ch).
[63] Ibid [112].
[64] [2016] EWHC 2307 (QB).

where there are positive contractual obligations on the parties.[65] However, this case did not deny the possibility of applying the duty to some parts of the agreement.[66]

Similarly, in *Property Alliance Group Ltd v Royal Bank of Scotland Plc*[67], the High Court found no implied term to act in good faith in accordance with fair dealing in a standard banking documentation as this would be contrary to the facility agreement's express term to exclude equitable or fiduciary duties.[68] To support this conclusion, the High Court considered significantly the view of Andrewes J, in *Greenclose v National Westminster Bank*[69], who found that 'such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length'.[70] Furthermore, the High Court supported its conclusion by discussing the judgment of Jackson LJ in *the Mid Essex*[71] case where he said that 'such a term may be implied based on the presumed intention of the parties'.[72] Consequently, the High Court provided a reason to exclude such agreements from categories of contract that may imply the duty of good faith by stating that 'such an implied term cannot have reflected the presumed intention of the parties nor is necessary for the proper functioning of the contracts'.[73]

In *The Law Debenture Trust Corpn plc v Ukraine*[74], Blair J found that there was an overlap between the implied requirement to act in good faith and the obligation not to prevent performance[75], which is implied into all contracts.[76] Blair J interpreted preventing performance as it 'is understood as comprising total prevention of performance, delaying of performance, hindering performance, and/or interfering

[65] Ibid [23] – [24].
[66] Ibid.
[67] [2016] EWHC 3342 (Ch).
[68] Ibid [250].
[69] [2014] EWHC 1156 (Ch), [2014] 1 CLC 562.
[70] [2016] EWHC 3342 (Ch), [250].
[71] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265.
[72] [2016] EWHC 3342 (Ch), [275].
[73] Ibid [276].
[74] [2017] EWHC 655 (Comm) [2017] QB 1249.
[75] Ibid 1317.
[76] See *Barque Quilpué Ltd v Brown* [1904] 2 KB 264, [271] – [272].

with performance'.[77] This was because the legal test to imply the duty of good faith was not satisfied.[78] However, this case is currently being appealed.

The duty of good faith was not been implied either in a distribution agreement in *Ilkerler Otomotiv Sanayai ve Ticaret Anonim Sirketi and another v Perkins Engines Co Ltd*[79]. The Court of Appeal affirmed the judge's decision that the duty of good faith did not exist as an implied term, and the appeal was dismissed. Longmore LJ pointed out with whom Briggs LJ agreed that 'the judge was prepared to contemplate the possibility of a general good faith term but even that which he identified would not be broken in the present case if it existed'[80].

In *BP Gas Marketing Limited v La Societe Sonatrach, Sonatrach Gas Marketing UK Limited*[81], the duty of good faith was not found to be a free-standing obligation by the High Court.[82] There was a significant discussion about breach of the duty of good faith without acting bad faith.[83] There was a serious allegation by the claimant that BP had breached the duty of good faith by refusing to amend the agreement and not acting in a particular way at a particular time.[84] The High Court pointed out that, under that agreement, performing obligations must be in good faith[85], as good faith did not 'require a party to surrender contractual rights'[86]. Further, the High Court did not find BP in breach of the duty of good faith.[87]

Similarly, in *Monde Petroleum SA v Western Zagros Ltd*[88], the court rejected an attempt to imply the duty of good faith into a commercial contract, which had a commercial and practical coherence without implying such duty. Recently, the Court of Appeal dismissed the appeal and affirmed this judgment.[89]

[77] [2017] EWHC 655 (Comm) [2017] QB 1249, 1261.
[78] *The Law Debenture Trust Corpn plc v Ukraine* [2017] EWHC 655 (Comm) [2017] QB 1249, [356].
[79] [2017] EWCA Civ 183 [2017] 4 WLR 144.
[80] Ibid [29] – [30].
[81] [2016] EWHC 2461 (Comm).
[82] Ibid [403].
[83] Ibid [379-80].
[84] Ibid [378].
[85] Ibid [378].
[86] Ibid [401].
[87] Ibid [385].
[88] [2016] EWHC 1472 (Comm).
[89] Ibid.

Different positions were recognised in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*[90] and *Emirates Trading Agency Llc v Sociedade De Fomento Industrial Private Ltd*[91], where the England and Wales High Court found a dispute resolution clause required the parties to resolve the dispute by 'friendly discussions' that required negotiating in good faith before arbitration was enforced. The High Court held that 'the obligation to seek to resolve disputes by friendly discussions must import an obligation to seek to do so in good faith'[92].

Significantly, in 2017, a different position from that of Leggatt J was recognised in respect to the duty of good faith in *Astor Management AG v Atalaya Mining plc*[93], where the claimant argued the defendant's obligation to act in good faith as an implied term in the context to use reasonable endeavours in order to obtain a senior debt facility. Non-compliance with this obligation would be considered a breach of the duty of good faith.

Leggatt J had described the duty of good faith as a 'modest requirement'[94]. This new position on the meaning of good faith would be highlighted in terms of the discussion of this duty in the English law, as Leggatt J stated that 'there is no need or scope to imply a term requiring the defendants to act in good faith… since such a requirement is subsumed within the express obligation to use all reasonable endeavours'[95].

It is very clear that Leggatt J views have changed about the duty of good faith since his position in *Yam Seng*[96]. However, it should be noted that Leggatt J did not find if this agreement should be recognised as a 'relational' or long-term contract to apply the duty of good faith, and why good faith should be recognised as a modest requirement. The lack of justification of these views found in *Astor Management AG v Atalaya Mining plc*[97] might meet some further comments about the hesitation of the Leggatt J to set the duty of good faith as an implied term.

[90] [2014] EWHC 2104 (Comm).
[91] [2015] EWHC 1452 (Comm).
[92] [2014] EWHC 2104 (Comm), [51].
[93] [2017] EWHC 425 (Comm).
[94] Ibid [98].
[95] Ibid [99].
[96] [2013] EWHC 111 (QB).
[97] [2017] EWHC 425 (Comm).

To sum up, the duty of good faith is generally not recognised in the English law, however, there were some doubts to reconsider its position in terms of the long-term contracts. Some comments in regard to the justification of its effectiveness let to the possibility of the existence of such duty as an implied term. Nevertheless, the recognition of such a duty for a 'relational' contract may lead to further debate. Finally, the existence of the duty of good faith may still be under debate for its interpretation and elements in the English contract law.

2.2. The Developments of the Doctrine of Utmost Good Faith in Insurance Law in the UK

Since 1957 there have been many attempts to reform insurance law especially with regard to sections 17 to 20 of MIA. The Fifth Report of the Law Reform Committee in 1957 called to reform the law because of the crucial effect of the remedy in case of non-disclosure especially in the case where the insured was honest and reasonably careful.[98] However, this attempt was unsuccessful. Other unsuccessful attempts were in 1979 and 1980.[99]

Significantly, the English and Scottish Law Commissions (the Law Commissions) had a serious project in 2006 to reform insurance law where needed. The first paper was issued in September 2006, 'Misrepresentation and Non-disclosure' calling for relevant views in order to identify the scope of this reform. The scope was for specific issues including consumer insurance, business insurance, late payment, warranties, and pre-contract disclosure and misrepresentation.[100] Following this paper, the Law Commissions published a report and consultation paper in 2007 for misrepresentation, non-disclosure and warranties. Later, in 2010, The Law Commissions' project focused, as well, on post-contractual duties of utmost good faith by publishing a report, 'The Insured's Post-Contract Duty of Good Faith'; later

[98] Law Reform Committee, *Fifth report: conditions and exceptions in insurance policies* (HMSO, London 1957) Cmnd 62, [11-12].
[99] See further reading in Rob Merkin and Özlem Gürses, The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured, (2015) 78(6) MLR 1004, 1005. See also John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 20 - 21.
[100] See the Law Commission, 'Insurance Contract Law Project' <http://www.lawcom.gov.uk/project/insurance-contract-law> accessed 1st May 2018.

the Law Commissions published the joint consultation paper 'Post-Contract Duties and Other Issues' in 2011[101].

The Law Commissions' project contributed to produce two Acts of Parliament. The first Act is CIDRA[102] which imposes the duty of reasonable care and a variation of matched remedies based on the differentiation between reckless or deliberate breach and careless breach. These changes are important for two reasons. Firstly, they abolish the existing duty of disclosure in consumer insurance contracts and the connected remedy for breach of the duty as provided in MIA, avoidance of the contract by the insurer *ab initio*. Secondly, they impose consumer protection within the UK insurance market.

The other Act is IA. Following the passing of this Act, the Law Commission published an Explanatory Note for the IA[103]. Significantly, this Act modifies the doctrine of utmost good faith based on a significant repeal of parts of s 17 of MIA by abolishing the remedy of avoidance of the contract. This Act imposes the duty of fair presentation of the risks and creating a variation of matched remedies in case of breach of the duty. Importantly, the duty of fair presentation provides a balanced position between the contracting parties on an inquiry basis instead of a disclosure basis in terms of the repealed sections 18 to 20 of MIA. Moreover, the duty of fair presentation of the risks was the approach that was adopted by the common law, for example, in *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp*[104], where the insurer could not avoid the policy because of the fair presentation of the risks. This was held not to count as breach of the duty of disclosure.

According to the wording of s 17 of MIA after the recent reform which abolished the avoidance as a remedy of the contract, the doctrine of utmost good faith appears to be without definition, specific elements, or remedies. This shall be investigated, discussed, and analysed in this study in light of the meaning of the doctrine of

[101] The Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues, A Joint Consultation Paper* (Law Com CP No 201, Scot Law Com DP No 152, 2011).
[102] Significant report by the Law Commission to shape this Act was The Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009).
[103] HM Treasury's Explanatory Notes to the Insurance Act 2015, 12 February 2015.
[104] [2011] 1 All ER (Comm) 573, [2011] 1 Lloyd's Rep 589, [2011] Lloyd's Rep IR 366. See also, *Drake Insurance plc v Provident Insurance plc* [2004] QB 601.

utmost good faith and the related issues by using the position of common law and academic discussions on the related issues with a consideration to the commonwealth position where needed in Australia, Canada, and New Zealand.

2.3. The Developments of Insurance Law in Saudi Arabia

2.3.1. Saudi Legal Structure

According to the Basic Law of Governance[105], the highest law in Saudi Arabia, which is equivalent to the constitution in other countries, is Sharia law, the Islamic law. Sharia is the constitution of Saudi Arabia and the umbrella of all Saudi laws and regulations. [106] This means that if any law challenges the Islamic provisions, it would be constitutionally abolished. Moreover, major Islamic sources are considered including the Holy Quran, the holy Islamic book, Prophet's traditions, and 'Fiqh' provisions. 'Fiqh' provisions are distinguished based on differences between Islamic schools 'madhabs', which include *Shafiey* madhab, *Maalki* madhab, *Hanafi* madhab, and *Hanbali* madhab.

It is important to address that any modern issue in Saudi Arabia regarding social or religious aspects, and commercial transactions are discussed by the 'Council of Senior Islamic Scholars' (CSIS), the only permitted council to observe 'Fatwa'[107] in Saudi Arabia based on the Royal Order of the past king, King Abdullah Al-Saud[108], under the Permanent Committee for Scholarly Research and Ifta' (PCSRI). Then, these scholars consider a 'Fatwa' based on the Islamic schools for a specific issue[109], which becomes often a guide for judges. In addition, it is common to say

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[105] The Basic Law of Governance by the Royal Decree No A/90 dated 02/03/1992.

[106] Ibid. Article 1 states 'God's Book (the Holy Quran) and the Sunnah of His Prophet are the country's constitution'.

[107] Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000) 5, which explains Fatwa, as follows:

> In practice, a lay Muslim, seeking to act in harmony with God's law in some difficult or perplexing situation, approaches a scholar of the law whom he or she respects, summarizes the situation faced, and asks for his views of the Sharia ruling for that situation. In this function the scholar is called a Mufti, and his opinion is called a Fatwa.

Generally, Fatwa is based on "Ijtihad", which is the mechanism to access a religious opinion of the Islamic scholars depending on a combination between the past and the present Islamic perspectives, and it is related to the all affairs of Muslims life, especially, where no existence of laws.

[108] Royal Order (2010) No 13876 dated 2/9/1431H.

[109] Article 45 of The Basic Law of Governance (1992) states that:

> The sources for the deliverance of fatwa in the Kingdom of Saudi Arabia are God's Book and the Sunnah of His Messenger. Article 17 of the same regulation: Property, capital, and labour are essential elements in the Kingdom's economic and social life.

that Saudi Arabia is following generally *Hanbali* madhab, and Saudi judges are adopting and following *Hanbali* Islamic resources more than other Islamic schools' resources.[110] In 1928, the Saudi Judicial Monitoring Association decided that if the four schools agreed about a particular provision, judges should consider this agreed provision without any objection, but if the four schools do not agree about a provision, the *Hanbali* madhab would be generally considered. However, if there is any difficulty to apply the *Hanbali* madhab on the contracting parties or society, other madhab may be considered depending on the discretion authority of judges.[111]

In regard to insurance law, Saudi Arabia did not have any valid insurance law till July 2003, when it first regulated the *Law on Supervision of Cooperative Insurance Companies* (2003)[112] (LSCIC). LSCIC does not cover substantive aspects of insurance contracts, such as insurance principles and parties' obligations, but is more about managing insurance market. Accordingly, LSCIC left significant legislative gaps. Although the *Commercial Court Law* 1931[113] (CCL) is recognised as the oldest commercial law in the country, which considers marine insurance provisions by articles 324-389; CCL is invalid in practice as the Commercial Court is not founded till 2017[114], and its provisions are 'too unclear'[115]. In fact, CCL had a limited impact only as a guide in arbitration cases.[116] The Implementing Regulation of the Law on Supervision of Cooperative Insurance Companies 2004 (IRLSCIC) is issued by the decision of the Minister of Finance No 1/596 dated 21/4/2004, which considers some significant insurance principles and partially fills legal gaps that were indicated in LSCIC.

SAMA is deemed to be responsible for the insurance sector. Accordingly, SAMA has codified some significant insurance regulations as part of its role.[117] The most

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They are personal rights which perform a social function in accordance with Islamic Sharia.

[110] The Ministry of Justice, 'A Brief Summary of the Judiciary System in Saudi Arabia' (2018) <https://www.moj.gov.sa/ar/Ministry/Pages/HistoryMOJ.aspx> accessed 1st May 2018.

[111] Decision of the Judicial Monitoring Association (1928) No 3 dated 03/24/1347.

[112] Issued by the Royal Decree M/32 dated 1/8/2003.

[113] Issued by the Royal Decree No 32 dated 1/6/1931.

[114] As had been announced by the Ministry of Justice in 2017, see The Ministry of Justice, 'Media Centre Report' (18/09/2017) <https://www.moj.gov.sa/ar/MediaCenter/Documents/27-12-38.pdf> accessed on 1st May 2018.

[115] Richard Price & Andreas Haberbeck, *The Maritime Laws of the Arabian Gulf Cooperations Council States* (Graham and Trotman 1986) 32.

[116] Ibid. See also, Andreas Haberbeck, 'Insurance under Saudi Arabian Law' [1986] LMCLQ 246, 248-250.

[117] Article 2 of LSCIC states that:

important regulations are including the Insurance Market Code of Conduct Regulation 2008[118] (IMCCR), the Anti-Fraud Regulation 2008[119] (AFR), and Online Insurance Activities Regulations 2011[120] (OIAR). Importantly, SAMA recently applies Insurance Consumer Protection Principles 2014[121] (ICPP). There are other law and regulations which apply to specific types of insurance, for examples, the Unified Compulsory Motor Insurance Policy 2011[122] (UCMIP), *Cooperative Health Insurance Law*[123] 1999 (CHIL), and Implementing Regulation of Cooperative Health Insurance Law[124] 2014 (IRCHIL). Although there are laws and regulations to regulate insurance in Saudi Arabia, there are significant legislative gaps, for examples, regarding detailed provisions and limitations for legal principles, doctrines, and duties, legal remedies, and specifically, in respect of the doctrine of utmost good faith. Significantly, any gaps could be filled by Islamic provisions.[125]

For a comprehensive understanding of Sharia law in regard to insurance contracts, understanding the differences between Islamic schools is necessary. While the majority of Islamic scholars prohibit conventional insurance and permit Takaful insurance, which is the Islamic form of an insurance system, others objected to this perspective and permitted conventional insurance. However, a minority of Islamic scholars prohibited all types of insurance contracts. All of these positions are considered below.

2.3.2. Prohibition of Conventional Insurance

Takaful insurance has been permitted and conventional insurance has been prohibited in Saudi Arabia since 1977 by the majority of the CSIS under the PCSRI

> The Saudi Arabian Monetary Agency (the "Agency") shall, in the course of implementing the Regulations, have the following powers:… c) approving insurance and re-insurance standard policy forms; d) establishing rules and controls to determine the means of investing in the assets of insurance and re-insurance companies. e), establishing general rules to determine the assets that each company should maintain inside and outside the Kingdom.

[118] Insurance Market Code of Conduct Regulation, issued by SAMA dated 8/9/2008.
[119] Anti-Fraud Regulation, issued by SAMA dated 18/12/2008
[120] Online Insurance Activities Regulation, issued by SAMA dated 13/12/2011
[121] Insurance Consumer Protection Principles, issued by SAMA dated 07/2014.
[122] The Unified Compulsory Motor Insurance Policy, issued by SAMA dated 13/12/2011.
[123] Issued by Royal Decree M/10 dated 13/8/1999.
[124] Implementing Regulation of the Cooperative Health Insurance Law No 299/1 dated 12/1/2014.
[125] Article 1 of LSCIC states that 'insurance in the Kingdom shall be undertaken through registered insurance companies operating in a cooperative manner…and in accordance with the principles of Islamic Sharia'.

except one of the members, Abdullah Almuna'i, who denied Takaful insurance and permitted conventional insurance.[126] Nonetheless, no amendments were considered to CCL based on these changes on the nature of insurance contracts. Later, in 1978, the majority of the Islamic scholars of the Islamic Fiqh Academy (IFA) issued a Fatwa, which stated that conventional insurance is prohibited, except one of the member, Mustafa Alzarqa, one of the most famous Islamic scholars, who followed the same views as Abdullah Almuna'i. Furthermore, Alzarqa made an observation in regard to IFA session by saying that the session did not include the half members of the Academy, and it was important to wait for the majority of members for such an important fatwa.[127] However, this observation did not receive any attention from the rest of the Academy, and they concluded to prohibit the conventional insurance.

The prohibition of the conventional insurance was depending on several principles including, significantly, gharar (uncertainty), maysir (gambling), and riba (usuary).[128] The first reason is gharar which means that 'fraudulent transaction where details about the sold item are unknown or uncertain'[129]. From this perspective, at the time of entering into the insurance contract, insurance companies cannot determine the exact amount that would be paid if the risk occurred.[130] As a result of this perspective, if the risk does not occur, the insured will pay for nothing, which challenges Islamic commercial principles.[131] These commercial principles require that the value of the price paid must be properly linked to services or goods. Thus, if the value is not proper to the goods or services provided under the contract, gharar would exist and the contract would be prohibited according to gharar and, consequently, void.[132]

It can be argued however that insurance contracts do not seem to include gharar due to several reasons. This is because at the time of conclusion of an insurance contract, the insured understands exactly the level of cover which is provided by the insurer

[126] Fatwas of Council of Senior Islamic Scholars, decision no 55 of 10th session, 4/4/1397H 23/3/1977. See also, the Permanent Committee for Scholarly Research and Ifta', 'Albio'a 3', Group 1, Volume 15, 275, Fatwa No.18047.
[127] Islamic Fiqh Academy, decision no 9(9/2)[1], 1st session of 10/08/1398, 15/07/1978.
[128] Fatwas of the Permanent Committee for Scholarly Research and Ifta' (2001), decision no (5/10), part 4, 312.
[129] Ibid; see also Fatwas of the Permanent Committee for Scholarly Research and Ifta', 'Albio'a 3', Group 1, Volume 15, 275, Fatwa No.18047.
[130] Mohammed Ahmed Alsaleh, *Altameen Bain Alhazr O Alebaha* (Al-Riyadh 2004) 108 - 109.
[131] Ibid.
[132] Ibid.

under the insurance contract.[133] This insurance cover should have been well-explained and be part of the contract terms. Accordingly, the level of cover will be reflected in the premium. Insurance contracts are similar to the warranty included in the sale of goods, as far as uncertainty is concerned. This is especially when the buyer pays extra for a special warranty or a comprehensive warranty against theft or loss. The warranty is taken because it can provide protection for consumers from manufactures problems, but there are other types of warranty which exist because of external circumstances such as against theft. The warranty contracts or terms are permitted in Sharia even though they include uncertain elements.[134]

Another comparison would be with security guard contracts. The contracting parties of such a contract understand that one party works for the other party to guard them from uncertain risks. The parties understand that this protection, from one side, and the risk, from the other, may or may not occur.[135] Although, the insurance contract is not about labour, it is, similarly, about transfer of uncertain risks to the other party in order to provide certain level of insurance cover. However, from the Islamic perspective, the hiring of a security guard is not considered an uncertain or gharar contract. Therefore, insurance contracts should be considered in the same light.

Another Saudi system that recognises a type of social insurance is the Saudi Retirement Pension System, which applies all insurance principles under another umbrella.[136] Furthermore, this system is based on the payment of a small premium, which would be invested to meet the participants' need, to receive a large sum after retirement or infirmity, which is similar to life insurance.[137] However, while the Retirement Pension System is operated by the government, life insurance contracts are operated by insurance companies. Because of the different status of these operators, some of the Islamic scholars permitted the Retirement Pension System whilst prohibiting insurance contracts. This was objected to by other Islamic scholars, such as Mustafa Alzarqa. He pointed that if you could accept such a

[133] Ibid 113.
[134] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (2001) 4 Research of Council of Senior Islamic Scholars 33, 271-272.
[135] Ibid 211 - 212.
[136] Social Insurance Law 1969 by Royal decree M/22 dated 15/11/1969. See further discussion in Mohammed Ahmed Alsaleh, *Altameen Bain Alhazr O Alebaha* (Al-Riyadh 2004) 189 - 191.
[137] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (1987) 20 The Journal of the Islamic Research 17, 44 - 46.

system as the Retirement Pension System, you should also accept insurance contracts.[138]

The Holy Quran states that 'O ye who believe! Squander not your wealth among yourselves in vanity, except be it a trade by mutual consent'[139]. It is clear that conventional insurance, which is based on commercial dealing, relies on this verse that creates an exception for commercial contracts. Further, the Quran provides that 'mutual consent' between the contracting parties in commercial contracts is permissible in terms of the latter part of the verse. Noticeably, Islamic scholars who prohibited conventional insurance do not notice this exception applies. Conversely, the exception does not apply to Takaful insurance, because the basis of Takaful is donation and the application of the exception is only envisaged in respect of commercial contracts. As a result, Takaful insurance faces further challenge in applying this Quran provision.

Second, conventional insurance includes a type of maysir or 'gambling'.[140] This is because the insured benefits by chance, and, in the case of non-occurrence of the risk, the insurer is not obliged to return the premium to the insured.[141] However, it would be unsuitable to measure insurance contracts based on the principles of gambling because of two reasons. Gambling is based on parties wishing to have the other suffer a loss in order to win unlike an insurance contract. Because of the requirement for insurable interest, if either the insured or beneficiary has no insurable interest, the insurance policy will be void. Saudi regulations also apply the principle of insurable interest by article 55(1) of IRLSCIC, which challenges the reason to prohibit conventional insurance.

Even though, insurance generally includes risks, insurance plays an important role in the society, and each insurance company applies statistical, legal, and actuarial studies to deal with insurance contracts, and it is not relying totally on luck at any stage.[142] Further, the nature of commercial contracts is that they include various

[138] Ibid.
[139] The Holy Quran, 4:29.
[140] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (1987) 20 The Journal of the Islamic Research 17, 44 - 46. See also, Fatwas of the Permanent Committee for Scholarly Research and Ifta', 'Albio'a 3', Group 1, Volume 15, 275, Fatwa No.18047.
[141] For further discussions see Mohammed Ahmed Alsaleh, '*Alta'amin Bain Alhazr O Alebaha* (Al-Riyadh 2004) 130 - 133.
[142] Ayman Saleem & Jamal Abdulrhman, *Aloqood Almadania: Albai'a, Alejar, O Altameen* (Dar Hafiz 2009) 670.

levels of risks during the performance of the contract; however, those contracts are not considered as gambling even if they include risks or luck.[143]

Third, conventional insurance indicates Riba or 'usury'[144]. Significantly, according to the holy Quran and Sunnah Islamic schools, Riba is prohibited.[145] Based on Islamic scholars who prohibited conventional insurance, *Riba* occurs when the insurer provides insurance cover of a greater value than the premium paid by the insured.[146]

On the other hand, even though one of the major principles of insurance contracts is indemnity, the insurance contract is not about paying money to collect money or to repay a loan with interest. The insurance contract is about security. Insurance in Arabic is 'tameen' from 'amman' which defines in the Arabic dictionary as providing security and leave fear and guarantee security and protection.[147] If the case is understood this way, the insurance contract would not include Riba. Additionally, the insured pays premiums based on the insurance cover provided by the insurer that are determined depending on the probability of occurrence of the loss and surrounding circumstances. Accordingly, the insured pays to feel secure having the expectation of two possible outcomes, either the loss may or may not happen. Furthermore, the premium usually increases with the increasing level of the security provided by the insurance cover with the understanding of the probabilities of occurrence of the losses. Moreover, the premium may increase because of the surrounding circumstances of either the insured himself or the subject of the insurance. Therefore, insurance contracts are not including both types of Riba because it is not money for money, such as an interest-based-loan. All in all, in brief, these are the three major reasons given allowing prohibition of conventional insurance from the Islamic perspective.

[143] Such as, shipping and cargo contracts, where the shipment could reach the agreed destination or could not be based on surrounding circumstances.
[144] Barbara L Seniwaski, 'Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law' (2000-2001) 39 Columbia Journal Transnational Law 701, 709.
[145] Fatwas of the Permanent Committee for Scholarly Research and Ifta', 'Albio'a 3', Group 1, Volume 15, 275, Fatwa No.18047.; and Islamic Fiqh Academy, decision no 9(9/2)[1], 1st session of 10/08/1398, 15/07/1978.
[146] For further discussions see Mohammed Ahmed Alsaleh, *Altameen Bain Alhazr O Alebaha* (Al-Riyadh 2004) 116 - 126.
[147] Arabic Language Academy, *Almujaam Alwaseet* (Maktabat Dar Alshroug Aldawlia 2004) 28.

The majority of Islamic scholars agreed with the fatwa for prohibition of conventional insurance. However, others disagreed with this Fatwa and issued their reservations about allowing conventional insurance based on two significant reasons.[148]

First, the most important reason is the Fiqh rules which state 'necessity knows no laws and a need is considered as a necessity', and second, 'rules change with the change of time, place, and conditions'.[149] The last rule is based on the 'doctrine of necessity', which means that if there was a provision about prohibition of a transaction, but the surrounding circumstances of society regarding this transaction had changed, and this issue had been considered as a current need and necessity to people and the society, then the provision may change to comply with these changes and peoples' needs. Moreover, these Fiqh rules could be used with the conventional insurance contracts because of the current requirements of insurance contracts which meet the social needs in any modern society. [150]

In conclusion, Saudi legal system generally is following Islamic provisions. This reflects further on insurance contracts. Conventional insurance is prohibited in Saudi Arabia; while Takaful insurance is permitted from the Islamic perspective due to several reasons. However, the debate continuous to adopt the conventional insurance.

2.3.3. Permission of Takaful Insurance

The PCSRI issued a fatwa that permitted 'cooperative insurance' or 'Takaful insurance' in 1977, as a permitted insurance contract in Saudi Arabia, and IFA, in 1978, agreed with this Fatwa. Takaful insurance defines a system based on cooperation between groups of people to indemnify losses with no interest to make any profit.[151] Based on *Malki* madhab and *Hanafi* madhab, the basis of this type of insurance is a 'donation' between participants (insureds), and it follows the type of

[148] Including a member of the Council of the Senior Scholars, Alshaikh Abdullah Almunai', Alshaikh Ali Alkhafif, and Alshaikh Mustafa Alzarqa. See Mustafa Alzarqa, *Aqd Altameen O Mawaqefh fe Alsharia* (Damascus University 1962) 29; and Ali Alkhafif, 'Altameen' (1966) 8 Alazhar Journal 480.

[149] Ali Alnadawai, *Alqawa'ed Alfeqhia* (Dar Alqalam 1998) 101.

[150] Renat Bekkin, 'Islamic Insurance: National Features and Legal Regulation' (2007) 21(3) Arab Law Quarterly 3.

[151] Mher Hussain & Ahmad Pasha, 'Conceptual and Operational Differences between General Takaful and Conventional Insurance' (2011) 1(8) Australian Journal of Business and Management Research 24.

contract which is 'starting with a donation, ending with a commercial contract[152]'. Moreover, based on the *Hanbali* madhab, this contract which is 'starting with a donation, and ending with a commercial contract', takes the same provisions of sales contracts, which means commercial contracts, when the donation requires to be a specified fixed payment.[153] However, if the payment is not specified, the contract will be void.[154] IFA concluded the Fatwa by applying provisions of donation to insurance contracts. This then leads to the question, relying on this theory, about what is the obligation on the insurer to indemnify losses if any?

The Islamic perspective prohibits gharar and uncertainty prior to the conclusion of the contract or during the performance of the contract as is the case in conventional insurance contract. Therefore, Takaful insurance contract would be void, from this perspective, because of uncertainty and gharar, as Takaful contracts include gharar and uncertainty at the second part, as it is ending with commercial provisions.[155]

Another strong criticism of Takaful insurance is the need to be reinsured. [156] Though there are many Takaful insurance companies, there are no experienced Takaful re-insurance companies.[157] Consequently, the majority of reinsurance activities will be operated by conventional reinsurance companies. Based on the Islamic perspective which prohibits conventional insurance, conventional reinsurance contracts are prohibited, as well. Thus, Takaful insurance companies are required to reinsure under conventional insurance policies. Indeed, this issue had not been discussed by Islamic scholars when they issued the permission for Takaful insurance and prohibited of conventional insurance. As a result, there was no real need to establish a new system such as Takaful insurance with its many practical

[152] For Malki Madhab, see Ahmed Aldardir, *Alsharh Alkabir maa' Hashiat aldesoqi* (Dar Ihiaa Alkotob Alarabia 1996) part 4, 116. For Hanafi Madhab, see Alaa' Aldin Alkasany, *Badae' Asanaea'* (Dar Alkotob Alelmaia 1986) part 8, 130.
[153] Mohammed Ibn Othaimeen, *Alsharh Almomtea' Ala Zad Almostaqne'a* (Dar Ibn Aljauzi 2002) part 11, 67; and Ahmed Alqari, *Magallat Alahkam Alsharia* (Tihama Publications 2005) 307, code 881. This publication includes Islamic provisions in specific codes depending on *Hanbali* madhab.
[154] Mohammed Ibn Othaimeen, *Alsharh Almomtea' Ala Zad Almostaqne'a* (Dar Ibn Aljauzi 2002) part 11, 67; and Ahmed Alqari, *Magallat Alahkam Alsharia* (Tihama Publications 2005) 307, code 881. This publication includes Islamic provisions in specific codes depending on *Hanbali* madhab.
[155] Abdulsattar Abu Gudda 'Nezam Altameen Altakafuli mn Khilal Alwaqf: Badeela an Altameen mn Khilal Eltizam Altabura' (International Symposium for Takaful Insurance through Waqf System, International Islamic University, Malaysia, March 2008) 8. See also, Abdulazim Abuzaid 'Albenaa' Alsharaie Alaslam Lealtameen Aleslami' (8th International Conference on Islamic Economics and Finance, Qatar, 2011) 10.
[156] Mohammed Anas Alzarqa, 'Khamsa Kadaya fe Altameen Altawani' (Takaful Insurance Conference: Abaadoh, Afaqoh, O Mawqef Alsharia menh, Jordan, April 2010) 5.
[157] Ibid.

obstacles when another experienced and professional system such as conventional insurance already existed.

The Saudi government applies some types of mandatory Takaful insurance, such as motor insurance. However, this, as a result, is deemed to be a commercial contract not a donation, because a donation contract should be agreed without any force on any party.[158] It is well-established under Islamic contract law that duress on a contractual party to enter into a contract invalidates the contract, especially, in the case of donation.[159] As a result, in relation to the mandatory insurance contracts, if a person does not desire to enter into a donation contract, the contract should be invalid.

Another criticism of the general Islamic contract law is that donation contracts consider generally the personality of the contracting parties.[160] This means that a grantor would specify a recipient either on a personal basis, such as relatives or a relationship, or a personal desire to give a grant to a specific person or institution, which is unlike the status of Takaful insurance contracts where neither the insurer nor the insured choose to enter into the contract based on personal aspects. Furthermore, the Takaful insurance contracts neither provide nor mention mutual grants between the insured and the insurer but premiums and the insurance cover.

Takaful insurance is based on a mutual donation between the grantor (insured) and the recipient (insurer). The theory of donation says that it is another donation from the insurer to the participant (insured). It is accepted that a Takaful contract, as a donation contract, should be void, because the grantor pays the donation (premiums) based on the possible occurrence of a future condition (to be covered by the insurer).[161] On the other hand, the recipient pays its donation (insurance cover) in respect of the occurrence of a future uncertain condition (occurrence of the risk) based on the surrounding circumstances and the extent of the insurance

[158] Abdulazim Abuzaid 'Albenaa' Alsharaie Alaslam Lealtameen Aleslami' (8th International Conference on Islamic Economics and Finance, Qatar, 2011) 10.
[159] Ibid 10. See also Mohammed Anas Alzarqa, 'Khamsa Kadaya fe Altameen Altawani' (Takaful Insurance Conference: Abaadoh, Afaqoh, O Mawqef Alsharia menh, Jordan, April 2010) 6; and Ahmed Alqari, *Magallat Alahkam Alsharia* (Tihama Publications 2005) 305, code 879 states that 'it is invalid any donation contract of forced person'. Further, see Ali Afandi, *Dorar Alhokam fi Sharh Majallat Alahkam* (Dar Aljail 1991) part 6, 158.
[160] Abdul RazzaK Alsanhouri, *Alwaseet fe Sharh Alqanoon Almadani* (Munsha'at Alma'aref 2004) part 1 'Masader Aleltizam', 136.
[161] Ahmed Alqari, *Magallat Alahkam Alsharia* (Tihama Publications 2005) 307, code 883.

cover.[162] However, it is clear in an insurance contract that each party has no desire to provide donations but rather agree commercial obligations between the contracting parties. Furthermore, according to the *Hanafi*[163], *Hanbali*[164], *and Shafie*[165] madhabs, commenting the donation on such condition is prohibited unlike *Malki* madhab. This is because a donation has to be made in the present not the future, and the donation must be well-known in amount at the time of the contract, which does not exist in the case of Takaful insurance contracts.[166] However, *Malki* madhab observes that a donation contract is permitted to include gharar and uncertainty unlike commercial contracts.[167] Accordingly, this is still a view of one of the Islamic schools, and indeed the majority of schools found Takaful includes gharar.

A few of the Islamic scholars, such as Mohammed Almutaii [168] denied any type of insurance contracts, including Takaful Insurance. This is because, from their perspective, any type of insurance is may contain riba and gambling.[169] Another reason to support this view is that Muslims should pay for their financial issues or mistakes, such as medical errors, without seeking any support from either commercial or cooperative institutions[170]. This perspective is supported by the view of the famous Islamic scholar Mustafa Alzarqa who said that 'who would vary between commercial insurance and Takaful insurance would not understand any issue of Islamic Fiqh'[171]. Significantly, it is important to note that Mustafa Alzarqa adopted the permission of conventional insurance and he made many observations against Takaful insurance. Further, Alzarqa tried to destroy any distinction between Takaful insurance and conventional insurance, because both contracts apply almost the same principles. This is to support the position of conventional insurance. However, this perspective, which denies any type of insurance, does not adopt

[162] Ibid.
[163] Alaa' Aldin Alkasany, *Badae' Asanaea'* (Dar Alkotob Alelmaia 1986) part 6, 119.
[164] Mowafaq Aldeen Almakdesi, *Almoghni* (Dar Alketab Alaarabi 1983) part 6, 46 - 47.
[165] Mohiee Aldeen Alnawawi, *Almajma'a Sharh Almohadhab* (Dar Alfikr 1997) part 15, 373 - 375.
[166] Hassan Body, *Mawanea' Alrogoo' fe Alhiba: Derasa Moqarana Bain Al-Fiqh Eleslami O Alqanon Alwade'i* (Dar Aljamea' Aljadida 2004) 60.
[167] Shehab Aldin Alqarafi, *Alfrooq* (Dar Alkotob Alalamia 1998) part 1, Farq 24, 276 - 277.
[168] Mustafa Alzarqa, *Nezam Altameen O Mawqif Alsharia Menh* (Alrisalah Institution 1984) 25. He discussed the perspective of Alshaikh Mohammed Almutaii, the past Egyptian Chairman of Senior Islamic Scholars, who objected any type of insurance.
[169] Ibid.
[170] Ibid.
[171] Ibid.

Alzarqa approach; it does not appreciate the current role of insurance; and it does not consist with the society's needs.

2.4. The Doctrine of Good Faith in the General Law of Contracts in Saudi Arabia

Sharia law applies the doctrine of good faith as 'Eltizam Husn Alniyah' which means that any act must be done with good intention or faith. Quran provisions and Prophet Traditions (Sunnah) obliged Muslims to deal honestly, especially, in contracts. The Holy Quran states that 'O you believers! Do not betray Allaah and the Messenger, nor knowingly, betray your trusts'[172], 'O you who have believed, fulfill [all] contracts'[173], 'cooperate in righteousness and piety, but do not cooperate in sin and aggression and fear Allah'[174], and 'give in full the measure and do not be of those causing loss; and weigh with scales that are straight; do not defraud people of their things, and do not commit corruption in the earth'[175]. In addition, the prophet's traditions (Sunnah) focus on this doctrine, as well. The Prophet stated that 'if anyone has four characteristics, he is a pure hypocrite, and if anyone has one of them, he has an aspect of hypocrisy until he gives it up: whenever he is trusted, he betrays his trust; whenever he speaks, he lies; whenever he makes an agreement, he breaks it; and whenever he quarrels, he deviates from the truth speaking falsely'[176], and 'O you traders, beware of telling lies in (your business) transactions'[177]. Moreover, a very famous Prophet's tradition in this respect is that 'he is not one of us who deceives us'[178]. The importance of this tradition in Sharia context is broad in application to protect contracting parties from any kind of cheating, lies, or bad faith acts. Accordingly, the doctrine of good faith applies in several forms and at all stages of the contract including the negotiation stage, during formulating the contract, and finally, during the executing of the contract.[179]

[172] The Holy Quran, 8:27.
[173] Ibid 5:1.
[174] Ibid 5:2.
[175] Ibid 26:181-83.
[176] Ibn-Rajab Alhanbali, *Jamea' AlO'loum O Alhekam* (Alrisalah Institution 2001) 480.
[177] Ahmed Al-Suwaidi, *Finance of International Trade in the Gulf* (Brill 1994) 192.
[178] Yehia Alnanawi, *Sharh Alnawawi Ala Muslim* (Dar Alkhair 1996) para [101].
[179] Saad Aldiyabi, 'Mabade Husn Alneya fe Alnezam Alqanoni Alsaudi O Alanzema Almoqarana' (2014) 23 Journal of Sharia and Law and Islamic Studies 15, 24 - 25.

Defects of satisfaction are the most significant consideration in regard to the origin of the doctrine of good faith.[180] In addition, any defects whether by intention or not by a contractual party impact on the other party who entered into the contract in good faith with no appreciation of the real facts and status.[181] Accordingly, contracting parties are responsible for disclosing information related to the contract and any defects that may impact on the contract. Thus, concealment and lack of honesty and non-disclosure would challenge the doctrine of good faith.[182] Under Sharia provisions, several defects of satisfaction are recognised. Significantly, this includes deceit and fraud (tadlees) and mistakes (ghalat).[183] Indeed, in some cases, contractual terms may not be valid when these terms challenge the doctrine of good faith, based on Sharia law. This is because adhering to the contractual terms leads to damaging the other party, which does not comply with Sharia provisions about the doctrine of good faith.[184]

Based on Sharia provisions, deceit and fraud can take three forms that are: Firstly, fraud by using words, for example, by lying to the other party, providing misleading information, deliberately careless of providing accurate information, and promising or holding an obligation with knowledge of the inability to fulfil this promise. Secondly, deceit or fraud may occur by acting fraudulently, for example, falsified evidence or documents, as positive acts. Thirdly, deceit or fraud may occur by failure to disclose significant facts including misrepresentation and concealment.[185]

It is well-known under Sharia provisions that deliberate concealment counts as deceit when it is known that the other party would not have concluded the contract if he had been informed of all relevant facts and surrounding circumstances.[186] Moreover, Fiqh provisions set four requirements to apply the fraud or deceit provisions. These requirements are, firstly, misrepresentation and using fraudulent methods to mislead the other party; secondly, the intent to defraud; thirdly, this fraud induced the other party to enter into the contract; finally, causing damage to

[180] Ahmed Abu Alsoud, *Oqood Altameen Bain Alnazerya O Altatbeeq* (Dar Alfekr Aljame'ai 2008) 230.
[181] Ibid.
[182] Saad Aldiyabi, 'Mabade Husn Alneya fe Alnezam Alqanoni Alsaudi O Alanzema Almoqarana' (2014) 23 Journal of Sharia and Law and Islamic Studies 15.
[183] Wahba Alzuhaili, *Alfiqh Alislami O Adelatoh* (Dar Alfikr 2011) part 4, 3063.
[184] Saad Aldiyabi, 'Mabade Husn Alneya fe Alnezam Alqanoni Alsaudi O Alanzema Almoqarana' (2014) 23 Journal of Sharia and Law and Islamic Studies 15.
[185] Wahba Alzuhaili, *Alfiqh Alislami O Adelatoh* (Dar Alfikr 2011) part 4, 3069 - 3070.
[186] Mahmoud Mozafar, *Nazerayet Alaqd* (Dar Hafiz 2002) 139 - 143.

the other party because of the fraud and imbalance of the position of the contracting parties.[187]

Mistake in the context of Sharia law refers to a misunderstanding of an issue or issues regarding the basis of a contract, express and implied terms that the contracting parties do not agree, based on the same level of understanding.[188] Indeed, where a mistake could occur because of misunderstanding of the nature of the contract, its essential terms or conditions, or its object, the contract simply will be invalid because of the significance of the mistake. However, where the mistake is in respect of a non-essential condition or term, the contract will be rescinded by a request of the contracting parties.[189]

There are examples of the general application of the doctrine of good faith in practice. The Saudi courts have well-considered the doctrine of good faith for all contracts including commercial, civil, and administrative contracts based on Sharia provisions. For example, according to Aldiyabi, who reported two cases based on the doctrine of good faith in Saudi Arabia, the case number 566/3 of 1421H that was held by 29th sub-tribunal of the Board of Grievances was about a lease contract between a company and the government.[190] The government party amended the contract with no previous discussion about these amendments with the other party because of its power. However, the court concluded its decision by saying that each party should consider any changes and share their views of these amendments with the other parties. Further, even if the government was a party to this contract, and did not enter into the contract by relying on its power; the government would be considered as a civilian party in a regular lease contract. Significantly, the court held that the interpretation and amendments of a contract must be considered based on the joint will of the contracting parties depending on the need to adhere to the requirements of the principle of good faith in any contract whether prior to the conclusion of the contract or during the performance of this contract. This is a clear application of the principle of good faith where a disclosure of essential information

[187] Ibid.
[188] Wahba Alzuhaili, *Alfiqh Alislami w Adelatoh* (Dar Alfikr 2011) part 4, 3067. See also Mahmoud Mozafar, *Nazerayet Alaqd* (Dar Hafiz 2002) 130.
[189] Ibid.
[190] Saad Aldiyabi, 'Mabade Husn Alneya fe Alnezam Alqanoni Alsaudi O Alanzema Almoqarana' (2014) 23 Journal of Sharia and Law and Islamic Studies 15, 38.

in regard to the changes of the contract was relevant to the other contractual party was induced the other party to proceed in such contract.

Another case, which was reported by Aldiyabi, was supported by the fact that Sharia principles apply the doctrine of good faith in a broad way. The case number was 721/1 of 1408H that was held by 3rd sub-tribunal of the Board of Grievances.[191] The dispute was based on a supply contract between a company and a governmental ministry. The company was to provide cables to the governmental ministry. A royal order was then issued to increase the custom fees from 5% to 7% which was not taken into account when the policy was entered into. Then, the company asked for collection of these fees from the ministry because of an unexpected issue arising, but the ministry refused, because the company should maintain the same price during the performance of the contract. The Primary Court did not accept the claim of the company to collect these fees. However, the Court of Appeal issued its decision number 61/T/2 of 1413H by saying that a reservation must be marked on this judgment because it was contrary to the approach of the Board of Grievances and Sharia. Furthermore, the Prophet's tradition should be considered which said that 'there should be neither harm nor 'malice''[192]. This means that this tradition sets a general Islamic rule for all dealing including commercial transactions to not harm the other party or in general sense to not harm any person even without any contractual relationship based on the principle of good faith. Additionally, the Prophet's tradition particularly is always considered in the context of the principle of good faith and fair dealing in Sharia. Accordingly, the company's claim was successful, based on this doctrine.

The next chapter explores the meaning of the doctrine of utmost good faith in the UK and Saudi jurisdictions. Critical analysis is provided about the meaning of the doctrine of utmost good faith, the continuity of the doctrine of utmost good faith, and its legal remedies.

[191] Ibid 41.
[192] Ibn Rajab Alhanbali, *Jamea' AlO'loum O Alhekam* (Alrisalah Institution 2001) 207, Hadith 32.

CHAPTER 3

THE MEANING OF THE DOCTRINE OF UTMOST GOOD FAITH

3.1. Introduction

This chapter considers the meaning of the doctrine of utmost good faith in the UK and Saudi jurisdictions. In order to achieve the aim of this study, understanding the status of the doctrine of utmost good faith in light of related issues such as the meaning, scope, and continuing impact of the doctrine of utmost good faith, and its consequent remedies for breach shall allow the development of recommendations for each jurisdiction.

This is an important exercise also to clarify the implications and possibilities of the doctrine of utmost good faith especially after the reform in the UK based on IA. Significantly, two questions shall be answered in this chapter: Firstly, what are the meaning, limitations, and possibilities of the doctrine of utmost good faith in the UK and Saudi insurance laws and regulations, and secondly, what are the legal remedies for breach of the doctrine of utmost good faith in the UK and Saudi laws and regulations. Accordingly, this chapter shall consider three main areas that are firstly, the meaning of the doctrine of utmost good faith; secondly, continuing the doctrine of utmost good faith; and, thirdly, remedies upon breach of the doctrine of utmost good faith.

3.2. Origin and Meaning of Utmost Good Faith

Insurance contracts have relied on the doctrine of utmost good faith in both the UK and Saudi Arabia based on different premises. The early leading case *Carter v Boehm*[193] established the doctrine of good faith in insurance contracts in the UK. This case was based on an insurance policy to cover any loss for taking Fort Marlborough on Sumatra by any foreign enemy. Within a year of the policy, the fort was taken by a French attack, and the insurer refused the claim made by the

[193] (1766) 3 Burr 1905.

insured, Mr. Carter, the Governor of Fort Marlborough. The insurer attempted to void the insurance policy due to essential information regarding the weakness of the fort and the possibility of an expected French attack not having been disclosed to the insurer. Lord Mansfield in his decision established the doctrine of good faith and clarified the principal elements of insurance contracts[194], as follows[195]:

> Insurance is a contract based 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 underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back of such a 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… Good faith forbids either 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.

Distinctions between the doctrine of good faith and the doctrine of 'utmost' good faith were not based on the judgment of Lord Mansfield but came later. Indeed, Lord Mansfield never mentioned 'utmost good faith' but simply 'good faith'.[196] Furthermore, identifying insurance contracts as a contract of *uberrimea fidei* came after 32 years of *Carter v Boehm*[197], specifically in *Wolff v Horncastle*[198]. Later, in 1906, the doctrine of 'utmost good faith' was codified by s 17 of MIA, which states that 'insurance is *uberrimæ fidei*: a contract of marine insurance is a contract based upon the utmost good faith'.

There was uncertainty surrounding identifying either the doctrine of good faith, perfect good faith, or utmost good faith. However, significant distinctions were drawn in the English common law authorities. While the doctrine of good faith requires honest dealing with sincere intention; the doctrine of the 'utmost' good faith should not just mean the simple understanding of the doctrine of good faith.[199] While the doctrine of good faith, in ordinary contracts, means that all contracting parties must refrain from making a misrepresentation; the doctrine of utmost good faith means that contracting parties must refrain from making a misrepresentation

[194] Ibid 1910.
[195] Ibid 1909 - 1910.
[196] This issue is considered in the next chapter.
[197] (1766) 3 Burr 1905.
[198] (1798) 1 Bosanquet and Puller 316, 126 ER 924, 928.
[199] Peter MacDonald Eggers & Patrick Foss, *Good Faith and Insurance Contracts* (LLP Reference Publishing, 1998) 34 - 35.

and also make full disclosure.[200] It is also accepted that the doctrine of utmost good faith extends further than the obligation of honesty.[201] Consequently, the doctrine of utmost good faith may be breached without dishonesty. However, dishonesty can contribute to a breach of the doctrine of utmost good faith.[202]

For example, in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*[203], the High Court of Australia found that 'the criteria of dishonesty, caprice and unreasonableness more accurately express the ambit of what constitutes a breach of s 13'[204]. Accordingly, the recognition of the meaning of the doctrine of utmost good faith is not only about abstaining from bad faith situations.[205] This is because the doctrine of utmost good faith is not a negative obligation, it requires positive obligations. However, bad faith situations do contribute to the breach of the doctrine of utmost good faith.[206] As a result, the interpretation of the doctrine of 'utmost' good faith is not only about abstaining from bad faith acts, but it includes also notions of reasonableness[207], and 'commercial standards of decency and fairness'[208].

To identify the degree of good faith in insurance contracts requires identifying the meaning of good faith and the significance of adding 'utmost' to good faith.[209] 'Utmost' good faith means most extensive not the greatest good faith.[210] This needs the insurers and insureds to act in good faith 'as far and as best as they can'[211]. For

[200] Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211, 219.
[201] *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] 235 CLR 1, 62 ACSR 609, [2007] HCA 36, [15].
[202] Ibid [15], [257] & [130].
[203] [2007] 235 CLR 1, 62 ACSR 609, [2007] HCA 36.
[204] Ibid [131]. Section 13 of the Australian Insurance Contracts Act 1984 (Cth) (ICA) states that 'a contract of insurance is based on utmost good faith requiring each party to act towards the other party with the utmost good faith'.
[205] Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211, 219.
[206] Haemala Thanasegaran, *Good Faith in Insurance and Takaful Contracts in Malaysia: A Comparative Perspective* (Springer 2016) 12.
[207] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-008].
[208] [2007] 235 CLR 1, 62 ACSR 609, [2007] HCA 36, [15].
[209] This issue is criticised in the next chapter.
[210] [2003] 1 AC 469, 492.
[211] Greg Pynt, *Australian Insurance Law: A First Reference* (3rd edn, LexisNexis Butterworth 2015) 130.

this purpose, Lord Hobhouse significantly recognised developments in the phrase 'utmost' good faith in *the Star Sea*[212], as follows[213]:

> It was probably the need to distinguish those transactions to which Lord Mansfield's principle still applied which led to the coining of the phrases "utmost" good faith and "*uberrimae fidei*", phrases not used by Lord Mansfield and which only seem to have become current in the 19th century. Storey used the expression "greatest good faith", Wharton's Law Lexicon 14th ed (1938) , p 1020 "the most abundant good faith"; a Scottish law dictionary (Trayner, Latin Maxims and Phrases, 2nd ed (1876) , p 590) used "the most full and copious" good faith; some English judges referred to "perfect" good faith (Willes J in *Britton v Royal Insurance Co (1866) 4 F & F 905*) and Lord Cockburn CJ to "full and perfect faith" (*Bates v Hewitt, LR 2 QB 595, 606*). But "utmost" became the most commonly used epithet and its place was assured by its use in the 1906 Act. The connotation appears to be the most extensive, rather than the greatest, good faith. The Latin phrase was likewise a later introduction.

Similarities between the meaning of the doctrine of utmost good faith in the UK insurance law and the Saudi approach in insurance contracts can be recognised. Committees for Insurance Disputes and Violations (CRIDV) made several decisions that considered the meaning of the doctrine of utmost good faith.[214] Based on these decisions, the doctrine of utmost good faith means that each contractual party is obliged to disclose all material facts that are related to the insured risk and induced the other party to enter into the contract whether these material fact were asked by the other party or not.[215] Additionally, the doctrine of utmost good faith requires each party to refrain from fraud and acting in bad faith.[216] Furthermore, the doctrine of utmost good faith requires maintaining integrity, reasonableness, fairness, and balancing contracting parties' powers.[217] Noticeably, CRIDV have

[212] [2003] 1 AC 469.
[213] Ibid 492.
[214] See for example, decision no 70/R/1433H (2012) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 128/R/1435H (2014) which was affirmed by the Appeal decision no 704/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[215] Ibid.
[216] Decision no 125/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 131/R/1433H (2012) which was affirmed by the Appeal decision no 346/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 375/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 264/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 146/R/1434H (2013) which was affirmed by the Appeal decision no 76/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[217] Decision no 27/D/1437H (2016) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 335/R/1433H (2012) which was affirmed by the Appeal decision no 4/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 111/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

followed the doctrine of utmost good faith unlike the Islamic sources which recognise the doctrine of good faith.[218]

Since the scope of the doctrine of utmost good faith has a reciprocal application[219], four possibilities are recognised which fall into two categories that are pre-contractual duties and post-contractual duties. The four possibilities are insured's pre-contractual duties, insurer's pre-contractual duties, insured's post-contractual duties, and insurers' post-contractual duties. In the UK, these possibilities are based on the wording of s 17 of MIA as s 17 does not limit the doctrine of utmost good faith to a specific party; while in Saudi Arabia, these possibilities are based on the Islamic provisions. Further, CRIDV committees apply these possibilities in their decisions based on the Islamic approach.[220]

The following section considers the continuation of the doctrine of utmost good faith. This section shall figure out the impact of utmost good faith during the performance of the contract for both parties as utmost good faith is not limited to the pre-contractual stage.

3.3. Continuing of the Doctrine of Utmost Good Faith

The doctrine of utmost good faith consists of pre-contractual and post-contractual stages. Norma Hird considered that 'section 17 is drafted in wide enough terms to admit the possibility of a post-contractual duty of utmost good faith'.[221] However,

[218] This issue is considered in the next chapter.
[219] See for example, *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and Others (the star sea)* [2003] 1 AC 469.
[220] For example for post-contractual duties for both parties, decision no 285/R/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 9/R/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 131/R/1433H (2012) which was affirmed by the Appeal decision no 346/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 81/R/1435H (2014) which was affirmed by the Appeal decision no 181/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 27/D/1437H (2016) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 70/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 223/J/1431H (2010) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 76/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; and decision no 93/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[221] Norma Hird, 'The Star Sea - The Continuing Saga of Utmost Good Faith' [2001] JBL 311, 316.

other views found it unlikely that s 17 of MIA refers to the post-contractual stage of the contract.[222] This is based on four reasons.

Firstly, Sir Mackenzie Chalmers, the drafter of MIA, did not mention post-contractual obligations or even consider the two stages of the obligations of the doctrine of utmost good faith.[223] Secondly, the avoidance of the contract upon breach of the doctrine of utmost good faith is a consequence of the breach of the doctrine during the formation of the contract of insurance rather than a consequence of the post-contractual breach.[224] Thirdly, s 17 was under the disclosure and representations part of the Act which included four other provisions about disclosure at the pre-contractual stage and nothing about the post-contractual stage. Thus, s 17 dealt only with the obligations at the pre-contractual stage.[225] Fourthly, the wording of s 17 should be limited to the pre-contractual stage because it says the contract of insurance is 'based on', and the basis of a thing should refer to the establishment of it. Accordingly, this refers to the formation of the contract and the pre-contractual stage.[226]

Although this is an interesting interpretation of s 17 of MIA, especially, the interpretation of the wording 'based on', the interpretation by the common law jurisdictions went further than the wording of s 17.[227] Likewise, for example, s 13 of ICA refers similarly to the doctrine of utmost good faith as it is a basis of the contract, but it goes further than s 17 of MIA as under Australian law the doctrine of utmost good faith refers to any matter under or in relation to the contract of insurance. This may easily refer to the post-contractual stage.

For another example, in New Zealand, there is no recognition of the doctrine of utmost good faith in the Insurance Law Reform Act of 1977; however, the High

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[222] Neil Campbell, 'The Scope of an Insurer's Post-Contractual Duty of Good Faith' (2016) 27 ILJ 185.
[223] Ibid 187. See also Mackenzie Dalzell Edwin Stewart Chalmers & Douglas Owen, *A digest of the law relating to marine insurance* (William Clowes & Sons Ltd 1901) 21 - 22; and Mackenzie Dalzell Chalmers & Douglas Owen, *The Marine Insurance Act 1906* (William Clowes & Sons Ltd 1907) 25.
[224] Ibid 187. See also, Howard Bennet, 'Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law' [1999] LMCLQ 165, 219; Haemala Thanasegaran, *Good Faith in Insurance and Takaful Contracts in Malaysia: A Comparative Perspective* (Springer 2016) 14.
[225] Ibid 187.
[226] Ibid.
[227] See for example, *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* (*The Mercandian Continent*) [2001] CLC 1836; *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others (the Star Sea)* [2003] 1 AC 469.

Court of New Zealand considered the doctrine of utmost good faith as it was an agreed general common law principle. In *Young v Tower Insurance Limited*[228], Gendall J did not only consider the doctrine of utmost good faith as an implied term in every contract of insurance[229], which was similar to the ICA position rather the UK position; but also the continuity of the utmost good faith on behalf of the insurer was accepted. The scope of the doctrine of utmost good faith based on this judgment was extensive as it was not only about disclosure.[230]

Although, s 17 of MIA does not state the same wording as ICA, it has nothing in it implying that it should be limited to the pre-contractual stage. As a result, it is an accepted interpretation of the doctrine of utmost good faith in both pre-contractual and post-contractual stages, because of two reasons that, first, it is settled by the common law authorities. Secondly, the wording of s 17 does not limit the utmost good faith to a specific stage of the contract, and the interpretation of 'based on' may refer to the time that the duty should start as it starts prior the conclusion of the contract, but it does not mean 'only' to this stage. Significantly, in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others* (*The Star Sea*)[231], Lord Hobhouse affirmed that 'utmost good faith is a principle of fair dealing which does not come to an end when the contract has been made'[232].

The nature of the post-contractual duties of utmost good faith is not obvious and specified in the UK jurisdiction. The application of the post-contractual duty is different depending on different facts and circumstances.[233] Nevertheless, it can be noticed now, based on ss 21-22 of IA, which are abolished ss 18 to 20 of MIA, that there is no recognition of post-contractual duties. The only duty to be recognised was the pre-contractual one.[234] Thus, at the post-contractual stage, the post-

[228] [2016] NZHC 2956.
[229] Ibid [163], as Gendall J stated that:

> A duty of good faith on the part of the insurer is implied in every insurance contract. It must, as I see it, be a necessary incident of these contracts (long said to be contracts of utmost good faith) and an obligation that flows both ways. To suggest otherwise would make no sense. And in my view, this duty extends beyond a mere obligation on the insurer and the insured of continued disclosure.

[230] Ibid.
[231] [2003] 1 AC 469.
[232] Ibid 493. See also the Court of Appeal decision in *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters* (*The Mercandian Continent*) [2001] CLC 1836.
[233] [2003] 1 AC 469, 495.
[234] Ibid.

contractual duties are determined based on the circumstances of each case.[235] The post-contractual duties are governed by the contract itself where this duty can be an express or an implied term, and this should help to identify a link between formation of the contract and the doctrine of utmost good faith to impose post-contractual duties. Further, the post-contractual duties are considered a variation of the contract, especially, where increasing risks. Lord Hobhouse stated that 'where the contract is being varied, facts must be disclosed which are material to the additional risk being accepted by the variation'[236].

In Saudi jurisdiction, the post-contractual duties of utmost good faith are recognised and these duties have wider applications. The interpretation of the doctrine of utmost good faith is not limited for the pre-contractual stage but also during the performance of the contract.[237] Several decisions of CRIDV stated obviously that contracting parties acting in bad faith during the performance of the contract would breach the doctrine of utmost good faith.[238] In decision no 38/J/1429H, the Committee held that complying with the contract terms was an obligation for both the insured and the insurer; thus, breach of any contract term which harmed the position of the other party was an act of bad faith which breached the obligation to comply with the doctrine of utmost good faith.[239] Moreover, the Committee held that, in this case, the insured did not comply with his obligation to provide the insurer the required documents after he got his insurance cover to harm the position of the insurer, which was considered as acting in bad faith. As a result, similar to the UK jurisdiction, the determination of the post-contractual duties is on a case-by-case basis as these duties are different depending on different facts and circumstances.

The extent of post-contractual duties of utmost good faith in the claims process, litigation, and fraudulent claims was questioned prior to the recent reform in the

[235] Peter MacDonald Eggers & Patrick Foss, *Good Faith and Insurance Contracts* (LLP Reference Publishing, 1998) 45.
[236] [2003] 1 AC 469, 495.
[237] Mohammed Ahmed Alsaleh, *Altameen Bain Alhazr O Alebaha* (Al-Riyadh 2004) 116 - 126; Ayman Saleem and Jamal Abdulrhman, *Aloqood Almadania: Albai'a, Alejar, O Altameen* (Dar Hafiz 2009) 670.
[238] Decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; and decision no 93/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[239] Decision no 93/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.

UK.[240] In the *Star Sea*[241], it was held that the doctrine of utmost good faith applied not only to the pre-contractual stage but also to the post-contractual stage of the insurance contract and the scope of the continuity of the doctrine of utmost good faith existed up to the presentation of claims and to the beginning of the legal proceedings. Furthermore, fraudulent claims should be interpreted in light of the doctrine of utmost good faith as the doctrine of utmost good faith is an interpretative principle.[242] However, the duty not to make fraudulent claim is now an independent duty not reliant on the doctrine of utmost good faith in terms of s 12 of IA. In comparison, Saudi jurisdiction does not separate fraudulent claims from the doctrine of utmost good faith as fraudulent claims reflect acts of bad faith which breach the doctrine of utmost good faith.[243] However, the similarity between Saudi and the UK jurisdiction before the Act of 2015 is to interpret fraudulent claims in light of the doctrine of utmost good faith.

Other arguments discussed the extent of the doctrine of utmost good faith during the performance of the contract as it requires, for instance, disclosure and the exercise of powers and rights.[244] This is based on the interpretation of the word 'utmost' which referred to all aspects of the post-contractual stage.[245] According to this view, the question raises whether relying on the doctrine of utmost good faith is required to determine specific obligations or does it allow consideration of all related issues of the contract of insurance? The answer is uncertain, as it needs an authoritative interpretation. Thus, the scope of the doctrine is up to the courts to determine.

As a result of the recent position to consider the doctrine of utmost good faith as an interpretative principle which is also accepted in Saudi jurisdiction, the doctrine of

[240] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 123.
[241] [2003] 1 AC 469, 503 - 504.
[242] This point is considered in depth in chapter 4. See for more details The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 6.8.
[243] Decision no 131/R/1433H (2012) which was affirmed by the Appeal decision no 346/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 375/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 264/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[244] Greg Pynt, *Australian Insurance Law: A First Reference* (3rd edn, LexisNexis Butterworth 2015) 133.
[245] Ibid.

utmost good faith should not be limited to specific obligations but have a wider application for all aspects of the insurance contract. All in all, the doctrine of utmost good faith is not limited to a specific stage or a specific obligation on behalf of both insurers and insureds, as it reflects the reciprocal application.

The next section considers remedies upon breach of the doctrine of utmost good faith in both the UK and Saudi jurisdictions. This section recognises the consequences of breach of the doctrine of utmost good faith and examines similarities and differences between both jurisdictions.

3.4. Remedies upon Breach of the Doctrine of Utmost Good Faith

In the UK, the only remedy that existed upon breach of the doctrine of utmost good faith was avoidance *ab initio* based on s 17 of MIA prior to IA. The wording of s 17 before the modification did not give any flexibility to adopt other remedies as it stated that 'a contract of marine insurance is based upon the utmost of good faith, and if this is not to be observed by either party, the contract shall be avoided by the other party'. Accordingly, no damages might be calculated upon breach of this doctrine based on three decisions of the House of Lords that were in *Banque Financiere de la Cite S.A. (Formerly Banque Keyser Ullmann S.A.) v Westgate Insurance Co. Ltd. (Formerly Hodge General & Mercantile Co. Ltd.)*[246], *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co*[247], and the *Star Sea*[248].

The remedy was criticised as 'it would operate unfairly' and described as 'draconian' in *Drake Insurance plc v Provident Insurance plc*[249], where the Court of Appeal suggested applying the doctrine of utmost good faith to limit the insurers' right to avoid the policy in case of breach of this doctrine by the insured especially for consumer insurance. Rix LJ illustrated this issue by saying 'not all insurance contracts nowadays are made by those who engage in commerce. The existence of widespread insurance contracts of a consumer nature presents new problems. It may be necessary to give wider effect to the doctrine of good faith'[250].

[246] [1990] 3 WLR 364, [1991] 2 AC 249.
[247] [1994] 3 WLR 677
[248] [2003] 1 AC 469.
[249] [2004] QB 601.
[250] Ibid [87] – [89].

Based on s 14 of the IA, s 17 of MIA is amended and the remedy, avoidance *ab initio*, is omitted from the wording. Section 17 is modified to read 'marine insurance contracts are contracts of the utmost good faith'. This amendment could be seen to allow the possibility of other remedies upon the breach of the doctrine. However, the disadvantage of this amendment is that it left in the doctrine of utmost good faith as applying to insurance contracts but did not give any remedy for breach. Consequently, it is up to the common law authorities now to decide which proper remedy should match to a specific type of breach, whether the breach occurs prior to the conclusion of the contract, during the performance of the contract, at renewal, on variations, or until the commencement of legal proceedings.

Remedies that may be offered upon the breach of the doctrine of utmost good faith can be damages, termination, estoppel, or others. This will be based on various factors. These factors are, for example, the type of breach, occurrence of loss, and the time of breach. According to s 14(1) of IA, avoidance cannot be part of the available remedies upon the breach of the doctrine of utmost good faith[251], as it says that 'any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished'. Accordingly, based on this section, the remedy for breach of the doctrine of utmost good faith would differ from the past English common law approach. This is an advantage of IA as it stops criticisms of the harshness of avoidance especially for the insureds because avoidance was worthless against insurers.[252]

The Law Commissions discussed several points with regard to the impact of avoidance as a remedy in the case of a failure of complying with the doctrine of utmost good faith. Firstly, the Law Commissions found that where the failure was by the insurers, the avoidance was not appropriate for the insureds.[253] This was because the purpose of the claim against an insurer was to pay a specific claim not to avoid the whole policy.[254] Further, the Law Commissions highlighted that the

[251] See also Peter Macdonald Eggers, 'The Fair Presentation of Commercial Risks under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 35.
[252] *Cox v Bankside Members' Agency Limited* [1995] 2 Lloyd's Rep 437.
[253] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 6.4.
[254] Ibid.

insureds' wished their claims to be paid in case of the breach of the doctrine of utmost good faith by the insurer.[255] The Law Commissions preferred to give the courts the room to decide the proper remedy upon specific breach. Thus, the question arises whether by accepting that the doctrine of utmost good faith is an interpretative principle which may generate implied terms, breach of these implied terms would result in damages being sought because of breach of the contract. However, the Law Commissions discussed the need to consider damages as a remedy in case of the insurer's bad faith[256]; but they found that s 17 of MIA did not give the right to damages against insurers.[257] Although the wording of s 17 does not give the right to damages, s 17 says nothing against an award of damages. Accordingly, as the late payment provisions based on s 28 of *Enterprise Act* 2016 give the right to damages in case of a failure to pay claims in a reasonable time, breach of the doctrine of utmost good faith may follow the same reasoning to allow damages in case of breach, as both situations are about supporting the insured's position against improper behaviour of the insurer, and in some cases for the insurer against the insured such as in case of the insured's post-contractual breach.

Secondly, where the failure to follow the doctrine of utmost good faith was by the insured, avoidance was not appropriate in all cases as a result of the breach.[258] This discussion was consistent with the majority of criticisms, which were about the harshness of avoidance[259]. The Law Commissions considered the discussion for recognition of an independent duty of fair presentation of risks by the insureds and its proportionate remedies in case of the breach, which are imposed by IA. This recognised that there was no more need for avoidance as a remedy in case of breach of the doctrine of utmost good faith.[260]

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[255] See also, Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 38.
[256] The Law Commission and Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation* (Law Com CP No 204, Scot Law Com DP No 155, 2012) paras 10.6 - 10.7.
[257] Ibid.
[258] Ibid.
[259] See for example, Hasson R, 'The Doctrine of *Uberrima Fides* in Insurance Law: A Critical Evaluation' (1969) 32 MLR 615.
[260] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 39.

Thirdly, the Law Commissions found that the remedy upon breach of the doctrine of utmost good faith, avoidance, was not consistent with the proportionate remedies that were proposed in the case of breach of the duty of fair presentation of risks and the remedies available in cases of fraudulent claims.[261] This was an interesting point because of two reasons. On the one hand, the Law Commissions considered the impacts of the remedies for breach of both the duties of fair presentation of risks and to not claim fraudulently, and the impact of this in light of the doctrine of utmost good faith, on the other hand. This was in order to stress the doctrine of utmost good faith as a general and interpretative principle for both duties.[262] Consequently, the Law Commissions' approach in respect to remedies was to have a consistent model between the duties and the doctrine of utmost good faith. As a result of the Law Commissions' view, avoidance would not be appropriate where there were other proposed remedies for breach of other duties.

Fourthly, the Law Commissions argued the possible effect of s 17 of MIA on the insureds' post-contractual duties that might give insurers the right to avoid the insurance contract.[263] In this context, the Law Commissions opened the door to the courts for further discussion and interpretation for further development. The majority of consultees in this context agreed to retain the doctrine of utmost good faith as a general principle.[264] Although, this might impact negatively on the certainty of the interpretation of s 17 of MIA;[265] it would give the doctrine of utmost good faith a flexibility to be expanded where needed depending on the discretion of the courts based on specific circumstances. The expanding of the doctrine of utmost good faith as an interpretative principle to impose implied terms is consistent with the view of Merkin that 'anything happening post-contract should be the subject of express terms or, if none, implied terms'[266].

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[261] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 6.5; see also Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 39.

[262] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 6.7.

[263] Ibid para 10.14.

[264] Ibid para 10.16.

[265] Ibid paras 10.14 – 10.15.

[266] Ibid para 10.18. See also, Haemala Thanasegaran, *Good Faith in Insurance and Takaful Contracts in Malaysia: A Comparative Perspective* (Springer 2016) 17.

Accordingly, the remedy as a result of a failure of the doctrine of utmost good faith at the post-contractual stage shall not be to avoid the contract[267], but breach of the contract, which may result in a damages claim. However, the Law Commissions did not find damages appropriate in the case of breach of the doctrine of utmost good faith.[268] Indeed, this consequence was not well-reasoned by the Law Commissions especially after the abolishment of avoidance as a sole remedy.

For example, the breach of the doctrine of utmost good faith should be considered in case of a failure to notify the insurer about increasing the risk.[269] The Law Commissions found that according to *Commercial Union Assurance Co Ltd v Niger Co Ltd*[270], a failure to notify the insurer did not breach the doctrine of utmost good faith.[271] Additionally, the Law Commissions did not examine any other remedy in case of such breach, on the one hand; and, on the other hand, the Law Commissions did not consider any element of the doctrine of utmost good faith as an interpretative principle to imply terms in the contract. The interpretation of such an element would give a right in damages for breach of an implied term of the contract that is to comply with the notification clause in good faith.

By comparison, in Saudi jurisdiction, breach of the doctrine of utmost good faith has no specific remedies based on either the laws or regulations. On the contrary, under the Islamic system, general contract law rules are applied in the case of breach of the doctrine of utmost good faith in insurance contracts. These provisions include the right to avoid the contract where the breach is in respect of an essential defect which arises prior to the conclusion of the contract; whereas if it occurs after the conclusion of the contract, the right of termination may be recognised upon the request of the other party.[272] For example, CRIDV in Riyadh made a decision to

[267] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 10.18.
[268] Ibid para 10.20.
[269] The Law Commission and Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation* (Law Com CP No 204, Scot Law Com DP No 155, 2012) para 10.11.
[270] (1922) 13 LlL Rep 75.
[271] The Law Commission and Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation* (Law Com CP No 204, Scot Law Com DP No 155, 2012) para 10.12.
[272] Abdulazim Abuzaid 'Albenaa' Alsharaie Alaslam Lealtameen Aleslami' (8th International Conference on Islamic Economics and Finance, Qatar, 2011) 10; Mohammed Anas Alzarqa, 'Khamsa Kadaya fe Altameen Altawani' (Takaful Insurance Conference Abaadoh, Afaqoh, O Mawqef Alsharia menh, Jordan, April 2010) 6; and Ahmed Alqari, *Magallat Alahkam Alsharia* (Tihama Publications 2005) 305.

void the insurance policy based on the insurer's non-disclosure at the pre-contractual stage.[273] Additionally, losing the right to claim also is recognised by CRIDV in case of fraudulent claims.[274] Furthermore, damages can be awarded if harm and a loss are incurred. This is based on Sharia law as the Prophet's tradition said 'no harm no foul'[275]. In other words, it means that it is not permitted to harm others and if there is harm, there should be compensation based on Fiqh rule 'harm must be removed'[276]. Damages can be awarded in respect of leagl expenses[277], accommodation expenses[278], travel expenses[279], late payment[280] and any other losses.

CRIDV applies reconciliation to settle disputes between insurers and insureds based on Sharia provisions.[281] Based on the Holy Quran verse that 'reconciliation is best'[282]; and the Prophet's tradition 'reconciliation is permitted between Muslims except a reconciliation that permits a forbidden or forbids a permitted'[283]. This method of settling disputes is an advantage of the Saudi jurisdiction as it gives parties the chance to resolve disputes, add a further term or claim, and negotiate solutions amicably. For example, in decision no 248/R/1434H, the insured made a

[273] Decision no 335/R/1433H (2012) which was affirmed by the Appeal decision no 4/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[274] Decision no 131/R/1433H (2012) which was affirmed by the Appeal decision no 346/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 375/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 264/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[275] Muhammed Abdulbaqi (ed), *Sunn Ibn Majah* (Dar Alhadith, 2010), Hadith 2/784 No 2340. See also, Abdulgafour Albaiati, *Almadkhal Ledrasat Al-Qawae'd Al-Feqhia* (Dar Alkotub Alelmia 2015) 29.
[276] Mohammed Bakr Ismaeil, *Alqua'ed Alfeqhia Bain Alasala O Altawjeh* (Dar Almanar 1997) part 3, 10. Saad Alshathri, 'Almaslaha fe Al-Madhab Al-Hanbali' (1996-1997) 47 The Journal of the Islamic Research 275, 297.
[277] Decision no 31/R/1434H (2013) which was affirmed by the appeal decision no 667/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[278] Decision no 55/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[279] Decision no 70/R/1435H (2014) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[280] Decision no 41/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 204/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 19/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[281] Decision no 243/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 75/R/1428H (2007) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 248/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[282] The Holy Quran, 4:128.
[283] Bashar Awad Marouf (ed), *AlJame'a Alkabeer (Sunan Alturmathi)* (Dar Algharb Aleslami 1996) part 3 'Alahkam O Alwasaya', 27, Hadith No 1352. See also, Abdullah Bin Zaid Almahmoud, 'Alaqd Sharia't Almotaqedeen' (1984) 10 Islamic Research Journal 145, 146.

claim under a comprehensive motor insurance policy.[284] Further, although the insured had a right to claim for 135,000 SR for his vehicle, as it was considered as a total loss, the insurer wished to pay 150,000 SR for the cover and to keep the car. The insured accepted the insurer's request to retain the vehicle, and the dispute was resolved by a reconciliation.

However, the CRIDV attitude when resolving disputes by a reconciliation can be criticised from two sides. Firstly, CRIDV had a negative role during the settlement in several decisions, as CRIDV did not play any role during the settlement such as by informing the insured about his right to proceed the claim. Secondly, CRIDV did not consider the imbalance of power between the contracting parties and their different knowledge and experience in negotiating especially in the case of consumer insurance. For example, several decisions settled disputes in favour of the insurers; even though the breach of the doctrine of utmost good faith was obviously by insurers.[285] Breaches were clearly made by insurers, as they negotiated to reduce the insured's cover without any requirement or right to do so.[286] As a result, this reduction of the insured's cover is a consequence of the insured's lack of knowledge and experience especially for consumer insurance such as motor insurance policies. It appears clearly from these decisions that CRIDV played no positive role to advice insureds about their rights during the negotiation between parties to achieve a reconciliation.

3.5. Conclusion

This chapter discusses the position of the doctrine of utmost good faith in both the UK and Saudi jurisdictions in order to provide a general view of the impact of the doctrine of utmost good faith and to provide recommendations that serve the aim of this study. This chapter contributes towards answering one of the major questions

[284] Decision no 248/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

[285] Decision no 75/R/1428H (2007) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 70/R/1428H (2007) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 72/R/1428H (2007) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

[286] Decision no 72/R/1428H (2007) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 70/R/1428H (2007) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 21/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 75/R/1428H (2007) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

of this study with regard to what the meaning, limitations, and possibilities of the doctrine of utmost good faith are in the UK and Saudi insurance laws and regulations. This chapter considered three main sections, the meaning of the doctrine of utmost good faith, continuing the doctrine of utmost good faith, and, remedies upon breach of the doctrine of utmost good faith.

The basis of the doctrine of utmost good faith in the UK was the early case *Carter v Boehm*[287] and following s 17 of MIA it has become a statutory rule, whereas the basis of the doctrine of utmost good faith is Sharia law in Saudi Arabia. Although the doctrine of utmost good faith is based on a different premise in these two jurisdictions; it has a similar meaning, and implications. As is shown above, it is difficult to specify exactly the meaning of the doctrine of utmost good faith in the UK and to consider the impact of the meaning of 'utmost', reflecting the uncertainty in recognising the meaning of it, especially after the enforcement of IA.

By comparison, in the Saudi jurisdiction and CRIDV decisions, the doctrine of utmost good faith has a similar meaning to the wording of the abolished ss 18- 20 of MIA and English precedent, as this meaning particularly reflects Sharia understanding of the doctrine of utmost good faith. Further, the Saudi perspective adopts a similar understanding to Lord Mansfield in regard to refraining from fraud, which is a bad faith act in breach of the doctrine of utmost good faith. Both jurisdictions consider the doctrine of utmost good faith to support fairness, reasonableness, and to balance the contracting parties' powers.

Criticising the meaning of the doctrine of utmost good faith is not limited to the discussion in this chapter, it should be followed by other discussion to recognise the meaning of the doctrine of utmost good faith as an interpretative principle, and to distinguish between the doctrine of utmost good faith and the doctrine of good faith discussed in the next chapter. These all together would give valuable recognition to the doctrine of utmost good faith in the UK, and it would give valuable understanding in the meaning of the doctrine of utmost good faith in Saudi Arabia as it is similar to the UK approach. Finally, it should reduce uncertainty of the meaning of the doctrine of utmost good faith especially after the recognition of

[287] (1766) 3 Burr 1905.

the duty of fair presentation of risks for business insurance by IA and the duty of reasonable care to not make misrepresentation for consumer insurance by CIDRA.

The scope of the doctrine of utmost good faith is not limited to the pre-contractual stage, but also extends to the post-contractual stage in both jurisdictions. However, the application of the doctrine of utmost good faith at the post-contractual stage was questioned and criticised initially by the courts but was later approved based on examining different circumstances depending on case-by-case facts in the UK. In comparison, this impact is similar to Saudi jurisdiction where the doctrine of utmost good faith has a different application at the post-contractual stage as it imposes different duties on both parties which shall be considered in the next chapters.

The UK insurance law does not provide a specific remedy for breach of the doctrine of utmost good faith after the abolishment of avoidance in terms of the amendment to the law by s 14 of IA. The Law Commissions preferred not to limit the doctrine of utmost good faith to specific types of remedies, and they tended to accept the doctrine of utmost good faith as a general and interpretative principle. Accepting the doctrine of utmost good faith as an interpretative principle may then allow implied terms in the contract of insurance which would give a right in damages in case of breach of an implied term. Furthermore, understanding the doctrine of utmost good faith, as an interpretative principle, gives the common law a flexibility to consider more broadly the doctrine of utmost good faith based on different circumstances and to specify the proper remedy for a specific breach, which should be discussed in-depth in the next chapters.

Unlike the Saudi jurisdiction, the breach of the doctrine of utmost good faith may lead to avoidance, termination, damages, or losing the right to claim based on the timing of the breach, the reason for the loss, and the type of breach. Conversely to the UK jurisdiction, damages are widely accepted by CRIDV in Saudi jurisdiction based on Sharia law. Interestingly, CRIDV apply reconciliation as a method to settle disputes. Although there can be criticism of this method, in that this method would introduce an unusual route to resolve insurance disputes based on the satisfaction of the contracting parties. CRIDV needs to give more positive direction rather than relying on the parties' discretion especially where this discretion is of the party who has knowledge and experience. This need will be more significant in

consumer insurance to protect consumers from losing their rights through an imbalance in negotiation positions.

The next chapter considers main criticisms to the doctrine of utmost good faith in both jurisdictions. The next chapter shall evaluate the possible and main criticisms of decision of *Carter v Boehm*[288] in respect of the doctrine of good faith in the UK, the impact of the doctrine of good faith on Takaful insurance contracts, the new position of the doctrine of utmost good faith as an interpretative principle in the UK with a comparison to Saudi jurisdiction, and shall analyse whether there is a need to move from the doctrine of utmost good faith to the doctrine of good faith in both jurisdiction.

[288] (1766) 3 Burr 1905.

Chapter 4

CRITISMS OF THE DOCTRINE OF UTMOST GOOD FAITH

4.1. Introduction

This chapter considers criticisms of the doctrine of utmost good faith in the UK and Saudi jurisdictions. The importance of looking at those criticisms is to identify major issues that arise in respect to the doctrine of utmost good faith in order to assist in developing recommendations to achieve the aim of this study.

Two questions to be addressed in this chapter are: 1- What are the main criticisms of the doctrine of utmost good faith in the UK and Saudi jurisdictions? 2- How do the UK and Saudi jurisdictions distinguish between the doctrine of utmost good faith and the doctrine of good faith?

This chapter will consider four major points that are firstly, the misapplication of Lord Mansfield's judgment in UK insurance law; secondly, an evaluation of Takaful insurance based on the doctrine of good faith in Saudi Arabia: Should Takaful insurance be a commercial or a donation contract?; thirdly, utmost good faith versus good faith: which should be applied?; and fourthly, the adoption of utmost good faith as an interpretative principle. It is worth mentioning that according to the different premises that the doctrine of utmost good faith based on in the UK and Saudi jurisdictions, the first two sections include principal criticisms in each jurisdiction which have not mirror in the other jurisdiction.

4.2. The Misapplication of Lord Mansfield's Judgment in UK Insurance Law

The original judgment by Lord Mansfield did not receive full acceptance by the courts, but it was subject to significant changes. Several observations can be made of the Lord Mansfield's judgment.

First, his Lordship introduced the broad principle of 'good faith' not 'utmost' good faith by proposing this principle of good faith in all commercial contracts.[289] This view is similar to civil law jurisdictions[290], and the Islamic law. Nevertheless, generally, this was not the case in the English law except for some contracts including insurance contracts.[291]

Second, his Lordship interpreted the principle of good faith as a pre-negotiation duty for both the insurer and the insured which includes the duty of disclosure and to not make a misrepresentation or concealment. As a result, not only the insured was required to disclose facts and to not conceal information but also the insurer, as his Lordship stated that 'the 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'[292]. Accordingly, his Lordship did not introduce the duty for the post-contractual stage.

Third, based on the Lord Mansfield's judgment, there was a positive insurer's role by, for example, asking questions, disclosing information as the insurers held the duty of disclosure. His Lordship stated that 'the under-writer at London, in May 1760, could judge much better of the probability of the contingency'[293]. Further, he stated that 'good faith forbids either party by concealing what he privately knows'[294].

Fourth, Lord Mansfield looked at the considered insurer's knowledge and what the insurer should know which added to the insurer's duty to investigate and assess the information and what the insured might not disclose.[295]

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[289] *Carter v Boehm* (1766) 3 Burr 1905, 1910. This is as he stated that 'the governing principle is applicable to all contracts and dealings'. See also Greg Pynt, *Australian Insurance Law: A First Reference* (3rd edn, LexisNexis Butterworth 2015) 129. John Lowry, 'Whither the Duty of Good Faith in UK Insurance Contracts' (2009) 16(1) CILJ 97, 107.

[290] John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60(1) CLP 338, 338.

[291] See for example, *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others (the Star Sea)* [2003] 1 AC 469, [42], as Lord Hobhouse of Woodborough stated that as follows:

> As Lord Mustill points out, Lord Mansfield was at the time attempting to introduce into English commercial law a general principle of good faith, an attempt which was ultimately unsuccessful and only survived for limited classes of transactions, one of which was insurance.

[292] (1766) 3 Burr 1905, 1909.

[293] (1766) 3 Burr 1905, 1914.

[294] (1766) 3 Burr 1905, 1910. See also Susan Hodges, *Cases and Materials on Marine Insurance Law* (Routledge Cavendish 1999) 242.

[295] (1766) 3 Burr 1905,1914 - 1915, Lord Mansfield clarified that as follows:

Fifth, this judgement linked the breach of good faith and fraudulent intention.

Sixth, the basis of the principle of good faith is to avoid fraud, as his Lordship stated that 'the reason for the rule against concealment is to prevent fraud and encourage good faith'.[296]

Seventh, the effect of the breach of good faith based on this judgement was that the contract was 'void' not 'voidable'. Moreover, void means void *ab initio,* which has a retrospective effect to return both contracting parties to the position before the contract was concluded. Later, this was codified in s 17 of MIA. However, this is changed again based on the coming into force of CIDRA and IA.

The MIA and the developments of the law through the majority of the common law decisions in the UK interpreting the Lord Mansfield's judgment did not recognise those seven observations. The courts tended to interpret the doctrine of utmost good faith regarding the insureds' duty of disclosure and misrepresentation with a negative insurer's role, as, for example, the insurer held no duties to ask questions. Further, the insurer's duty to investigate based on the doctrine of utmost good faith was questioned. Then, the courts took significant time to discuss and accept the post-contractual duty of utmost good faith and to identify its scope and situations where it might apply.

A significant critique was given by Hasson, due to the judiciary's interpretation of the decision in *Carter v Boehm*[297].[298] He argued against the negative nature of the insurer's role; how the principle did not meet with the concept of fairness; how the English courts misapplied and misunderstood this principle; how the judges had contributed in making the relationship between the insured and insurer 'lopsided'.

> The underwriter at London in May 1760 could judge much better of the probability of the contingency than Governor Carter could at Fort Marlborough in September 1769. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know everything which was known at Fort Marlborough in September 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance…Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by ail European power.

[296] (1766) 3 Burr 1905, 1919. See also, Peter MacDonald Eggers & Patrick Foss, *Good Faith and Insurance Contracts* (LLP Reference Publishing, 1998) 45.
[297] (1766) 3 Burr 1905.
[298] Hasson R, 'The Doctrine of *Uberrima Fides* in Insurance Law: A Critical Evaluation' (1969) 32 MLR 615.

Moreover, he attempted to narrow the principle and reach a balance between the contracting parties.[299] He also commented that MIA did not distinguish between bad faith due to deliberate concealment and misrepresentation and innocent non-disclosure, which was recognised by Lord Mansfield.[300] It was clear that both the English common law authorities and MIA did not reflect the view of the Lord Mansfield.[301]

The next section considers an evaluation of Takaful insurance depending on the doctrine of good faith in Saudi Arabia. This section shall address the point that insurance contracts should follow either commercial or donation provisions in Saudi Arabia.

4.3. Takaful Insurance: Should Be a Commercial or a Donation Contract?

To understand the importance of weather Takaful insurance contracts are based on donation or commercial provisions, it needs to consider the following premises as discussed below.

Donation provisions challenge the nature of insurance contracts, while the commercial aspects of insurance contracts create proper legal rights and obligations, especially in regard to the doctrine of good faith. For the purpose of this study, it is important to determine duties and legal remedies upon the breach of the doctrine of good faith. This section, specifically, discusses the Fatwa that established Takaful insurance was based on donation provisions in light of the doctrine of good faith. Furthermore, based on Saudi insurance law and regulations, commercial aspects and conditions are more clearly adopted rather than donation elements and provisions. The following ten points are discussed in order to support the commercial nature of insurance contracts, and challenge the donation nature.

Firstly, it is well-known as a general provision of the Islamic donation contracts that the grantor is not a warrantor.[302] In other words, warranty provisions do not

[299] Ibid 615 - 616.
[300] John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' [2007] 60(1) CLP 338.
[301] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 86.
[302] Abdulrhman Aljazeiri, *Alfeqh Aleslami Fe Almadaheb Alarba'a* (Dar Alkotob Alelmeia 2003) part3, 125.

exist under donation contracts unlike commercial contracts.[303] This follows the Fiqh rule that 'a recipient is either a gainer or a secured[304]', which means that the recipient may receive a benefit from the donation or get nothing if there is no loss. Moreover, both parties, the recipient and the grantor, would not pay damages and are secure from loss.

An exception to this is a contract that includes a donation in exchange for a sum of money.[305] In addition, related to this scenario, the provisions which should be applied are provisions of sale of goods contracts. Furthermore, the Fiqh rule, which should be applied, is that 'the contractual party is either a gainer or loser'[306] in the context of commercial contracts. Significantly, from a theoretical aspect, this rule would be applicable in Takaful insurance contracts, because it is based on mutual donation; and, at the end, Takaful applies commercial provisions even if Takaful starts with donation.[307] However, applying sale of goods provisions means that Takaful insurance would then turn into conventional insurance, because the reasons to prohibit conventional insurance will exist, at the end, when applying commercial provisions. As a result, it seems clear that there is no reason to adopt donation provisions, because, on the contrary, the general principles of insurance contracts are the opposite of donation such as the principle of indemnity.

Secondly, according to decision number 200 (21/6) of IFA in regard to Takaful insurance provisions, it is acceptable to say that Takaful insurance contracts are similar to conventional insurance in some principles including the doctrine of good faith, indemnity, subrogation, contribution, proximate cause, and insurable interests.[308] These similarities reflect that IFA accepted the provisions of commercial contracts because some of the above principles are not relevant to donation contracts. Furthermore, donation contracts usually do not require the contracting parties to have any interest to enter into the contract unlike the case of insurance contracts including, Takaful insurance. Moreover, although the doctrine

[303] Ali Afandi, *Dorar Alhokam fi Sharh Majallat Alahkam* (Dar Aljail 1991) part 6, 168.
[304] Mohammed Ibn Othaimeen, *Alsharh Almomtea' Ala Zad Almostaqne'a* (Dar Ibn Aljauzi 2002) part 11, 68.
[305] Ali Afandi, *Dorar Alhokam fi Sharh Majallat Alahkam* (Dar Aljail 1991) part 6, 185.
[306] Ibid 76. See also, Khaled Bin Ali Almeshiqeh, 'Altawaruq Almasrefi an Tariq Baie' Alma'aden' (2004) 73 Islamic Research Journal 235, 312.
[307] Abdulazim Abuzaid 'Albenaa' Alsharaie Alaslam Lealtameen Aleslami' (8th International Conference on Islamic Economics and Finance, Qatar, 2011) 7, 10.
[308] Islamic Fiqh Academy, decision no 200 (21/6), Session 21 (November 2013) 10 - 11.

of good faith exists in all Islamic contracts upon request or without[309], it is not expected that parties are to disclose information in donation contracts. However, it is clear that IFA accepted the technical principles of insurance. Indeed, both the Academy and PCSRI did not consider these issues through their decisions, even though those principles could challenge donation provisions.

Thirdly, insurance contracts in Saudi Arabia, in practice, appear to be commercial contracts not donation contracts. Indeed, it is clear that there is a similarity between conventional insurance and Takaful insurance not at operating levels but at the contract levels, including duties and principles. Although the practice of insurance in Saudi Arabia is under Takaful insurance, the applicable provisions are similar to conventional insurance. This result is consistent with the Fatwa of the PCSRI. This Fatwa concluded by saying that even though one of the licensed insurance companies in Saudi Arabia was applying Takaful concepts based on donation provisions and with the cooperation between Muslims, the reality of the company's work and other companies was applying conventional insurance rules instead.[310] Further, it states that 'the changes in name do not change the fact'[311] in the context of applying conventional insurance, in reality.

Fourthly, Saudi laws and other related insurance regulations neither mention nor consider donation provisions. Conversely, all of these regulations adopted provisions of commercial contracts. For example, article 10 of ICPP, article 37 of IMCCR, and article 29 of OIAR divide insurance provisions into two categories, before-sale provisions and after-sale provisions. Accordingly, these regulations are related to the sale of products, which means applying commercial provisions not donation provisions. This is unlike the Fatwa of the Senior Islamic Scholars, which accepted the type of insurance that based on only donation. As a result, it appears that Saudi regulations follow the Islamic perspective which permitted conventional insurance under commercial provisions, although they still called insurance products cooperative insurance or Takaful insurance. This leads to the conclusion that it is necessary to change Takaful insurance to simply conventional insurance.

[309] Decision no 70/R/1433H (2012) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[310] Fatwas of the Permanent Committee for Scholarly Research and Ifta', 'Albio'a 3', Group 1, Volume 15, 275, Fatwa No.18047.
[311] Ibid.

Neither Saudi laws nor regulations consider donation provisions. Conversely, all of these regulations adopt the provisions of commercial contracts. For example, OIAR and IMCCR, refer to insurance services by using commercial terms, such as 'products'.[312] For instance, article 13 of OIAR states that the 'company should submit a request to SAMA for obtaining an approval on its insurance products that will be sold on its website', and article 28 of the same regulation states that 'a company, wishing to sell its insurance products through a third party website licensed to do so, must obtain SAMA's prior written approval'. This supports the view that Saudi regulations adopt commercial concepts as with conventional insurance instead of Takaful insurance.

Fifthly, regulations prior to ICPP consider the insured as customers; but after the ICPP, these principles consider these customers as consumers and provided them with proper protection. Many Arab legal scholars did not consider the insurance contract as a type of consumer contract. However, Abu Orabi described insurance contracts as clearly under the provisions of consumer contracts[313], and he called to provide proper consumer protection.[314] His perspective did not vary between consumers, and his view is consistent with the recent reform of Saudi Arabia based on ICPP unlike the English approach, which differentiates between consumer and business insurance by s 1 of CIDRA.

Consumer protection applies to either commercial or donation contracts.[315] In addition, while a consumer is 'any natural or corporate person acquiring a commodity or service for a charge or free in order to fulfil a personal need or the needs of others[316]'; the grantor is who 'grants gratis his money or property to others in his lifetime, but if the grantor requests money in exchange, the donation will take the provision of sale of goods contracts[317]'. However, there is an argument that

[312] See for example, section D of OIAR: Sale of Insurance Products and Services and section E: Post-sale Customer Services, and article 29 - 46 of part 2 of IMCCR. Special Provisions: First: Pre-Sale Provisions, Second: Sale Rules, Third: Post-Sale Provisions.
[313] Ghazy Abu Orabi, *Ahkam Aqd Altameen: Dirasa Moqarana* (Dar Wael 2011) 254 - 256.
[314] Ibid 256.
[315] Article 1 of Consumer Protection Regulation, issued by the Council of Ministers' decree No (120) dated 15/12/2014.
[316] Article 1 of Statute of Consumer Protection Association Regulation, issued by the Council of Ministers' decree No (3) dated 20/01/2008.
[317] Mohammed Ibn Othaimeen, *Alsharh Almomtea' Ala Zad Almostaqne'a* (Dar Ibn Aljauzi 2002) part 11, 65 - 67.

donation contracts cannot include the concept of consumption.[318] Consequently, grantors cannot be consumers. This leads to the conclusion that, according to this perspective, Takaful insurance cannot be covered by consumer protection because of its donation nature.

Sixthly, the nature of the relationship between contracting parties is not charitable. According to PCSRI, the insurance contract is a commercial contract from the side of the insurance company; and it is a civil contract, when the insured is a civilian.[319] Further, if the insured is a company, it is a commercial contract from two sides of both parties.[320] Indeed, the insurance contract is a commercial contract, and its purpose is to make a profit, according to PCPIS.[321] Additionally, the collaboration between insureds by sharing risks may exist as one of the characteristic of Takaful insurance contracts; however, this is not the major purpose of the contract.[322] Accordingly, this supports the view that existing insurance contracts in Saudi Arabia are under conventional insurance provisions, in reality.

Seventhly, insurance contracts, theoretically, are not only based on donation provisions, but also it is prohibited to apply any provisions of conventional insurance. From a practical side, Saudi insurance law and regulations impose commercial insurance provisions on both parties, insurance companies and consumers, and they recently provided an umbrella of consumer protection to insurance contracts. The major reason of issuance by ICPP is the insured's urgent need to be protected by the law due to the imbalance of power between the contracting parties. Conversely, the insured's wish, in reality, is that it is going to buy an insurance product to feel secured by an insurance cover in case of occurrence of risks, and, obviously, the insured does not donate[323], and needs to have consumer protection.

[318] Abdullah Abdulkareem & Faten Hussain, 'Consumer Protection in Arabic Jurisdictions: Between the Reality and Practice' (Consumer Protection for Arabic Consumer between the Reality and Application Procedures, Lebanon, 2014) 8.
[319] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (1987) 20 The Journal of the Islamic Research 17, 39.
[320] Ibid.
[321] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (2001) 4 Research of Council of Senior Islamic Scholars 33, 76.
[322] Ibid.
[323] Ibid 70.

In addition, it is accepted that there is a dispute between the practice and the theory of Takaful insurance. Consequently, there is a particular need to amend the Islamic insurance theory to comply with the practice side. Thus, the existence of Takaful insurance is challenged based on these observations.

Eighthly, legal definitions of insurance adopt commercial terms. For example, article 1(7) of IRLSCIC defines insurance as 'transfer of the burden of risk from the insured parties to the insurer and payment of compensation by the insurer to persons that incur loss or damages'. Furthermore, insurance policy is defined by article 1(17) of IRLSCIC as 'a contract whereby the insurer agrees to compensate the insured party in the event of loss or damage covered by the policy, in exchange for the premium paid by the insured party', and the premium is defined by article 1(18) as 'the amount paid by the insured party to the insurer in exchange for the insurer's agreement to compensate the insured party for any loss or damage resulting directly from an insured risk'.[324] Additionally, Article 2(13) of Cooperative Health Insurance Policy 2014 defines the indemnity as 'amounts to be paid by the company to a third party within the maximum civil liability specified in this policy'. It is significant to highlight that none of these definitions recognise the donation elements of Takaful insurance. However, these definitions recognise the commercial aspects especially when they use and refer to the term 'compensation' or 'indemnity' rather than mutual donation, as considered in Takaful insurance.

Accordingly, no donation provision or element is included in Saudi insurance laws, rules, and regulations. On the contrary, the terminology of these legal instruments supports the conclusion of chapter three that insurance contracts in Saudi Arabia are commercial in structure rather than based on the Takaful system of donation.

Ninthly, the Saudi insurance market cannot cover some large risks due to the market's capacity, and the Saudi market deals with some brokers from Lloyds in London and other foreign companies. In addition, article 14 of the IRLSCIC states that 'companies and professional entities must obtain the prior written approval of

[324] See also article 1(32) IRCHIL, which defines the premium as 'amount paid by the policyholder to the insurance company for the insurance coverage provided by the policy during the insurance term'. See also, Article 2(14) of Cooperative Health Insurance Policy 2014, which defines the premium as 'amount paid by the insured to the company for its agreement to indemnify the third party for damage or loss whose direct cause is a risk covered under this policy'. All of these definitions of the term 'premium' have the same meaning of conventional insurance with no consideration of the donation element.

SAMA before doing business with insurance brokers from Lloyds or foreign companies to cover risks that cannot be covered in Saudi Arabia'. Significantly, this article is an explicit recognition of not only the shortage of the Saudi market and the international Takaful market, but also the possibility of dealing with foreign companies requires that Saudi insurance market must comply with the principles of the global conventional insurance market without worrying about the distinctions of insurance theory between conventional and Takaful insurance.

Tenthly, insurance and reinsurance intermediaries are obliged to provide reinsurance offers to, first, domestic reinsurance companies and, then, to foreign companies by article 26(2) of IRLSCIC. Again, this acknowledges the need to work with foreign reinsurance companies. This is obviously because of the small capacity of the Saudi insurance market which is not able to accommodate some large risks especially in reinsurance. This is one of the major critique of Takaful insurance, which is the need to be reinsured, commonly, by foreign companies that apply conventional commercial insurance. This critique, however, has not received any reasonable response by IFA.

The approach adopted by Saudi regulations is unlike the Fatwa of the Senior Islamic Scholars, which accepted the type of insurance that is based only on donation. As a result, it appears obvious that Saudi regulations follow the Islamic perspective which permitted conventional insurance under commercial principles, although they still named insurance products cooperative insurance or Takaful insurance. Indeed, this leads to conclude that it is necessary to transform Takaful insurance to conventional insurance.

The next section is going to discuss whether to adopt the doctrine of good faith or utmost good faith in insurance contracts analysing both English and Saudi jurisdictions. This should be achieved by evaluating and analysing the significant criticisms of the doctrine of utmost good faith and good faith in both jurisdictions.

4.4. Utmost Good Faith versus Good Faith: Which Should be applied in Insurance Contracts?

4.4.1. In the UK

The Law Commissions asked consultees to consider which should be applied either the doctrine of good faith or utmost good faith, but there was no consensus among consultees. While the majority (56%) favoured 'good faith', (44%) of the consultees found 'utmost good faith' more appropriate.[325] Significantly, the consultees did not agree about the difference between these two principles.[326] International Underwriting Association (IUA), Royal & Sun Alliance Insurance plc (RSA), AXA Corporate Solutions Assurance (AXA), and Marsh Limited found the two principles interchangeable; while Association of British Insurers (ABI), Howard Bannett and NFU Mutual found that adding 'utmost' stressed the significance of the doctrine.[327] Additionally, Bannett considered that the importance of 'utmost' was that it differentiated insurance law and general commercial law.[328]

This was a significant argument because of two issues. First, according to this argument, the real distinction between 'utmost good faith' and 'good faith' is not clear among some members of the insurance industry. Further, the justification for relying on 'utmost' is only to emphasise the significance of the doctrine, but this is already achieved because it is based on statute. However, no further justification was provided about the impact of relying on 'utmost', and how the impact could vary between 'good faith' and 'utmost good faith'.

Second, it is not obvious why Bannett considered the need to distinguish between insurance law and commercial law, where general commercial law does not accept the doctrine of good faith for contracts expect specific types of contracts where the doctrine is currently under debate.[329] Furthermore, if the doctrine of 'good faith' becomes that as is imposed by MIA, this would distinguish insurance law further from general commercial law because it would be imposed by the legislation, while no other commercial contracts would be covered by the same regime.

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[325] The Law Commission and Scottish Law Commission, *Insurance Contract Law: Summary of Responses to Third Consultation Paper: The Business Insured's Duty of Disclosure and the Law of Warranties, Chapter 1: The Business Insured's Duty of Disclosure* (March 2013) para 6.6.
[326] Ibid para 6.7.
[327] Ibid.
[328] Ibid.
[329] As discussed earlier in chapter 2.

The Law Commissions considered the need to change the law to 'good faith' instead of 'utmost good faith', and demanded the consultees' views about this issue. Disagreement among the consultees was about the need to change. Some of the consultees found no need to change 'utmost good faith' to 'good faith'.[330] This is because, for example, the IUA found that these two principles are interchangeable, whereas The Lloyd's Market Association adopted 'good faith'. The risk managers' association Airmic found 'utmost good faith' should not be changed, although Airmic was not sure about the distinction between 'good faith' and 'utmost good faith'[331], which illustrated lack of reasoning in its decision. Strong arguments were made by the international law firms Allen & Overy LLP (A&O), K&L Gates LLP (K&L), and RSA that supported the change to 'good faith' due to two basic reasons that 'utmost good faith has become overloaded with history' and 'good faith' is easy to understand.[332] This is important because it reflects the industry view in seeking clarification of the application of 'utmost good faith'. Significantly, the British Insurance Brokers' Association found that the most clients or insurance personnel cannot understand the differences between these two principles.[333]

The Law Commissions did not consider these reasons strong enough to change the law, although the above reasons to change to 'good faith' were significant in term of the practice of insurance especially where the confusion was found among the insureds. In addition, the Law Commissions did not seek any clarification of the law in regard to 'utmost good faith' despite the recognition of the difficulty to understand the variation between 'utmost good faith' and 'good faith'. As a result of s 17 of MIA and the abolishment of ss 18 to 20, s 17 left the doctrine of utmost good faith as a sole principle with no specific meaning which may lead to further confusion among the contracting parties, especially consumers.

The distinction between the doctrine of utmost good faith and good faith was recognised by the courts, which reflected further uncertainty between the meaning and effect of these doctrines. For example, in the *Star Sea*[334], where the House of Lords argued the existence of the post-contractual duties of utmost good faith, the

[330] The Law Commission and Scottish Law Commission, *Insurance Contract Law: Summary of Responses to Third Consultation Paper: The Business Insured's Duty of Disclosure and the Law of Warranties, Chapter 1: The Business Insured's Duty of Disclosure* (March 2013) para 6.8.
[331] Ibid.
[332] Ibid para 6.9.
[333] Ibid.
[334] [2003] 1 AC 469.

argument was complicated due to the doubts about the breach of the doctrine of utmost good faith as it is far 'from any ordinary understanding of lack of good faith'[335]. Furthermore, the interpretation of *uberrimae fidei* and the expression of 'utmost good faith' was illustrated in the *Star Sea*[336] by stating that 'Blackstone's Commentaries… states that the very essence of contracts of marine insurance "consists in observing the purest good faith and integrity", but in *Carter v Boehm…* Lord Mansfield refers simply to "good faith"'[337].

Lord Hobhouse of Woodborough illustrated the distinction between 'utmost good faith' and good faith as the courts had varied the use 'utmost' good faith especially as it was not based on the judgment Lord Mansfield.[338] Further doubt was recognised in regard the continuity of the doctrine of utmost good faith, and the degree of utmost good faith in the context of insurance contracts. This would reflect further uncertainty in the interpretation of the doctrine of utmost good faith. Lord Clyde considered the degree of openness required of the parties to comply with their requirements of good faith especially during the performance of the insurance contract as it was not 'absolute'[339]. His Lordship stated that 'it is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made'[340].

The Court of Appeal, in *Societe Anonyme d'Intermediaries Luxembourgeois (SAIL) v Farex Gie*[341], justified the lack of utmost good faith compare to good faith, and hesitated to extend the meaning of 'material circumstances'. This, significantly, reflected the complexity of the concept of utmost good faith.[342]

Another example from a commonwealth authority of Australia, in *CGU Insurance Limited v AMP Financial Planning Pty Ltd*[343], the High Court of Australia debated the definition of utmost good faith and the phrase *'uberrimae fidei'*. This was because it was not defined in ICA, and it overlapped with the meaning of good faith;

[335] [2003] 1 AC 469, 474.
[336] Ibid.
[337] Ibid 481.
[338] Ibid 492.
[339] Ibid 482.
[340] Ibid 482.
[341] [1995] LRLR 116; [1994] CLC 1094.
[342] Ibid 111.
[343] [2007] 235 CLR 1, 62 ACSR 609, [2007] HCA 36.

however, the High Court of Australia emphasised 'utmost' good faith rather than good faith. Even then this approach did not indicate a clear difference between these two principles and justification of the need to use 'utmost' was not strong. The High Court of Australia illustrated this issue by stating that 'emphasis must be placed on the word "utmost". The exhibition of good faith alone is not sufficient. It must be good faith in its *utmost* quality'[344].

Finally, it is accepted that most of the previous interpretations of the doctrine of utmost good faith were usually in light of the duty of disclosure and misrepresentation.[345] In addition, as a result of the abolishment of ss 18 to 20 of MIA, there is a particular and urgent need to identify situations involving the doctrine of utmost good faith, specifically, to avoid uncertainty and to find out a potential scope for the doctrine. This need is because the recent English model based on the latest reform is unlike the rest of common law jurisdictions, for instance, Australia and Canada which both include the duty of disclosure as a part of the doctrine of utmost good faith.

According to the Law Commissions, the doctrine of utmost good faith shall be considered as an interpretative principle, and this principle may impose further implied terms. However, the doctrine of utmost good faith, based on s 17 of MIA, is not an implied term, which is unlike, for example, the Australian model. All in all, it is all about time to interpret the doctrine of utmost good faith based on the English common law authorities and to determine the scope, situations, and specific remedies. However, it is significant to consider and apply that the doctrine of utmost good faith may impose further implied terms these terms can be for the insurer and insured; hence, these terms would balance the relationship between contracting parties. As well as, breaching implied terms can be sound in damages.

4.4.2. In Saudi Arabia

Theoretically, although Saudi laws and regulations do not apply the doctrine of 'utmost' good faith; the doctrine of 'utmost' good faith is recognised and applied,

[344] Ibid 124, 130.
[345] Greg Pynt, *Australian Insurance Law: A First Reference* (3rd edn, LexisNexis Butterworth 2015) 125, 130 & 176.

in practice, by CRIDV.[346] Instead, the doctrine of good faith does exist as a general doctrine over Islamic contract provisions.[347]

Important Islamic legal sources recognised a high standard of good faith with no restrictions. Indeed, the majority of Islamic sources do not recognise the duty of 'utmost' good faith and do not see a need to vary between those doctrines unlike, for example, the UK jurisdiction. Moreover, while the doctrine of utmost good faith, in relation to insurance contracts, is to volunteer and disclose material facts, which induce the insurer to enter into the contract in specific terms and premiums, prior and during the performance of the contract[348]; the doctrine of good faith is a wider concept entailing dealing honestly and fairly as well as including the duty of disclosure and to not misrepresent in all contracts, including insurance contracts. However, CRIDV applied the doctrine of utmost good faith similarly to the doctrine of good faith.

A minority of Islamic legal scholars noted the doctrine of utmost good faith, but with the same explanation as the doctrine of good faith, which is to provide faithfully, honestly, and clearly needed facts, to the other contractual party.[349] According to Abu Orabi, the importance of the doctrine of utmost good faith in the context of insurance contracts is because of the differences in the severity of remedies compared with other contracts, such as termination of the insurance contract, the loss of the right to claim for the insurance cover, and avoidance of the insurance contract.[350] Although, Abu Orabi's argument distinguishes between legal remedies in respect of insurance contracts and other contracts requiring a need to recognise the distinction between the doctrine of good faith and the doctrine of

[346] See for example, decision no 127/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 94/D/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Dammam; and decision no 73/D/1435H (2014) which was affirmed by the appeal decision no 391/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Dammam.
[347] Saad Aldiyabi, 'Mabade Husn Alneya fe Alnezam Alqanoni Alsaudi O Alanzema Almoqarana' (2014) 23 Journal of Sharia and Law and Islamic Studies 15, 32.
[348] Decision no 89/R/1433H (2012) which was affirmed by the appeal decision no 398/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 70/R/1433H (2012) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[349] Ghazy Abu Orabi, *Ahkam Aqd Altameen: Dirasa Moqarana* (Dar Wael 2011) 253. See also, Ali Badawi, *Altameen: Dirasa Tatbeqia* (Dar Alfikr Aljamei' 2009) 8.
[350] Ghazy Abu Orabi, *Ahkam Aqd Altameen: Dirasa Moqarana* (Dar Wael 2011) 254.

utmost good faith, those legal remedies, indeed, already exist and are applied under Islamic contracts, for breach of the doctrine of good faith.[351]

SAMA's regulations do not recognise the doctrine of utmost good faith nor any distinction between the doctrine of good faith and the doctrine of utmost good faith. However, SAMA's website illustrates the principles of insurance, including the doctrine of utmost good faith, in its role of keeping consumers informed.[352] However, SAMA neither presents any distinction between the doctrine of utmost good faith and the doctrine of good faith, nor relies on any insurance regulations to specify and clarify this doctrine.[353] As a result, it appears that this is adopting the interpretation from other legal jurisdictions.

It is more appropriate to consider the doctrine of good faith from the Islamic perspective.[354] This is because it does not recognise any differences between the utmost good faith and the doctrine of good faith. The majority of Islamic legal scholars do not mention the doctrine of utmost good faith as being different from the doctrine of good faith, and they tend to adopt only the doctrine of good faith.[355] Furthermore, there is no recognition of a particular need to adopt such doctrine. In Sharia law, there is no recognition of the doctrine of utmost good faith, and, notably, the concept of the doctrine of good faith incorporates the doctrine of utmost good faith.

According to a research by the Islamic Research Journal, the insurance contract is based on the doctrine of good faith, as a required element along with trust, and faithfulness for this contract and any consensual contracts.[356] This provision is based on the verse of the Holy Quran: "O you, who have believed, do not betray Allah and the Messenger or betray your trusts while you know the consequence".[357]

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[351] See Mahmoud Mozafar, *Nazerayet Alaqd* (Dar Hafiz 2002) 121 - 125.
[352] Saudi Arabian Mandatory Agency, 'Frequently Asked Questions in regard to awareness guide for clients with the General Secretariat of the Committees for Resolution Insurance Disputes and Violations' <http://www.sama.gov.sa/ar-sa/ConsumerProtection/Pages/FaqAG.aspx> accessed 1st May 2018.
[353] Ibid.
[354] Ghazy Abu Orabi, *Ahkam Aqd Altameen: Dirasa Moqarana* (Dar Wael 2011) 254.
[355] Such as, Abdul RazzaK Alsanhouri, *Alwaseet fe Sharh Alqanoon Almadani* (Munsha'at Alma'aref 2004) part 7(2) 'Aqd Altameen'; Ayman Saleem and Jamal Abdulrhman, *Aloqood Almadania: Albai'a, Alejar, O Altameen* (Dar Hafiz 2009); and Ali Badawi, *Altameen: Dirasa Tatbeqia* (Dar Alfikr Aljamei' 2009) 8.
[356] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (1987) 20 The Journal of the Islamic Research 39.
[357] The Holy Quran, 8:27.

This study pointed out, specifically, that the fundamental requirement of the doctrine of good faith is that it applies to both contracting parties, because insureds and especially consumers, generally, neither know nor have full understanding of features of insurance contracts.[358] On the contrary, the insurer does not know about specific circumstances around each insured.

However, IFA mentioned the doctrine of good faith as one of the significant principles of Takaful insurance contracts, as with conventional insurance contracts, and with no consideration of the doctrine of 'utmost' good faith. Additionally, the Academy adopted that this principle is based on volunteering important information to the other party either upon request or not[359], which is similar to several decisions of CRIDV that do accept the doctrine of utmost good faith.[360]

Based on Islamic contract provisions, the importance of the doctrine of good faith presents not only prior to the conclusion of the insurance contract, but also during the performance of the contract.[361] Indeed, the importance of this doctrine under Islamic contracts law is to give the other party the chance to enter into the contract without any defect in the party's intention. Moreover, silence or hiding any relevant essential information or facts indicates the probability of bad faith, which will impact on the validity of the contract.[362] However, this impact is different in commercial contracts and donation contracts. This is because under, Islamic contract provisions, the grantor should not be asked about withholding or hiding any information.[363] Further, no claim can be made against the grantor based on a donation contract. Accordingly, this argument also supports the view that insurance contracts should be considered as commercial contracts not based on donation.

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[358] The Permanent Committee for Scholarly Research and Ifta', 'Altameen' (2001) 4 Research of Council of Senior Islamic Scholars 33, 76.
[359] Islamic Fiqh Academy, decision no 200 (21/6), Session 21 (November 2013) 11.
[360] Decision no 70/R/1435H (2014) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 73/D/1435H (2014) which was affirmed by the appeal decision no 391/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 94/D/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Dammam; and decision no 195/R/1434H (2013) which was affirmed by the Appeal decision no 231/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[361] Mohammed Saleh, *Altameen Bain Alhalal O Alharam* (King Fahad National Library 2004) 86.
[362] Mahmoud Mozafar, *Nazerayet Alaqd* (Dar Hafiz 2002) 127 - 135. This is a general provision among all the Islamic contracts, including, for example, tenancy contracts, fiduciary contracts, and insurance contracts, except donation contracts.
[363] Ibid.

It is common to consider bad faith as a breach of the doctrine of good faith in Islamic contracts law. Bad faith situations, which occur upon breach of the duty of good faith, are well-considered under Sharia provisions. If the bad faith occurred prior to the conclusion of the contract and has been proved by the claimant, who is responsible to prove the bad faith, the contract could be void. On the other hand, if the bad faith occurred during the performance of the contract, and the bad faith act has been proved, the contract could be terminated.[364] Because Saudi laws and regulations do not mention any details of legal remedies particularly of bad faith cases, general Islamic contract principles and provisions are applied to fill this gap.

The next section discusses the adoption of the doctrine of utmost good faith as an interpretative principle in both Saudi and the UK jurisdictions. This point shall consider the impact of the doctrine of utmost good faith on other terms and duties.

4.5. The Adoption of Utmost Good Faith as an Interpretative Principle

The English and Scottish Law Commissions found that there is no need to change or abolish the doctrine of utmost good faith but to maintain it as a general principle and specifically as an 'interpretative principle'[365] based on the significant support of the majority of the respondents 71% agreed, while the minority of the respondents (8%) disagreed.[366] After the recognition of the duty of fair presentation of risks and remedies for fraudulent claims, the position of the doctrine of utmost good faith as an interpretative principle is important as both fraudulent claims and the duty of fair presentation of risks are 'examples of good faith'[367]. However, as MIA did not provide any further provisions to assist in the interpretation of the doctrine of utmost good faith, clarity of the doctrine is questioned.

In Saudi Arabia, applying the doctrine of utmost good faith as an interpretative principle for insurers' and insureds' duties is commonly based on the Islamic provisions. Additionally, this application can be found often in CRIDV decisions where the Committees interpret parties' obligations in light of the doctrine of

[364] Abdul RazzaK Alsanhouri, *Alwaseet fe Sharh Alqanoon Almadani* (Munsha'at Alma'aref 2004) part 7(2) 'Aqd Altameen', 1188.
[365] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.8.
[366] Ibid.
[367] Ibid para 6.8.

utmost good faith.[368] This is because the doctrine of utmost good faith is flexible and provides a balance to the contract of insurance in order to protect integrity, fairness, and honesty.[369]

The role of the doctrine of utmost good faith as an interpretative principle was recognised by the Law Commissions.[370] Firstly, good faith gives a basis to imply specific terms when necessary in light of the 'business efficacy test'[371]. By comparison, CRIDV applies such an approach in resolving insurance disputes by implying further duties based on the doctrine of utmost good faith in Saudi Arabia. This is because the doctrine of utmost good faith has various applications for example imposing the duty to notify and the insured's duty to clarify the exceptions of the policy.[372]

Secondly, the Law Commissions found that good faith provides 'judicial flexibility' to solve rare and hard difficulties, which may contribute to the development of this principle. For example, it can be relied on to balance the relationship between parties where the insurer may be relying on its right to reject paying a claim when exercising this right is unfair.[373] Similarly, a decision was issued by CRIDV to rebalance the contracting parties' positions based on the doctrine of utmost good faith.[374] In this decision, the Committee found relying on the policy's terms would harm the insured unfairly. Thus, the Committee decided to interpret the term as an arbitrary term, and, consequently, invalidated it.[375]

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[368] See for example, decision no 89/R/1433H (2012) which was affirmed by the appeal decision no 398/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 2/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 32/J/1430H (2009) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; and decision no 27/D/1437H (2016) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

[369] Decision no 27/D/1437H (2016) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

[370] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23.

[371] Ibid.

[372] Decision no 306/R/1433H (2012) which was affirmed by the Appeal decision no 629/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

[373] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23.

[374] Decision no 27/D/1437H (2016) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

[375] Ibid

Third, as the parties should act in good faith exchanging information, the interpretation of the duty of fair presentation should be in light of the doctrine of utmost good faith.[376] The Law Commissions provided an example for this situation, for instance, if the court found that the insured failed to disclose some material facts intentionally, and the insured was not expected to make further inquiries about this information.[377] This would be counted as breach of the duty of fair presentation because the interpretation of this duty includes to act in good faith when providing information.[378]

Similarities between the duty of fair presentation in the UK and the duty of disclosure in Saudi Arabia can be recognised as both include elements of disclosure and to not misrepresent. In light of this, CRIDV made many decisions as a breach of the duty of disclosure based on the interpretation of the doctrine of utmost good faith.[379] Further, the doctrine of utmost good faith was used by CRIDV to measure whether the breach was harmful to the other party or not, and if yes to what extent.[380] However, if the breach was not harmful or did not increase the loss, CRIDV did not consider that as a breach.[381]

By analysing those three possible applications of the 'interpretative principle' of good faith, it is clear that good faith is favoured in Saudi and the UK jurisdictions. In addition, the interpretation of the three possibilities seems not to be limited to those situations. Significantly, good faith is at the heart of the duty of fair presentation and it seems to determine fraudulent claims, as well. It is as a factor in the determination of the breach. As a result, the distinction between the doctrine of

[376] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23.
[377] Ibid.
[378] Ibid.
[379] Decision no 70/R/1435H (2014) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 73/D/1435H (2014) which was affirmed by the appeal decision no 391/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 94/D/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Dammam; and decision no 195/R/1434H (2013) which was affirmed by the Appeal decision no 231/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[380] Decision no 81/R/1435H (2014) which was affirmed by the Appeal decision no 181/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[381] Decision no 127/J/1430H (2009) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; and decision no 81/R/1435H (2014) which was affirmed by the Appeal decision no 181/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

utmost good faith and good faith, fraudulent claims, and the duty of fair presentation of risks are seen mainly by examining the remedies available upon breach, rather than looking at them as the basis of the duty of fair presentation of risk or duty not to make a fraudulent claim.

Another significant point is that although the doctrine of utmost good faith generates implied terms in the contract of insurance, the doctrine of utmost good faith itself cannot be seen as an implied term. For example, the insured shall act in good faith but cannot prevent the insurer exercising its powers, such as of subrogation.[382]

However, this further raises the question whether the existence of the doctrine of utmost good faith itself is based on an implied term in the contract of insurance. Indeed, The Law Commissions reviewed the Australian model, which adopts the doctrine of utmost good faith as an implied term, but did not accept the doctrine of utmost good faith as an implied term. However, according to Kate Lewins, the Australian position is a 'neat solution'[383] that gives the doctrine of utmost good faith two major benefits that are[384]:

1) A juristic base, which assists the courts and commentators in its development;
2) A flexibility of remedy, including but by no means limited to damages for breach. All contractual remedies are possible, including specific performance and declarations. Therefore the duty can be of some use to an insured who wishes to complain of the conduct of its insurer.

The Law Commissions did not adopt the Australian model or make any suggestion for changes similar to the Australian model; consequently, the interpretation of s 17 of MIA should be limited to the impact of the doctrine in generating implied terms. This should be limited to 'extremely rare'[385] and 'especially hard case or emergent difficulty'[386] rather than the consideration of the doctrine of utmost good faith as an implied term.

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[382] Baris Soyer & Andrew Tettenborn, 'Mapping (Utmost) Good Faith in Insurance Law - Future Conditional?' (2016) 132 Law Q Rev 618, 620.

[383] Kate Lewins, 'Going Walkabout with Australian Insurance Law: the Australian Experience of Reforming Utmost Good Faith' (2013) 1 JBL 1, 3.

[384] Ibid. See also Kate Lewins, 'Reforming Non-disclosure in Insurance Law: The Australian Experience' [2008] JBL 158, 161.

[385] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23.

[386] Ibid.

Conversely, in contrast to Saudi jurisdiction, the doctrine of utmost good faith affects other obligations in light of good faith, as shown above, and not only for rare or hard cases but for all cases as the doctrine of utmost good faith is required for all insurance contracts and would give a possibility to collect damages if a breach occurred, which is similar to the Australian model.[387]

Other views found that the use of the doctrine of utmost good faith should be considered in the 'interpretation of the wording' of insurance contracts.[388] Supporting this view was the Law Commissions' example to use the doctrine of utmost good faith to interpret the duty of fair presentation. The significance of this view is because it extends the scope of the doctrine of utmost good faith; accordingly, the doctrine of utmost good faith can become more flexible and practical than under the previous the English approach especially after the abolishment of avoidance as a remedy by s 14 of IA. Thus, the interpretation of either the duty of fair presentation of risks in business insurance or the duty of reasonable care to not make misrepresentation for consumer insurance should be in light of the doctrine of utmost good faith. In addition, based on the Law Commissions' report, the first use of the doctrine of utmost good faith to interpret the duty of fair presentation of risks, was to exchange information in good faith[389], which had been codified in s 3(3)(c) of IA. Other examples may be considered in future by courts.

Two disadvantages can be identified considering the doctrine of utmost good faith as an interpretative principle. First, it may be preferable to recognise a wider scope for the doctrine in both Saudi and the UK jurisdictions. This may result a wider application than, for example, the English common law position. Second, as a consequence of the first point, there can be uncertainty in understanding the doctrine of utmost good faith by the contracting parties, especially insureds. This

[387] See for example, decision no 128/R/1435H (2014) which was affirmed by the Appeal decision no 704/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 89/R/1433H (2012) which was affirmed by the appeal decision no 398/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 41/R/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 55/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.

[388] Baris Soyer & Andrew Tettenborn, 'Mapping (Utmost) Good Faith in Insurance Law - Future Conditional?' (2016) 132 Law Q Rev 618, 622.

[389] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23.

would be more significant for consumer insurance. This confusion is a strong possibility as was identified by the Law Commissions as consultees recognised that the differentiation between good faith and utmost good faith was questioned by clients and insurance personnel. Consequently, further confusion among insureds might still arise, specifically, for insureds who have lack of knowledge and limited or no experience in consumer insurance in both jurisdictions.

4.6. Conclusion

This chapter examines four major issues to answer the two major questions of this study and to achieve the objectives and, eventually, the aim of the study. These major questions are what the major criticisms are that meet the doctrine of utmost good faith in the UK and Saudi jurisdictions and how the UK and Saudi jurisdictions distinguish between the doctrine of utmost good faith and the doctrine of good faith. Answering the first question is achieved in two points, as following:

First, this study found that there is a significant misapplication of the decision of Lord Mansfield in *Carter v Boehm*[390]. The English courts and MIA did not either recognise or adopt Lord Mansfield's perspective on good faith in all contracts. Instead they had their own interpretation to follow the doctrine of utmost good faith instead of good faith in insurance contracts and other specific and limited contracts. This study makes seven principal observations to identify the main differences between the judgment in *Carter v Boehm*[391] and the interpretation of the courts, as well as the impact of MIA. Significantly, Lord Mansfield recognised the doctrine of good faith not the doctrine of utmost good faith. Other significant academic criticisms based on the Lord Mansfield's view were made in trying to narrow, clarify, and interpret the doctrine of utmost good faith. Finally, the English insurance law and courts should reconsider the Lord's view in regard to apply the doctrine of good faith instead of the doctrine of utmost good faith.

Second, the determining which provisions Takaful insurance should rely on, whether donation or commercial provisions, helps to specify which further applicable rules and legal remedies are available in the case of breach. There was discussion of seven issues which present challenges to apply donation provisions in

[390] (1766) 3 Burr 1905.
[391] Ibid.

Takaful insurance. Recommendation was made to apply commercial provisions to Takaful insurance or to simply apply the conventional insurance. This is because there are significant difficulties when excluding commercial provisions from Takaful insurance. After all, insurance contracts basically should be dealt with in light of the commercial principles under Saudi legal regulations especially for consumer protection. This is based on the fact there is a disagreement among Islamic scholars regarding the prohibition of conventional insurance. Accordingly, applying commercial provisions would permit the application of the general insurance principles and obligations, significantly, the doctrine of good faith and its related duties, as donation provisions do not consider concealment or non-disclosure as a breach of the contract.

The second question is answered by considering three points, as follows: First, although the Law Commissions did not make a modification from the doctrine of utmost good faith to good faith, difficulties of understanding the doctrine of utmost good faith still exist. The Law Commissions did not recognise the doctrine of utmost good faith as either a specific and limited duty or an implied term, but set the doctrine of utmost good faith as a general principle. Accordingly, this may be a reason for further confusion particularly in consumer insurance. This study proposes that the doctrine of utmost good faith needs to be specific and well-understood by contracting parties. Further interpretation by the UK authorities to specify or widen its scope is needed as the doctrine of utmost good faith is already making confusion among professional, the clarification is significant especially for ordinary consumer and moving to the doctrine of good faith is favourable.

The advantages of moving to applying the doctrine of good faith are, firstly, to decrease the uncertainty of the doctrine of utmost good faith among insurance clients whether consumers or businesses, and secondly, doubts about the distinction between the doctrine of utmost good faith and good faith still exist whereas moving to good faith would limit these doubts.

Second, based on PCSRI and IFA, the Academy adopted the view that Takaful insurance contracts apply the doctrine of good faith with no regard to the doctrine of utmost good faith. However, scholars, who adopted the doctrine of ‘utmost’ good faith, did not recognise the actual importance of this variation in the context of Sharia law. Although CRIDV recognised utmost good faith, the committees did not

distinguish between the doctrine of utmost good faith and good faith, and they did not rely on any laws or regulations. Accordingly, the lack of justification for the existence of the doctrine of utmost good faith is significantly recognised. Additionally, all remedies, which have been mentioned by some as distinguishing the doctrine of utmost good faith from that of good faith, already existed and were well-known in Islamic contracts. It appears that the application of the doctrine of good faith under Sharia law is broad enough to include the provisions of 'utmost' good faith. This is because of the concepts taken from the main sources of law such as the Holy Quran and Prophet's traditions. This, as a result, supports the view that there is no need to recognise the doctrine of 'utmost' good faith under the Islamic perspective.

Third, according to the Law Commissions, the doctrine of utmost good faith shall be considered as an interpretative principle, and this principle may impose further implied terms, help interpret the wording of the contract, and to interpret the duty of fair presentation of the risks and duty not to make fraudulent claims. However, the doctrine of utmost good faith, based on s 17 of MIA, is not an implied term. CRIDV applies a similar position as the doctrine of utmost good faith might impose further terms, used to interpret other duties and to rebalance contractual obligations based on invalid terms. Noticeably, both Saudi regulations and the Law Commissions did not consider the case of consumer insurance which needs clearer obligations due to the lack of knowledge and experience of consumers. Because of this, a strong advantage of recognising the doctrine of utmost good faith would be that it is very flexible to help find further solutions to support integrity and balance the power between the contracting parties in an insurance contract.

The next chapter considers the insured's pre-contractual duties in consumer insurance. This chapter shall examine the new revolution in the UK insurance law which separates the insurance industry into consumer and business insurance. This shall be analysed in comparison with the Saudi jurisdiction which adopts the consumer insurance regime. Criticisms of how to determine who the consumer is in both jurisdiction are very significant to provide recommendations and suggestions. In addition, analysing and criticising the consumer's duty of reasonable care to not make misrepresentation and the related remedies for breach of that duty based on the consumer insurance regime in the UK in comparison to Saudi jurisdiction are also necessary.

CHAPTER 5

CONSUMER'S PRE-CONTRACTUAL DUTIES

5.1. Introduction

As chapter two explains the four possibilities of the doctrine of utmost good faith depend on two categories as insureds and insurers' pre-contractual duties and insurers and insureds' post-contractual duties. According to the modern insurance regime in the UK, the insured's pre-contractual duties are now independent from the doctrine of utmost good faith. This chapter considers consumers' pre-contractual duties in the UK with a comparison to Saudi jurisdiction.

CIDRA imposes the duty of reasonable care to not make a misrepresentation and abolishes the duty of disclosure for consumer insurance contracts. Based on the duty of reasonable care to not make misrepresentation, consumers have no commitments to voluntarily disclose material facts but to answer the insurers' questions. CIDRA provides different remedies upon the breach of this duty based on the intention of the insured whether there is reckless or deliberate misrepresentation or careless misrepresentation. In addition, insurers cannot avoid the policy in case of breach of this duty. Although the duty of disclosure is totally abolished based on CIDRA in consumer insurance contracts in the UK, the doctrine of utmost good faith may still influence the interpretation of the insureds' pre-contractual duty in consumer insurance.

This chapter shall examine significant changes which are related to the modification in remedies provided by CIDRA upon the breach of the consumers' pre-contractual duty in the UK. This is in keeping with the aim of the thesis to develop recommendations to Saudi jurisdiction based on the UK experience.

To achieve the objectives of this study, three main questions shall be answered in this chapter that are: Who is the consumer in the UK and Saudi jurisdictions? What is the duty of reasonable care to not make misrepresentation and its limitation and remedies? How do Saudi regulations apply consumer insurance?

To answer these questions, this chapter is divided into three sections that are within the scope of consumer insurance: who is the consumer? The duty of reasonable care to not make misrepresentation, and legal remedies upon breach of that duty.

5.2. The Scope of Consumer Insurance: Who is a Consumer?

As MIA did not refer to consumers in particular, there were significant attempts to relieve the harshness of the consequences of the duty of disclosure and misrepresentation. There were several attempts to relieve this harshness by the adoption of Statements of Insurance Practice by the ABI in 1977; and, later, by Insurance Ombudsman in 1981 which became the Financial Ombudsman Service (FOS).[392] FOS was established by the *Financial Services and Markets Act* 2000, which deals with disputes in terms of the Insurance Conduct of Business Sourcebook (ICOBS), which are now contained in the Financial Conduct Authority Handbook.[393] However, FOS is restricted to dealing with only disputes that are £150,000 or less and for consumers only as well as micro-enterprises which have an annual income of £1 million or less.[394]

The difference between consumer and business insurance was considered by the Law Commissions based on several facts. These facts included, for consumers, the differences in expertise, knowledge, bargaining powers, and the absence of expert advice such as the broker's advice.[395] By comparison, business insurance is competitive and the negotiation are balanced between more equal contracting parties.[396]

[392] John Lowry & Philip Rowling, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099, 1107 - 1108; Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157, 160.
[393] Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157, 160.
[394] Paul Jaffe, 'Reform of the Insurance Law of England and Wales – Separate Laws for the Different Needs of Businesses and Consumers' (2013) 87 Tul L Rev 1075, 1080.
[395] Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 51.
[396] John Lowry 'Whither the Duty of Good Faith in UK Insurance Contracts' (2009) 16(1) UCILJ 97, 155.

There was an argument given to include micro-businesses, 'smallest businesses with nine or fewer staff'[397] in consumer insurance by the Law Commissions.[398] The Law Commissions found that micro-businesses are unsophisticated businesses. This view would allow 'a more balanced approach for business insurance'[399]. The Law Commissions found that, based on the feedback of consultees, micro-businesses use their insurance policies similarly to consumers[400] in respect of there being lack of broker's advice[401]; they buy 'standard-form insurance policy' as they do not negotiate terms[402]. Accordingly, it seems that there was a particular need to cover micro-businesses under the consumer insurance regime.

Despite the seriousness of the debate to include micro-businesses, all attempts to do so were unsuccessful and all types of businesses are excluded. This is due to several reasons. Firstly, respondents to the Law Commissions' consultation paper found there was a level of uncertainty in adopting 'standard-terms' contracts for both insurers and policyholders for micro-businesses.[403] Secondly, micro-businesses covered by FOS for disputes less than £100,000.[404] Thirdly, according to FOS, it is difficult to define micro-businesses.[405] Fourthly, micro-businesses defined by the size of the businesses, annual turnover or the number of staff.[406] Fifthly, it was difficult to draw a clear distinction between small businesses and micro-businesses.[407] Finally, there was no evidence of any disadvantage of micro-businesses under the current insurance law.[408]

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[397] The Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009) para 10.12.
[398] The Law Commission, *Reforming Insurance Contract Law: Should Micro-Businesses be Treated Like Consumers for the Purposes of Pre-Contractual Information and Unfair Terms?* (Law Com IP No 5, 2009).
[399] Ibid para 1.17.
[400] Ibid para 1.25.
[401] Ibid 2.14. The Law Commission stated that 'these businesses are also the least likely to use brokers… [A]round 50% of those companies with turnover of less than £500,000 bought insurance directly from insurers'.
[402] Ibid para 3.2.
[403] Ibid para 3.7.
[404] Ibid para 4.3. According to FOS, losses should be up to £150,000 (£100,000) for complaints before 1st January 2012. Further, as the report was written 2009, the amount indicates above is £100,000. See Financial Ombudsman Service, 'Frequently-Asked Questions' <http://www.financial-ombudsman.org.uk/faq/answers/complaints_a3.html> accessed on 1st May 2018.
[405] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 2.24.
[406] Ibid para 2.24.
[407] Ibid para 2.25.
[408] Ibid para 2.27.

Although there may be several difficulties in recognising micro-businesses to be included in consumer insurance law, these difficulties can be treated by the law itself. It seems that it was all about a clear definition between micro-businesses and small businesses which can be overcome by specifying a clear definition for micro-businesses. According to FOS, it was complicated to define micro-businesses, but it was not impossible. Clear legislation should play a role to assist with complicated issues surrounding certain concepts such as by defining micro-businesses based on all factors including the size of the business at the time of the contract, turnover, and the number of staff.

Section 1 of CIDRA states a consumer is 'the individual who enters into a consumer insurance contract, or proposes to do so'. Further, consumer insurance contracts are made by 'an individual wholly or mainly for purposes unrelated to the individual's trade, business or profession' by s 1(a) of CIDRA. CIDRA applies to all contracts made on or after 6th April 2013 or varied on or after 6th April 2013. This means that CIDRA applies to new contracts, renewals, and variations. Significantly, as a consequence of the use of the term 'mainly', it could be that an insurance policy may have 'a dual purpose'.[409] The definition includes the case that the consumer may seek a motor insurance for a 'mainly' non-business purpose; however, it could be used rarely for business purposes.[410]

Based on the definition, there is a difficulty in some cases to distinguish between consumer and business insurance. For example, a fire insurance policy for a building which includes a store over a house.[411] In this case, the question is whether the insurance policy is under the consumer regime or the business regime. The third scenario would be to have a different policy for the house and another policy for the store. Another example would be home insurance which insured the contents

[409] Robert Merkin & John Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' (2008) 71(1) MLR 95, 98; John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-023].
[410] David Hertzell, 'The Consumer Insurance (Disclosure and Representations) Act 2012' in Peter Tyledysley, *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 184.
[411] John Lowry & Philip Rowling, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099, 1117.

that are for personal use 'mainly', but it could include a few contents for a business use.[412]

Examining the purpose of the policy is the key issue in applying CIDRA on the dual purpose insurance policy. This issue should be dealt with carefully as the 'mainly' purpose may be challenged by the insurer. The importance of the scope of this provision is to distinguish the case of a consumer insured who has business and individual uses. A further issue not recognised by CIDRA is which test should be adopted to apply whether an objective test or a subjective test. It is awaited an authoritative decision about what evidence would be required and how to prove the purpose of the policy based on the prudent insurer, reasonable insured, or actual insured.

The determination whether the insured was a 'consumer' was the key issue in *Ashfaq v International Insurance Co of Hannover Plc*[413]. In this case, the insured had a 'residential let property owners' policy to cover a property that he was letting to students. When the insured completed the proposal with his broker, it was stated that the insured had no pending prosecutions for offences except motoring offences. Later, the property was damaged by fire, and the insured claimed for indemnity. The insurer discovered that the insured was awaiting trial on an assault charge, which meant a breach of the duty of disclosure. The insurer, accordingly, avoided the policy. Although the insured tried to apply CIDRA in this case, the trial judge applied the common law, found that the insured breach of his duties and did not consider the insured as a consumer. The Court of Appeal recognised the argument made by the trial judge on this point that 'those Acts [CIDRA and IA] did not apply because they were not in force at the date of the inception of this Policy… it [CIDRA] only applied to consumer insurance contracts entered into after 6 April 2013 and the Act was not retrospective'[414].

The ground of the appeal was that the insured alleged that he had contracted as a consumer within the meaning of Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) and ICOBS as he was working as a director of a number of

[412] David Hertzell, 'The Consumer Insurance (Disclosure and Representations) Act 2012' in Peter Tyledysley, *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 184.
[413] [2017] EWCA Civ 357, [2017] HLR 29.
[414] Ibid [15] – [17].

information technology companies. However, the Court of Appeal found that there was no prospect to establish this grounds of appeal, and the insured was not a consumer.

The appeal was dismissed because of the following reasons: Firstly, the insured was not covered by the meaning of consumer by either UTCCR or ICOBS, which meant the policy was a business insurance policy not a consumer insurance policy.[415] The Court of Appeal illustrated that, as follows:

> Regulation 3(1) of UTCCR 1999 in force at the relevant time provided that a consumer is: "any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession."[416]
>
> ICOBS at para 2.1.1(3), in the section dealing with Client categorisation contains a similar definition of consumer: " *A consumer is any natural person who is acting for purposes which are outside his trade or profession.* " Paragraph 2.1.3 then deals with cases of customers covered in both a private and a business capacity in these terms: "(1) Except where paragraph (2) applies, if a customer is acting in the capacity of both a consumer and a commercial customer in relation to a particular contract of insurance, the customer is a commercial customer. (2) For the purposes of ICOBS 5.1.4 G and ICOBS 8.1.2 R, if, in relation to a particular contract of insurance, the customer entered into it mainly for purposes unrelated to his trade or profession, the customer is a consumer." [417]
>
> Paragraph 2.1.4 then provides: "*In practice, private individuals may act in a number of capacities. The following table sets out a number of examples of how an individual acting in certain capacities should, in the FCA's view, be categorised"*. One of the examples given in the "Capacity" section of the table is pertinent in the present context: "*Person taking out a policy covering property bought under a buy-to-let mortgage*". In the "*Classification*" section of the table against such a person is stated: "*Commercial customer*".[418]

Secondly, the purpose of obtaining the policy was for the insured's trade.[419] Flaux LJ considered that the issued policy was under the Residential Let Property Owners Scheme and not an ordinary house insurance. This reflected that the policy was for the insured's business.[420] Thirdly, as the insured described his work as a director, this meant that he may be involved in other businesses as he was a 'building owner letting out property for profit'[421]. Fourthly, the insured had described the property as his home; however, the Court of Appeal did not consider the property as the insured's home and pointed out that 'the property was not the insured's home, since it is accepted that he lived elsewhere, so it can only be the "home" of the tenants

[415] Ibid [45].
[416] Ibid [27].
[417] Ibid [29].
[418] Ibid [30].
[419] Ibid [46].
[420] Ibid [46].
[421] Ibid [48].

living at the property… Thus the reference to "home" does not convert what is business insurance into consumer insurance'[422].

The Court of Appeal was correct in its decision as the insured tried to rely on consumer insurance provisions whereas the policy was clearly for business purposes. The terms of CIDRA could not be relied on therefore. The court's interpretation of the wording of the insured's proposal for allowed the conclusion that this was a business insurance policy not a consumer insurance policy.

Although this type of dispute may be rare in future as the Act of 2012 is now in force, other disputes may arise regarding consumer dual-purpose insurance policies. Determination of the main purpose of the policy may raise difficulties; however, the conduct of the courts by interpreting the insured's words in the proposal form and the surrounding circumstances such as in *Ashfaq*[423] can limit these difficulties to identify the main purpose of the policy and for applying appropriate provisions whether consumer or business insurance.

Under Saudi jurisdiction, by comparison, which is based on ICPP, there is no limitation on applying consumer provisions to the whole Saudi insurance market. Based on article 2 of ICPP, a consumer defines as 'every natural or juristic entity that contracts, directly or indirectly, with an insurance company for issuance of a policy'. However, lessons could be learned from the UK as ICPP needs urgent reform to distinguish between business insurance and consumer insurance.

Several points can be recognised which could limit consumer protection by changing the definition of 'consumer' in Saudi jurisdiction. ICPP should consider, first, the difference in bargaining powers between businesses and non-businesses insurance customers; second, non-businesses insurance applicants cannot negotiate terms as they enter standard-form contracts; third, non-business insureds have lack of information or may have some challenges to achieve information or understand their duties; fourth, non-business customers may have no broker's advice; fifth, non-businesses generally have lack of expertise in insurance regulations particularly; finally, businesses often have their own legal consul for advice on their obligations and rights. Accordingly, it is proposed that Saudi jurisdiction should

[422] Ibid [51].
[423] [2017] EWCA Civ 357, [2017] HLR 29.

take advantage of the UK approach by dividing the Saudi insurance market into consumer insurance and business insurance on the one hand, and, on the other, including micro-businesses in consumer insurance in Saudi Arabia.

The next section critiques and analyses the duty of reasonable care to not make misrepresentation in consumer insurance in the UK jurisdiction. This section recognises the difficulty of applying the duty of disclosure in consumer insurance, how to prove the breach of the duty, when the misrepresentation is made reasonably, and the gaps in CIDRA.

5.3. The Duty of Reasonable Care to not Make Misrepresentation

In terms of CIDRA, the duty of disclosure is totally abolished in consumer insurance contracts. This is due to several historic criticisms of the duty of disclosure in consumer insurance contracts. Firstly, consumers were unaware of the duty of disclosure and misrepresentation.[424] Secondly, the test of materiality required consumers to predict the information that was required by a prudent insurer, who had a negative role, whereas the insurer had no obligation to ask questions or to draft questions clearly and unambiguously in the insurance proposal form. Thirdly, the harshness of the remedy of avoiding the policy as the sole available remedy in consequence of a breach is incongruous if the breach is made innocently. As a consequence of avoidance, all claims must be rejected and consumers may encounter difficulties in obtaining insurance cover in the future.[425]

The duty of reasonable care to not make a misrepresentation under s 2 of CIDRA abolishes the duty of disclosure or representation that existed under ss 18-20 of MIA. The duty of reasonable care to not make misrepresentation includes answering the insurer's questions or to complete the paper proposal or online proposal form before the conclusion of the contract or on renewal.[426] However, CIDRA does not provide a definition of 'misrepresentation'. Consequently, to interpret the meaning of 'misrepresentation' is left now to common law. In addition, dishonesty should be considered as misrepresentation by s 3(5) of CIDRA. Thus, it

[424] John Lowry & Philip Rowling, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099, 1104.
[425] John Lowry, 'Whither the Duty of Good Faith in UK Insurance Contracts' (2009) 16(1) CILJ 97, 99. Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 46 - 47.
[426] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 127.

is not required to volunteer information but only answering insurers' questions honestly. According to s 3 of CIDRA, the duty of reasonable care to not make misrepresentation is determined in light of relevant circumstances. Several examples of relevant circumstances are provided by s 3(2) to be taken into account, as follows:

> (a) The type of consumer insurance contract in question, and its target market,
> (b) Any relevant explanatory material or publicity produced or authorised by the insurer,
> (c) How clear, and how specific, the insurer's questions were,
> (d) In the case of a failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so),
> (e) Whether or not an agent was acting for the consumer.

There are three ways misrepresentation may arise in consumer insurance. Firstly, providing a false statement in response to a question; secondly, providing a false statement voluntarily where no question is asked by the insurer; thirdly, not confirming or modifying a given statement that is already made.[427] The second case is interesting as CIDRA says nothing about it, and it is up to the common law whether to include this as being covered under the duty of reasonable care.[428] The question is whether such facts should be permitted in light of the reasonable consumer test or whether the old law, the prudent insurer test, should be applied instead. In addition, it is for the insurer to prove the facts provided are relevant. This is because there is no question requiring demonstration of the significance of the fact.

To prove the breach of the duty of reasonable care to not make misrepresentation, it is significant to specify which test should be applied whether an objective test based on the reasonable consumer, or a subjective test using the actual consumer. The standard of reasonable care is determined by an objective test, the reasonable consumer test with an average knowledge, by s 3(3).[429] Moreover, the objective test should consider relevant circumstances such as the type of policy and the manner

[427] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-010].
[428] John Lowry & Philip Rowling, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099, 1111.
[429] Robert Merkin & John Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' (2008) 71(1) MLR 95, 100; David Hertzell, 'The Consumer Insurance (Disclosure and Representations) Act 2012' in Peter Tyledysley, *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 187.

of advertisement.[430] However, if there is particular knowledge that the insurer knows or ought to know, a subjective test of the actual consumer should be considered. In other words, no specific knowledge about the actual consumer, as for the subjective test, is required, generally, unless the characteristics of the proposer are relevant to the insurer, by s 3(4).

The Law Commissions Report of 2009 recognised several situations where consumers are acting reasonably.[431] Where the insurer's question is general the reasonable consumer may not have appreciated that the insurer is asking for specific information. Accordingly, the more obvious and directed the insurer's question is the more chance the insurer has to prove the consumer's breach of the duty of reasonable care.[432] Further, there are cases where the consumer has a reasonable ground to believe a particular fact is true. It may also be the case the reasonable consumer would not be aware of the significance of the fact to the insurer. Finally, the reasonable consumer may assume that the insurer would obtain particular information by itself or form a third party. In these situations, the misrepresentation is deemed to be reasonable. However, these situations are not exhaustive; therefore, the courts may add further wider interpretations.

In a recent case, *Ageas Insurance Ltd v Stoodley*[433], the insurer sought to avoid the insurance policy depending on a deliberate misrepresentation information about a previous accident and the claim resulting from the accident. [434] The insurer alleged that the failure counted as a breach of the duty of reasonable care under s 2(2) of CIDRA by misrepresenting the claims history deliberately or recklessly as the insurer would not enter into the contract if the insurer knew this information.[435] In this case, it had been seen that the insured answered the question without referring to the accident. The insured said that the question was 'rolled up' and confusing him referring to the guidance of ABI.[436] His Honour Judge Cotter QC explained that the primacy should be for complying with s 3 of CIDRA rather than other

[430] Robert Merkin & John Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' (2008) 71(1) MLR 95, 101.
[431] The Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009) para 5.71.
[432] Julie-Anne Tarr, 'Transforming Insurance Law: A Comparative Review of Recent Insurance Law Reform in the United Kingdom and Australia' (2016) 28 Insurance Law Journal 10, 12.
[433] [2018] WL 02024527.
[434] Ibid [11].
[435] Ibid.
[436] Ibid [63].

guidance.[437] The position of the Judge is correct and reasonable as referring simply to the ABI guidance by the insured would be inappropriate where the provision is legislatively recognised by CIDRA. Examining the clarity of the answer as it is part of the insurer's duty was significant to determine the breach. The Judge found that the test was satisfied and no breach was occurred as the question was clear and the answer was appreciated.[438] Further, the insured's argument was rejected.[439]

Under Saudi jurisdiction, as ICPP considers the whole market as consumers with no distinction between consumers and businesses, the insured's pre-contractual duty is totally based on the doctrine of utmost good faith.[440] The Saudi approach therefore is similar, on the one hand to the old law in the UK based on the abolished ss 18-20 of MIA, which include the duty of disclosure and misrepresentation; and, on the other hand, to the duty of fair presentation of risks. Even so, the duty of disclosure and misrepresentation is maintained under the Saudi jurisdiction; article 5(1) of ICPP requires consumers to provide honest, full, and accurate answers about material facts when filling forms and the proposal, which is similar to CIDRA but includes the obligation of disclosure. Based on article 2 of ICPP, it requires consumers to refrain from concealment and misleading the insurer. The recognition of the market as consumers by including the business and individual insureds should be reconsidered similar to the UK experience, as there are many differences between individual insurance and business and professional one. The adoption of the duty of reasonable care to not make misrepresentation is necessary in the Saudi jurisdiction because the different level of knowledge, experience, and awareness between consumers and businesses.

Accordingly, the next chapter shall critically examine the Saudi jurisdiction in regard to the insured's pre-contractual obligation and compare it with the UK business insurance instead of consumer insurance due to the similarities between the Saudi approach overall and the UK business insurance rather than the UK consumer insurance.

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[437] Ibid [64].
[438] Ibid [66].
[439] Ibid [67].
[440] Decision no 70/R/1433H (2012) which was affirmed by the Appeal decision no 269/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 128/R/1435H (2014) which was affirmed by the Appeal decision no 704/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.

The next section in this chapter considers the legal remedies available on breach of the duty of reasonable care to not make misrepresentation for consumer insurance in the UK. When looking at the Saudi jurisdiction, it is more appropriate to compare the Saudi approach with legal remedies in terms of business insurance in the UK because of two reasons. First, there is no mirror of the UK difference between consumer and business insurance in Saudi Arabia. Second, similarities can be seen between the insured's duties under Saudi jurisdiction and business insurance in the UK jurisdiction, especially, regarding the duty of disclosure and misrepresentation, material facts, waiver, the requirement of inducement; and, consequently, legal remedies are matched to these duties.

5.4. Legal Remedies

Avoidance is no longer the sole available remedy as a result of the abolishment of the duty of disclosure. Instead, remedies available upon breach of the duty of reasonable care to not make misrepresentation apply where there is 'qualifying misrepresentation'. The qualifying misrepresentation is defined differently depending on whether the breach is deliberate or reckless misrepresentation, or the breach is careless misrepresentation. A reasonable misrepresentation does not qualify as breach of the duty by CIDRA. Moreover, CIDRA does not include the case of innocent misrepresentation. Accordingly, in case of innocent misrepresentation, the insurer is left with no remedy, the claim should be paid, and the policy must remain.[441] In addition, damages under the *Misrepresentation Act* 1967 are no longer available to consumer insurance as CIDRA does not permit the right to damages.[442]

The qualifying misrepresentation is based on the breach of the duty of reasonable care to not make misrepresentation before the contract is entered into, renewed, or varied. Similar remedies apply in case of variations with a limitation to that part that has been varied. Hence, if the variations affect the whole contract, the insurer may seek a remedy based on the whole contract.

[441] Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 84; John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 128.
[442] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-015].

There are two requirements before the insurer can seek a remedy on this basis. Firstly, there should be a recognised misrepresentation. Secondly, the insurer must show how this misrepresentation impacted on the insurer's decision to enter into the contract at all or if they would have only on different terms, based on s 4 of CIDRA, which forms the inducement requirement. As mentioned above, CIDRA provides two types of qualifying misrepresentation that are deliberate or reckless misrepresentation and careless misrepresentation which shall be considered below.

5.4.1. Deliberate or Reckless Misrepresentation

Deliberate or reckless misrepresentation occurs in terms of s 5(2) of CIDRA, when the consumer 'knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer'. In this case, the insurer has the right to avoid the contract, retain the premiums paid, and reject all claims.[443] Exercising avoidance should be in good faith, as part of the insurer's post-contractual duty of utmost good faith.[444] Consequently, this limitation on the exercise of the insurer's right to avoid the policy can relieve the harshness of the avoidance remedy.[445]

The burden of proof is on the insurer, and the insurer may benefit from the presumption that the misrepresentation is deemed careless unless the insurer proves that it was reckless or deliberate, based on s 5(4) of CIDRA. By s 5(5), this should be done by proving that the consumer has reasonable consumer knowledge, and the consumer knows that the facts are material and relevant to the insurer who has asked a specific and clear question.[446] For example, if the consumer failed to response to a specific question about his health status and he has suffered a heart attack. This information is reasonably relevant to the insurer; accordingly, the insurer's position is supported in terms of s 5(5) as this is a presumption of law. Consequently, CIDRA applies the 'actual insurer' test by s 5(2)(b) instead of the 'prudent insurer'

[443] S 2, Schedule 1 of CIDRA 2012.
[444] This point is covered in chapter 9. See for example, *Drake Insurance Co v Provident Insurance Co plc* [2004] QB 601; *Brotherton v Aseguradora Colseguros (No.2)* [2003] EWHC 335 (Comm), [2003] 2 CLC 629.
[445] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 126.
[446] David Hertzell, 'The Consumer Insurance (Disclosure and Representations) Act 2012' in Peter Tyledysley, *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 189.

test. Thus, it is for the consumer to prove that he either does not understand the question, as there is a problem in the wording or the construction of the question, or that the insured does not have the knowledge which considers this fact relevant to the insurer.[447] This knowledge is based on an objective test based on s 5(5), as discussed earlier.

For a recent example, in *Ageas Insurance Ltd v Stoodley*[448] , the insurer had sought to avoid the policy because of deliberate or reckless misrepresentation; however, the insurer failed to prove that the insured acted deliberately or recklessly.[449] Although the insurer alleged the misrepresentation was reckless or deliberate, the insurer refunded the premium to the insured, and the Judge found that the insurer was 'confused'[450]. This was because refunding the premium would be for careless misrepresentation not reckless or deliberate misrepresentation.[451] The Judge's was correct in his observations as he took the insurer's actions into account which was important to prove and determine the type of misrepresentation and the impact of breach on the insurer.

For another example, in *Southern Rock Insurance Co Ltd v Hafeez*[452], the insurer sought to avoid a consumer's motor insurance policy because of his deliberately or recklessly misrepresenting his address, as he had two addresses. However, the insurer was not entitled to avoid the policy on this ground because the insurer could not prove recklessness on behalf of the consumer. Four points should be recognised from this case.

Firstly, the proposer could not provide further information which might have been of interest to the insurer as the proposal did not contain enough space.[453] Secondly, there was a problem with the online proposal that was to have a printed-copy or even an electronic-copy. This problem may arise frequently as consumers use basic online research to set up insurance policies through websites that work as a collector for insurance policies by several brokers or insurers to make a comparison between

[447] David Hertzell, 'The Consumer Insurance (Disclosure and Representations) Act 2012' in Peter Tyledysley, *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 189.
[448] [2018] WL 02024527.
[449] Ibid [76].
[450] Ibid [70].
[451] Ibid [71].
[452] [2017] CSOH 127.
[453] Ibid [19].

the prices of the policies. Particularly, in this case, the insured did an online search through 'moneysupermarket.com' and 'comparethemarket.com' which required him to fill in an online form.[454] Further, as 'moneysupermarket.com' gave the insured a quote, he proceeded to deal with insurance brokers 'GoSkippy', and he was not aware of who was his insurer till the time of the accident.[455] Although the problem of communication is obvious in respect of online insurance policies, communication between the insured and the insurer should be maintained and the proposal should be clear as this is the insurer's responsibility to draft clear questions in the proposal, according to CIDRA. Accordingly, it was important for the court to know the specific wording of the insurer's questions. However, the proposal questions could not be provided to the court. Although, it could be envisaged that the consumer might not be able to provide a copy of the proposal due to software issues or even a problem with his device; there could be no reason why details of the proposal was not held by the insurer. This issue was key in this recent case because the construction of the insurer's questions was considered by the court as to whether the question was 'what is the address where you live?' or 'What is the address at which the car will 'mainly' be stored?'[456] Accordingly, the advantage of the absence of the proposal form was in favour of the consumer. This was reasonably as the failure to provide the proposal by the insurer was not justified. Thirdly, online websites do not provide consumers proper appreciation of the significance of providing accurate information when asked.[457] Fourthly, to prove the recklessness in this case, it was important to prove that the consumer did not live 'at all' in the provided address. However, it was shown, in this case, that the consumer used to live 'mainly' in the provided address, and he had another address.[458] Moreover, giving the main address did not satisfy the test of recklessly or deliberately misleading the insurer.[459] Lady Paton acknowledged this point by saying that 'nor was it enough if the court were to conclude that the defender was living at Dinard Drive.... The pursuer had to go so far as to prove that the defender was not, on any view, living at Dinard Drive'[460].

[454] Ibid [19].
[455] Ibid [20].
[456] Ibid [53].
[457] Ibid [53].
[458] Ibid [54].
[459] Ibid [54].
[460] Ibid [54].

Under Saudi jurisdiction, Saudi regulation provides further protection to the consumer when applying for online insurance policies. Articles 36 and 37 of OIAR requires insurers when issuing online insurance policies in Saudi Arabia to provide insureds with their insurance proposal, terms and conditions, cover limits, and endorsements. A complete copy of the insurance policy must be sent via email, based on article 36 of OIAR. The regulation requires insurers to ensure that insureds are able to view, print and download their insurance policy copy, based on article 37 of OIAR. This approach would provide proper protection for consumers who do not know in particular which information that they are required to give. This approach would provide protection for consumers by obliging insurers to provide them with this information after issuing the policy and to avoid the key problem as in *Southern Rock Insurance Co Ltd v Hafeez*[461], where the insurance proposal was not available.

All in all, reckless or deliberate misrepresentation gives the insurer the right to avoid the insurance policy. However, this right is restricted by requiring it to be exercised it in good faith and the insurer must prove recklessness or deliberate misrepresentation. Further, a failure by the insurer to prove the reckless or deliberate misrepresentation should be found in favour of the consumer.

5.4.2. Careless Misrepresentation

There are three situations where the misrepresentation is careless. Firstly, if the insurer showed that it would not enter into the contract completely, the insurer has the right to avoid the contract, reject all claims, and return the premiums paid.[462] Secondly, if the insurer would enter into the contract but on different terms, the insurer has the right to impose these terms and treats the contract as if it has been entered into on these terms.[463] For example, if the insurer would include an exclusion clause in regard to a specific loss, the policy would exclude this specific loss as if the insurer had known this before the conclusion of the contract.[464] It is clear that the insurer should pay a claim where the claim is not related to the loss

[461] [2017] CSOH 127.
[462] S 3(5), Schedule 1 of CIDRA 2012.
[463] S 3(6), Schedule 1 of CIDRA 2012.
[464] David Hertzell, 'The Consumer Insurance (Disclosure and Representations) Act 2012' in Peter Tyledysley, *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 190.

occurred.[465] Finally, if the insurer would enter into the contract but on a higher premium, the insurer has the right to reduce proportionately the amount that should be paid on a claim.[466] This is by applying the following formula:

$$X = \frac{Premium\ Actually\ Charged}{Higher\ Premium} \times 100$$

For example, if the premium paid was £1000, the premium would have been £1500 where there was no misrepresentation. Further, if the consumer claims £5000 for his loss, the sum to be paid is (1000/1500) × 5000 = £3333.33.

This proportionality should be applied even in the case of subrogation. The reduced amount should be returned to the insurer as the amount is applied after the reduction, and the rest of the sum is retained by the consumer. Although CIDRA does not consider the case of subrogation, the Law Commissions covered this point in the 2009 Report.[467] However, it is open to the courts to provide further interpretation in the case of subrogation.

The change to proportionate payment was criticised. This was because if avoidance as a sole remedy had led many disputes, the proportionate method might give rise to further disputes around proving what the insurer would have done if the information had been revealed.[468] This may be partially right; however, this perspective does not consider and appreciate the existence of the termination provisions under CIDRA which would give both parties a chance to choose to continue the policy prospectively or not. This protection is needed especially for consumer insurance policies as the parties are not in the same bargaining position. Thus, proportionality and termination together would give consumer insurance remedies a proper balance.

Termination by any party differs from avoidance *ab intio* for three main reasons. Firstly, the insurer must return all premiums paid in respect of the policy post termination.[469] Secondly, all premiums paid before the termination are retained.

[465] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-018].
[466] S 3(7), Schedule 1 of CIDRA 2012.
[467] The Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009) para B.17.
[468] Paul Jaffe, 'Reform of the Insurance Law of England and Wales – Separate Laws for the Different Needs of Businesses and Consumers' (2013) 87 Tul L Rev 1075, 1102.
[469] S 9(7), Schedule 1 of CIDRA 2012.

Thirdly, the liability is on the insurer for all genuine and valid claims before the time of termination.[470]

The insurer must give notice to the consumer about changes in terms or the premium.[471] Accordingly, if the consumer does not agree on these changes, the consumer has the right to terminate the contract by giving reasonable notice to the insurer.[472] Otherwise, the insurer has the right to terminate the contract by giving reasonable notice to the consumer.[473] The exception to termination is where the contract is wholly or mainly one of life insurance, where the insurer cannot terminate the contract.[474]

5.5. Conclusion

According to the modern regime in the UK, the insured's pre-contractual duties are now dealt with separately from the doctrine of utmost good faith, as independent duties. CIDRA imposes the duty of reasonable care to not make a misrepresentation and the duty of disclosure for consumer insurance contracts is totally abolished. In case of a breach of the duty of reasonable care to not make a misrepresentation, insurers are not able to directly avoid the policy unless if the breach is reckless or deliberate misrepresentation.

According to CIDRA, all types of businesses are excluded from consumer protection including micro-businesses. The argument to include micro-businesses was significant for the same reasons given to protect consumers; although some difficulties were recognised to define and determine micro-businesses. However, in the same way consumers met significant obstacles under the duty of disclosure and misrepresentation based on the abolished ss 18- 20 of MIA and the lack of brokers' advice, micro-businesses meet the same difficulties in regard to the duty of disclosure, on the one hand, and, on the other, the duty of fair presentation. Thus, it is significant to include micro-businesses under the umbrella of consumer protection. All difficulties recognised by the Law Commissions in respect the determination of micro-businesses need further investigation instead of leaving

[470] S 9(8), Schedule 1 of CIDRA 2012.
[471] S 9(4), Schedule 1 of CIDRA 2012.
[472] S 9(6), Schedule 1 of CIDRA 2012.
[473] S 9(4), Schedule 1 of CIDRA 2012.
[474] S 9(5), Schedule 1 of CIDRA 2012.

micro-businesses without recognition as a consumer and with obstacles in their way.

Consumers however should be careful when specifying the purpose of the policy, if it is a dual purpose policy. This is because consumers must be aware of the main purpose of the policy, as this will determine whether it is under CIDRA or IA. However, the question arises whether there is any duty on the insurer to make the consumer aware of the meaning of dual purpose policies. CIDRA provides nothing about the insurers' duties at the pre-contractual stage. Thus, the courts should consider the insurer's pre-contractual duties clearly and specifically as the role of insurers and their responsibilities are uncertain. Further clarification should be considered by courts where many consumer policies are made online.

In comparison to Saudi jurisdiction, Saudi approach is different than the UK approach as it considers the whole market as consumers. This is a weakness of Saudi jurisdiction as there are significant differences between dealing with an individual and with businesses based on different bargaining powers between contracting parties. The UK approach has a significant advantage than Saudi approach; consequently, Saudi jurisdiction should learn from the UK experience to differentiate between consumer insurance and business insurance. The UK jurisdiction recognises significant points to distinguish between consumers and businesses; although this study suggests to include micro-businesses under the umbrella of consumer protection for the reasons state above. As a result of this critical and analytical comparative between both jurisdictions, there is a strong recommendation to separate business insurance from consumer insurance and adopt the consumer regime including the duty of reasonable care to not make misrepresentation and its matched remedies as in Saudi Arabia. This regime provides a proper balance in the relation between insurers and consumers, abolishes the duty of disclosure, sets the burden of proof for reckless or deliberate breach on the insurer, and limits the impact of avoidance as a sole remedy by providing avoidance, proportionate remedies, and termination.

The next chapter considers the insured's pre-contractual duties for business insurance in the UK and Saudi jurisdictions. It compares the duty of disclosure and misrepresentation in both jurisdictions, and the impact of the duty of fair presentation in the UK. This chapter critiques and analyses other related issues including material facts, inducement, waiver, remedies, and contracting out.

CHAPTER 6

INSURED'S PRE-CONTRACTUAL DUTIES FOR BUSINESS INSURANCE

6.1. Introduction

The IA 2015 sets out new special provisions for business insurance in the UK. Further, the duty of fair presentation of risks is imposed as the insured's pre-contractual duty. This chapter is going to analyse and critique relevant issues in regard to the insured's pre-contractual duties in the UK and Saudi jurisdictions. This shall include misrepresentation and the duty of disclosure as these duties are retained in the UK and already exist in Saudi Arabia. This chapter shall indicate where there are similarities between the old law in the UK and IA, on one hand, and, on the other between the UK and Saudi jurisdictions. Further, this chapter identifies criticisms of the prudent insurer test, materiality, the knowledge of the insured, and avoidance as a sole remedy upon the breach of the doctrine of utmost good faith under the UK's old law. Other important changes can be seen in respect to the requirement of inducement, material facts, and the 'basis of contract clauses' in terms of IA. Further comparison with Saudi jurisdiction is required to recognise the differences and similarities between these jurisdictions. Significant changes to the insurance regime in the UK are seen in the modification of the remedies for breach of the duty of fair presentation of risks. Although, uncertainty still exists as this area of law is still developing, IA provides a significant balance to the relationship between the insured and the insurer.

There are three major questions to be addressed in this chapter to achieve the objectives of this study. These questions are: What are the similarities and differences between consumer and non-consumer insurance contracts in relation to the doctrine of utmost good faith? What is the position of the duty of disclosure, misrepresentation, and the duty of fair presentation of risks in business insurance in the UK and Saudi Arabia? Is there any need to differentiate between the provisions of consumer and non-consumer insurance contracts in Saudi Arabia? This chapter shall answer these questions by use a critical analysis of these issues in the

following sections: the separation of the doctrine of utmost good faith and the duty of fair presentation of risks; the duty of disclosure, misrepresentation, the duty of fair presentation, material facts, the requirement of inducement, waiver, related remedies, and contracting out and 'basis of contract clauses'.

6.2. Separation of the Insured's Pre-Contractual Duties from the Doctrine of Utmost Good Faith

Since the enforcement of CIDRA and IA, the doctrine of utmost good faith is separated from the insureds' pre-contractual duties. While CIDRA imposes the duty of reasonable care to not make misrepresentation for consumer insurance contracts; IA imposes the duty of fair presentation of risks for business insurance contracts. These duties now are entirely different than the doctrine of utmost good faith.[475] Although the duty of disclosure is retained in business insurance, the duty is based on enquiry rather than the insured's voluntary disclosure. Thus, the insured only needs to disclose material facts 'fairly' and make 'signposts' to give the insurer a chance to make further enquiries.[476] Further, IA provides various remedies upon the breach of the duty of fair presentation of risks based on the intention of the insured. Moreover, insurers are not permitted to directly avoid the policy.

Significantly, depending on the terms of the contract, s 16 of IA contains contracting out provisions. Consequently, based on what is agreed by the parties, the duty of fair presentation of risks may be entirely excluded as long as the requirement of s 17 of IA is satisfied, and this reflects the old law of the duty of disclosure and misrepresentation as excluding the duty means that there needs to be voluntary disclosure by the insured and reliance upon the doctrine of utmost good faith. In addition, there should be careful drafting of insurance contracts. This is especially because no remedy of avoidance will be available for breach of the doctrine of utmost good faith in terms of s 14(1) of IA.

The next section considers the duty of fair presentation of risks in the UK. This section analyses and criticises provisions in related to this duty and major relation

[475] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1010.
[476] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) paras 7.37-8

issues. Further, it compares IA and the old law by looking at the abolished ss 18-20 of MIA.

6.3. The Duty of Fair Presentation

In February 2015, IA reformed the law of disclosure and misrepresentation for business insurance. IA came into full force on 12th August 2016. Section 21 of IA repeals ss 18-20 of MIA. The duty of disclosure is still retained for business insurance policies under the duty of fair presentation by s 3 of IA, unlike consumer insurance policies.[477] Remedies are currently based on IA which means that it is not now possible to rely on the general law of contracts or *Misrepresentation Act* 1967.[478] However, many similar points of the old law can be recognised.

Following Birds views, the 'traditional law' should be taken into consideration due to five reasons.[479] Firstly, CIDRA came into force on 6th April 2013; thus, any disputes arising before this date, especially in life insurance disputes, should apply the 'traditional law'.[480] Secondly, similarly, IA came into force on 12th August 2016, and all disputes arising before this date should apply the 'traditional law'. Thirdly, it is important to understand the new law in light of the 'traditional law'. Fourthly, for business insurance, it is possible to apply the 'traditional law' and to exclude the new provisions by contracting out of IA. Fifthly, looking at IA, no major changes fundamentally have been made; hence, the traditional law is still relevant. These reasons are significant because the application of the modern regime must be interpreted in light of the doctrine of utmost good faith[481], as the doctrine of utmost good faith has now become an interpretative principle.

Section 4 of IA provides different provisions for individual and non-individual insureds; the insured can be a sole trader or a small, medium, or large businesses. This point has been criticised as to whether it is fair to recognise the insured in this way by including all types of businesses due to the difference between dealing with

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[477] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 5.49.
[478] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-029].
[479] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 118.
[480] This was considered in *Ashfaq v International Insurance Co of Hannover Plc* [2017] EWCA Civ 357, [2017] HLR 29.
[481] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23. This is considered in chapter three.

an individual trader, micro-businesses, small businesses and medium and large businesses.[482] This is a significant criticism to IA because of two reasons that micro-businesses and individual traders such as an electrician or painter may need further protection similar to the insured under consumer insurance; and the lack of knowledge and experience about the law of insurance, they may have, especially, about the remaining duty of disclosure included in the duty of fair presentation. However, the Law Commissions found difficulties in defining micro-businesses, and rejected any demands to distinguish between micro-businesses and large businesses.[483] Even though these difficulties were recognised in respect of micro-businesses, there were no difficulties in excluding individual traders from business insurance provisions as their position is similar to consumers.

By s 3 and s 7, IA demonstrates that the duty of fair presentation includes both the duty of disclosure and the duty to not make a misrepresentation in any documents or any oral presentations before the contract is entered into, or on renewal, or on variation.[484] S 3(3) shows that the disclosure is required to be reasonably clear and accessible to the prudent insurer for every material representation. 'Materiality' means a circumstance or representation that would influence the judgment of a prudent insurer to either take the risk or on which terms, based on s 7(3). Similarities can be determined between s 7(3) of IA and s 18(2) of MIA as both use the term 'influence the judgment'. Accordingly, any debate about what is the 'reasonable insured' test is no longer relevant because the wording of s 7(3) adopts the prudent insurer test instead.[485]

Significant illustration was provided by the Law Commissions in this respect to determine whether it should be the 'reasonable insured' test or 'prudent insurer' test. The 'reasonable insured' test would lead to difficulties because of different types of insured, different types of insurance policies, and uncertainty with what was required or expected. It would be complex to identify such probabilities. The Law Commissions considered the difficulties of proposing a 'reasonable insured' test as it would lead to further doubts and uncertainty in how to prove the breach of

[482] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 130.
[483] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 2.28.
[484] See also John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 131.
[485] Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157, 164.

the duty. The Law Commissions stated that '[M]any criticised it for being uncertain… We accepted that a "reasonable insured" test would introduce an unknown and untested concept into the law'[486].

S 7(4) of IA provides examples which are not exhaustive for what will be considered as material circumstances. The courts may consider other examples in the future. Specifically, s 7(4) states that:

> (a) Special or unusual facts relating to the risk,
> (b) Any particular concerns which led the insured to seek insurance cover for the risk,
> (c) Anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

The duty of fair presentation is required to be followed by the insured to each insurer in the case where there are several insurers insuring one risk. It is recognised that the insured's duty of fair presentation of the risk should be relevant for each insurer on the assumption that each insurer shares this information with other insurers or insurer. It follows then that where one insurer has asked a particular question about a fact that has been disclosed, it does not exempt the insured from disclosing this fact to another insurer as long as this fact is relevant.[487]

Significant changes to the duty of disclosure have been made by s 3 of IA; although similarities between MIA and IA can be seen.[488] Firstly, s 3(3) differentiates between the case of a representation of a fact and a representation of an expectation or belief as the representation of a fact must be substantially correct, but the representation of an expectation or belief must be in good faith, which is similar to s 20(5) of MIA. The difference between MIA and IA is that IA requires disclosed circumstances to be 'substantially' correct and 'accessible' to the prudent insurer. Two issue may arise.

On the one hand, s 3(3)(b) deals with the problem of providing a mass of information i.e. 'data-dumping' which may be a breach of the duty of fair

[486] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 5.45, 5.47 – 5.48. See also Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211, 226.

[487] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) 81.

[488] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1011.

presentation.[489] This is because the facts are not fairly accessible to the insurer.[490] Thus, the insured's should signpost the insurer's attention to relevant information, and the insurer may ask follow-up questions if necessary.[491] However, if the insurer knew about the 'data-dumping', the insurer may not able to allege that the duty of fair presentation had been breached. Further, the insurer's knowledge would be considered as affirmation. To prove the breach, the objective test, the prudent insurer test, should be adopted.[492]

On the other hand, s 3(3) states that not all the information nor details need to be 'correct' but 'substantially' correct.[493] This should be interpreted in light of s 7(5) of IA, as this section indicates that 'a material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material'. This section is criticised as it seems to signify 'less exacting rules than other commercial contracts under which all material statements of fact must be true'[494]. This criticism is significant because insurance contracts are contracts based on utmost good faith unlike the rest of general law of contracts.

In fact, the wording of this section may give rise to another issue. In the situation where the representation is 'correct' but it misleads the insurer[495], a breach of the duty of fair presentation may occur because the prudent insurer cannot distinguish the correct information due to the insured's misleading conduct. The burden of proof is on the insurer but the insured may defend his position by referring to the wording and construction of the insurer's questions, for example, by proving that the insurer's question was unclear. However, if the insurer's question is deemed to

[489] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1011.
[490] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-038]. See also, Peter Macdonald Eggers, 'The Fair Presentation of Commercial Risks under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 30.
[491] David Hertzell, 'The Insurance Act 2015: Background and Philosophy', in Malcolm Clarke, Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 8.
[492] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-038].
[493] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 131.
[494] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) para 3.19.
[495] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-071].

be clear, the insured, accordingly, is in breach of the duty of fair presentation of risks.

Further, s 3(4)(b) points out that the disclosure is required only for every material circumstances that the insured knows or ought to know or the 'disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances'. While s 3(4)(a) re-enacts the wording of s 18 of MIA; s 3(4)(b) illustrates the differentiation between MIA and IA as the duty is based on enquiry rather than disclosure. Accordingly, if the insurer does not make these enquiries, no further disclosure is required by the insured. In addition, if the insured provides 'signposts' to the insurer to comply with the duty of fair presentation[496], these 'signposts' require the insurer to make further enquiries.[497] Moreover, the insurer would waive his right to avoid the contract or to have proportionate remedies by a failure to ask follow-up questions.[498] Accordingly, if the insurer enquires about specific information, the insured cannot allege that the insurer ought to know this information or this information is not material to the insurer.[499]

In the 2014 Report, the Law Commissions commented on the wording of s 3(4) to clarify the positive role of the insurer in the disclosure and fair presentation process as the insurer 'should not underwrite at the claim stage'[500]. This leads to the conclusion that it is now the insurers' pre-contractual duty to ask clear questions, and insurers have a significant role prior the conclusion of the policy unlike the old law based on the MIA approach, as follows[501]:

> Even where a material circumstance is not itself disclosed, the insured may still have done enough to satisfy the disclosure duty. The question is whether it has given the insurer sufficient "signposts" which would lead a prudent insurer to make further enquiries which, when answered, would reveal material circumstances… If a prudent insurer, reviewing the disclosed information, would be prompted to ask further

[496] John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-025].
[497] Aittilio Costabel, 'The UK Insurance Act 2015: A Restatement of Marine Insurance Law' (2015) 27 St Thomas L Rev 133, 151.
[498] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1011; Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-035].
[499] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-157].
[500] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 7.37-8.
[501] Ibid.

> questions or to seek further information, a failure on the part of the actual insurer to do so should not prejudice the insured at a later stage.

The significant implication of the meaning of the doctrine of good faith in the interpretation of s 3(4) is mentioned by the Law Commissions so as not to give benefit to the insured where the insured acts intentionally to provide limited facts 'hoping that the insurer would fail to make further enquiries to reveal the full picture'[502]. This would reflect a breach of the insureds' pre-contractual duty of fair presentation of risks by providing unclear and inaccessible information. Although the requirement of s 3(3) is clearly important to determine the breach, it is important to find out the insured's intent to act in good faith.[503]

In addition, s 3(5) of IA provides exceptions to the duty of disclosure in case of lack of enquiry in five situations that are if the fact '(a) diminishes the risk, (b) the insurer knows it, (c) the insurer ought to know it, (d) the insurer is presumed to know it, or (e) it is something as to which the insurer waives information'. This subsection re-enacts s 18(3) of MIA.

Finally, in terms of s 7(6), which re-enacts s 20(6) of MIA, IA gives the proposer the right to withdraw or correct a representation before the contract is entered into. Consequently, based on this section, it is presumed that by the conclusion of an insurance contract, the information may be substantially correct not in every detail, but all material circumstances must be correct.

Under the Saudi jurisdiction, there is no mirror to the duty of fair presentation of risks in Saudi insurance law and regulations as there is no separation between the insured's pre-contractual duties and the doctrine of utmost good faith similar to the old law in the UK. The duty of disclosure is well-set in Saudi jurisdiction. The next section criticises and analyses the duty of disclosure in both the UK and Saudi jurisdictions as the duty of disclosure is retained for business insurance.

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[502] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 7.40.
[503] Ibid.

6.4. The Duty of Disclosure

The root of the duty of disclosure in insurance law goes back to *Carter v Boehm*[504]. Lord Mansfield did not in fact identify a duty of disclosure but the duty of good faith and the position regarding concealment of information instead.[505] Later, the duty of disclosure was developed by the courts and codified by MIA.[506] Insurance policies have commonly bound the insured to the duty of disclosure particularly as a pre-contractual duty before conclusion of the contract.

The rationale behind this duty is to put the insurer in a position to know the circumstances that may impact on his decision to take the risk or assess it.[507] Mence LJ illustrated the philosophical basis of the duty of disclosure as 'a true and fair agreement for the transfer of risk on an appropriate basis depending on equality of information'[508]. The facts, which are provided by a proposer at the pre-contractual stage, impact on the insurer's decision to enter into the insurance contract, and on which terms and at what level of premium.

The duty of disclosure faced many criticisms due to the protection of insurers at the expense of the insured, and the duty of disclosure did not recognise the differences between the bargaining positions of individuals and businesses. Moreover, the duty did not allow a balance between the contracting parties based on the notion of fairness, proportionality, or actual inducement.[509] There were four main criticisms.[510]

[504] (1766) 3 Burr 1905.
[505] *Pan Atlantic Insurance Co v Pine Top Insurance Ltd* [1995] 1 AC 501, 528.
[506] John Lowry & Philip Rowling, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099, 1101.
[507] John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60(1) CLP 338, 339.
[508] *Brotherton v Aseguradora Colseguros (No.2)* [2003] EWHC 335 (Comm), [2003] 2 CLC 629, [24].
[509] John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60(1) CLP 338, 340.
[510] See for an important discussion, Hasson R, 'The Doctrine of *Uberrima Fides* in Insurance Law: A Critical Evaluation' (1969) 32 MLR 615, 615 - 616. See also The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 3.11.

Firstly, some insureds might not appreciate that they should volunteer material facts to the insurer.[511] Secondly, some insureds might not be aware which facts would be considered as material. Thirdly, the remedy, avoidance *ab initio*, was an 'all or nothing' remedy, which protected the insurer. Finally, there was no specific protection for consumers. Thus, there was an urgent need in the insurance sector to determine who would be defined as a consumer. The common law and FOS have successfully limited the harshness of the duty of disclosure by requiring inducement.[512] Further, proportionality was adopted by FOS in respect of remedies for consumers and micro-enterprises, and in modern cases the duty of disclosure moved to the duty of 'fair' presentation.[513]

In terms of MIA, avoidance *ab initio* with retrospective effect was the legal remedy for breach of the doctrine of utmost good faith including breach of the duty of disclosure and misrepresentation.[514] In terms of s 84(3)(a) of MIA, premiums should be returned on avoidance unless there had been fraud. However, the remedy relied on the will of the aggrieved party, who had a choice either to waive the right of avoidance or avoid the policy,[515] as s 17 of MIA only stated that 'the contract may be avoided'[516]. The effect of this remedy is to reset the insurer's position to one not based on the non-disclosure of facts.[517]

Accordingly, the remedy of avoidance faced many criticisms. Significantly, in the *Star Sea*[518], Lord Hobhouse of Woodborough stated that 'the remedy of avoidance can sometimes be draconian'[519]. This was due to three reasons. Firstly, this remedy was the only available remedy upon the breach of the duty of disclosure. Secondly,

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[511] John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60(1) CLP 338, 339. See also Aittilio Costabel, 'The UK Insurance Act 2015: A Restatement of Marine Insurance Law' (2015) 27 St Thomas L Rev 133, 151.
[512] John Lowry, 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60(1) CLP 338, 340.
[513] See for example, *Garnat Trading & Shipping (Singapore) PTE Ltd, Vung Tau Shipbuilding Industry Joint-Stock Company v Baominh Insurance Corporation* [2010] EWHC 2578 (Comm), [2011] 1 Lloyd's Rep 589, [2011] Lloyd's Rep IR 366.
[514] *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others (the star sea)* [2003] 1 AC 469, 474. See also, *HiH Casualty and General Insurance Co v Chase Manhattan Bank* [2003] Lloyd's Rep IR 230, [85].
[515] See in this regard, *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437, 515.
[516] See also, s 18(1) of MIA stated that '...if the assured fails to make such disclosure, the insurer may avoid the contract'.S.20/1'...If it (every material representation) be untrue the insurer may avoid the contract'.
[517] [2003] 1 AC 469, 478.
[518] Ibid.
[519] Ibid 474.

the remedy did not rely on the insurer's option but the law. Finally, the cruelty of this remedy was where there had been innocent non-disclosure where there had been no intention of the insured to make non-disclosure.[520]

Based on the conclusion of the substantial discussion in *La Banque Financiere de la Cite v Westgate Insurance*[521], damages were not available as a remedy for breach of the duty of disclosure as the doctrine of utmost good faith did not have the impact of an implied term. In this case, there was an attempt to develop damages as a new remedy for such breach but the Court of Appeal rejected it, and asserted that there was no other remedy but avoidance.[522] However, the effect of s 2(2) of the *Misrepresentation Act* 1967 was noticed which allows the insurer to collect damages in lieu of rescission or avoidance. However, the courts had not previously considered this remedy in commercial insurance because parties knew the consequences of breach, following the authority of *Highlands Insurance Co v Continental Insurance Co*[523]. Damages are still unavailable as a remedy under IA for breach of the duty of fair presentation of risks nor now for misrepresentation unlike under the previous law.

There are two principal ways in which the duty of disclosure and misrepresentation can be limited. Firstly, the duty of disclosure can be restricted or limited as a result of an exclusion clause under some types of insurance policies. For example, some policies may include a 'statement of truth' clause such as film finance insurance policies. Such insurance policies include a term that the insured does not hold any duty to disclose material facts or make any representation as this duty is waived by the insurer. [524] Accordingly, the insurer does not hold any right to avoid the policy upon non-disclosure. Secondly, the requirement of inducement was introduced by the House of Lords in *Pan Atlantic Insurance Co v Pine Top Insurance Ltd* [525] as

[520] Ibid 478.
[521] [1990] 3 WLR 364, [1991] 2 AC 249.
[522] Ibid 264. It was stated that:

> As was stated by Scrutton J. in *Glasgow Assurance Corporation Ltd. v. William Symond son & Co*., 16 Com Cas 109, 121, non-disclosure is not a ground for damages but only a ground for rescission of the contract. This is the only statement in the cases asserting to the fact that damages are not recoverable for non-disclosure, for it has always been understood that rescission is the only remedy.

[523] [1987] 1 Lloyd's Rep 109. See also *HIH Casualty and General Insurance Co v Chase Manhattan Bank* [2003] Lloyd's Rep IR 230, [116] as Rix LJ supported this conclusion.
[524] For instance, [2003] Lloyd's Rep IR 230.
[525] [1995] 1 AC 501.

another limitation of the duty of disclosure, which has to be shown in order to prove breach of the duty of disclosure or misrepresentation.

By comparison under Saudi jurisdiction, according to article 2 and 5.1 of ICPP, the duty of disclosure means not only providing complete information honestly, accurately, and clearly with transparency and credibility, but also abstaining from hiding or misleading any significant, influential, incomplete, wrong, and related information to any contracting parties, specifically, insured and insurer. Significantly, this is an improvement regarding the definition of the duty of disclosure as it was previously defined by article 55 of IRCICCL as a duty to disclose relevant information in the proposal of an insurance policy, and this proposal should be taken completely into account in case of any dispute regarding the information provided. Currently, the duty of disclosure is comprehensive especially as it is an obligation on both parties.

The information that should be disclosed to the insurer is limited to the information that a 'reasonable person' thinks relevant to disclose, based on article 42 of IMCCR.[526] One difficulty of applying the reasonable person test is that article 4 of ICPP requires insurers to provide 'special care' for special needs, limited education and elderly consumers, such as, providing advice, clarifying differences between insurance policies, and ensure full understanding of terms and conditions.[527] Consequently, it can be said that although ICPP considers differences between consumers, ICPP does not propose a definition of a 'reasonable person' in light of these differences. Accordingly, the question is whether these special cases of consumers are considered as a limit on the reasonable person test, or as an exception to test. Importantly, the burden of proof is on the insurers to show that the insured has not acted as the reasonable consumer in order to prove the breach of the duty of disclosure.

The next section shall give a critical analysis of the law of misrepresentation in both the UK and Saudi jurisdictions. This section considers the differentiation between innocent misrepresentation, fraudulent misrepresentation, and representation of an expectation or belief.

[526] See, for example, decision no 1603/R/1432H (2011) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[527] See also, article 31 of IMCCR.

6.5. Misrepresentation

Although there are rules regarding misrepresentation imposed for general contracts law in the UK, specific provisions exist for insurance law.[528] The difference between non-disclosure and misrepresentation is recognised in insurance contracts. While disclosure is about volunteering material facts, misrepresentation is where a false statement is made by one party to the other who is then induced by this statement to enter into the contract.[529] This difference has not usually been clear, and it was common in the case of breach of the doctrine of utmost good faith to consider both non-disclosure and misrepresentation. To claim for pure non-disclosure was 'relatively rare' as the House of Lords pointed out in *HIH Casualty and General Insurance Co v Chase Manhattan Bank*[530]. Accordingly, non-disclosure and misrepresentation were used commonly as a defence by the insurer. For example, while a blank answer may be deemed a negative answer which would be considered as a misrepresentation; however, silence would be considered as non-disclosure.

Under Saudi jurisdiction, the intent to act fraudulently and in bad faith by misrepresenting some material facts is the essential distinction between misrepresentation and non-disclosure. The burden of proof of the insured's intent to defraud and misrepresent is on the insurer[531] and if not proven, good faith is presumed. The requirement of inducement forms another requirement in proving fraud, which is the insured's intent to harm the insurer or impact on the insurer's decision whether to enter into the policy or on which terms or at what level of premium.

There are two breaches of the duty to not make misrepresentation in terms of IA being fraudulent misrepresentation, and innocent or negligent misrepresentation which are considered below. However, it is important to clarify the old law in the case of business insurance because the parties may contract out the duty of fair presentation of risks and rely on the old law. Currently, fraudulent and innocent

[528] See the repealed s 20 of MIA 1907; and John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 117.
[529] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 127.
[530] [2003] Lloyd's Rep IR 230.
[531] Bahaa Shukri, *Altameen fe Altatbeeq O Alqada w Alqanon* (Dar Althaqafa 2011) part 2 'Aqd Altameen', 721.

misrepresentations relate to the duty of fair presentation and the breach of this duty will be either deliberate or reckless breach or non-deliberate or reckless breach.

6.5.1. Fraudulent Misrepresentation

Fraudulent misrepresentation is when the insured makes a false statement having no regard to whether it is true or not.[532] Thus, where there is absence of dishonest intent or intent to fraud, the fraud cannot be proved.[533] On the other hand, fraudulent non-disclosure occurrs when the insured intentionally conceals material facts which the insurer should know.[534] The House of Lords in *Derry v Peek*[535] illustrated fraudulent misrepresentation by saying that 'first, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false'[536]. As a consequence of fraudulent misrepresentation, the insurer, based on the old law, had the right to avoid the contract, retain the premium paid, and claim damages based on the tort of deceit.[537]

There is a similarity between the UK and Saudi approach. Under Saudi jurisdiction, fraudulent misrepresentation is dealt with by articles 2 and 5(1) of ICPP as the insured is required to abstain 'from providing misleading any significant, influential, incomplete, wrong, and related information' to the insurer. Further, article 45(a) of AFR states that 'policyholder fraud is committed by policyholders… mainly… at the policy setup stage: withholding or providing incorrect personal or background information'. Accordingly, this definition combines fraudulent non-disclosure and fraudulent misrepresentation similar to the UK approach. Specifically, the key here is the insured's intent to provide a false statement when the insured knows that this information is not true.

[532] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 118.
[533] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 128.
[534] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 118 - 119.
[535] (1889) 14 App. Cas. 337.
[536] Ibid 361.
[537] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 119; and John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 129.

According to a CRIDV decision no 89/R/1433H (2012) in Riyadh, which was affirmed by the appeal decision no 398/a/1435H (2014) where motor insurance policy was issued and the insured was asked clearly about any previous accidents, the insured answered that there had been no accidents. However, after a claim for indemnity had been made by the insured, the insurer discovered that there had been an accident before the conclusion of the policy. The insurer tried to avoid the policy based on breach of the doctrine of good faith, on the one hand, and, on the other, according to breach of a term of the policy as the policy stated it would be void in the event of misrepresentation or providing any false material facts. Although, the insured's misrepresentation was proved, CRIDV did not consider this misrepresentation as breach of the insured's pre-contractual duties because materiality was not proved, and there was no harm on the insurer as the previous accident was modest and had no impact on the insurer's decisions.[538]

This decision seems incorrect because of four reasons. Firstly, the insured was required to answer the insurer's questions correctly based on articles 2 and 5.1 of ICPP. Secondly, the insured acted intentionally by not providing the correct answer even in front of the Committee itself, which reflected his fraud and bad faith. Thirdly, both the doctrine of good faith and clear contractual terms are required in all insurance policies. However, CRIDV failed to consider either the insured's duty to act in good faith or the contractual terms. Finally, CRIDV looked only at whether the fact had been material as there had been no harm to the insurer or impact on the insurer's decision to reject the insured's act as a misrepresentation. This was wrong as the insurer's questions should be considered as requiring material facts to be revealed in order to assess the insured risks. The insurer clarified this point by highlighting that the insurance policy included a term that defined material information as facts that impact and induce the insurer's decision to accept the risk and at which terms and premium. Although the insurer's point was clear on how the decision was induced by misrepresentation, CRIDV did not consider all of these points enough to treat the insured's act as fraud, regardless of the fact that the insured had deliberately concealed the existence of the accident.

[538] Similar to a decision no 125/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

6.5.2. Innocent Misrepresentation

Innocent misrepresentation is a false statement that has been made by an insured with no intention to make a false statement[539], and the insured does not know the truth, whereas innocent non-disclosure occurs when the insured does not appreciate the significance of the facts in question.[540] Based on the old law, the insurer had the right to avoid the contract on the ground of breach of the doctrine of utmost good faith.[541] Again, damages might be awarded based on tort and if the contract was not commercial, it may be rescinded, by s 2(2) of *Misrepresentation Act* 1967.

Innocent misrepresentation is not recognised in particular by Saudi insurance law and regulations. However, several CRIDV decisions consider that the burden of proof is on the insurer to show innocent misrepresentation.[542] In decision no 38/D/1429H (2008) in Dammam, the insurer claimed to avoid the insurance policy because the insured had breached the doctrine of good faith by making a misrepresentation of material facts regarding his medical history in the proposal. The insurer asked about the insured's medical history, but the insured denied any previous health problems, which induced the insurer to enter into the contract. The Committee found that the insured did not misrepresent material facts as the insurer could not specifically prove that the insured had known these facts prior to the conclusion of the policy.[543] However, in decision no 35/R/1435H (2014) in Riyadh, the Committee accepted the insurer's refusal to pay the insured's indemnity as the insurer proved that the insured made a misrepresentation about his medical history. Accordingly, the Committee found the insured was in breach of the doctrine of utmost good faith by making an innocent misrepresentation.

[539] Section 20 of MIA 1906. See also John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 119.
[540] John Birds, 'The Current Law', in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 28.
[541] S 17 of MIA before CIDRA and IA become valid laws. See also John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 119.
[542] Decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[543] There are similar decision, decision no 73/D/1435H (2014) which was affirmed by the appeal decision no 391/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Dammam, and decision no 167/R/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

6.5.3. Representation of Opinion or Belief

There is a difference between a representation of a fact and a representation of a belief or opinion. In terms of the abolished s 20(5) of MIA, the requirement was to make a statement of fact; however, a statement of opinion should be made honestly and in good faith.[544] Significantly, s 3(3) of IA imposes wording similar to MIA. Good faith is still relevant for the interpretation of the duty of fair presentation. This entails examining relevant aspects of good faith such as honesty and reasonableness, which should be determined in terms of the objective test. For example, in *Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA (The Game Boy)*[545], the insured got an insurance cover for the vessel which was bought for £1,800,000 whereas the invoice for the payment was for £101,197. The insured presented that the vessel was profitably chartered and the value was increasing; however, the documents were found fake. The judge found that the insured could not satisfy the requirements of s 20(5) as the representation of the opinion must be in good faith as the insured has no true belief that the value of the vessel was £1,800,000. Remarkably, the judge's conduct similar application should be applied by s 3(3) of IA.

Based on the common law, an opinion must be honest; and even if the proposer is an expert, this will still be seen as an opinion not a fact.[546] There is nothing in IA challenging the common law interpretation requiring honesty. Thus, this requirement is still relevant. For example, in life insurance, a proposer may fail to indicate a health issue as the proposer is not an expert; thus, this representation or disclosure is a statement of opinion unless the proposer did consult a physician for a specific medical matter, such as the decision in *Joel v Law Union and Crown Insurance Co*[547]. For another example, in *Economides v Commercial Union Assurance Co Plc*[548], the Court of Appeal questioned whether the insured's answer was honest rather than true or false. The insured was required to answer questions in the proposal form to the best of his knowledge and belief regarding the value of

[544] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1011.
[545] [2004] 1 Lloyd's Rep 238.
[546] *Joel v Law Union & Crown Insurance Co* [1908] 2KB 863.
[547] Ibid.
[548] [1997] 3 All ER 636.

the contents. In this case, the honesty satisfied the insured's duty and no breach was found.[549] This decision was affirmed in *Limit No.2 Ltd v Axa Versicherung AG*[550].

There was a difference identified however between commercial or consumer insurance. While a representation of belief in an individual insurance policy such as in *Economides v Commercial Union Assurance Co Plc*[551] was acceptable; the representation of belief was not accepted for a commercial insurance policy in *Kamidian v Wareham Holt*[552], where the policy was to cover valuable fine art. *Kamidian v Wareham Holt*[553] acknowledged the differences between this case and the decision in *Economides*[554]. In *Kamidian*[555], the insured was required to be aware about the value of the fine art not based on his opinion as in *Economides*[556]. Judge Tomlinson stated in the context of specialised fine art insurance that 'it would be a wholly uncommercial and unlikely approach for underwriters to agree an insured value upon the basis of a belief for which there might be no reasonable grounds'[557].

The question is currently whether the common law is going to adopt the same position after the enforcement of IA. As a result of the uncertainty about the position of the common law to adopt the position of *Economides*[558] or *Kamidian*[559], it is more appropriate for business insurance to adopt the position of *Kamidian*[560] as the facts more reflect the case of business insurance whereas applying *Economides*[561] in case of consumer insurance. However, there is a doubt about how honest is the insured's belief if the insured has deliberately ignored information that may change his belief, based on the old law.[562] Thus, the insured's act in these circumstances should be considered as breach of the duty of good faith.[563]

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[549] See also, *Sirius International Insurance Corp v Oriental Assurance Corp* [1999] Lloyd's Rep IR 343.
[550] [2008] EWCA Civ 1231, [2009] Lloyd's Rep IR 396, [4].
[551] [1997] 3 All ER 636.
[552] [2008] EWHC 1483 (Comm).
[553] Ibid.
[554] [1997] 3 All ER 636.
[555] [2008] EWHC 1483 (Comm).
[556] [1997] 3 All ER 636.
[557] [2008] EWHC 1483 (Comm), [90].
[558] [1997] 3 All ER 636.
[559] [2008] EWHC 1483 (Comm).
[560] Ibid.
[561] [1997] 3 All ER 636.
[562] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) [3.23].
[563] Ibid.

Based on s 6(1) of IA, 'an individual's knowledge include not only actual knowledge, but also matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them'. Accordingly, this section of the Act is helpful because such conduct therefore is to be considered as a deliberate or reckless breach of the duty of fair presentation.

Although there is no mirror in Saudi jurisdiction to the provisions of representation of an expectation or belief, any act should be done in good faith and honestly based on the Islamic rules. However, it is recommended that the Saudi jurisdiction could learn from the UK experience and have a specific provision about representation of an expectation or belief by differentiating between consumer and business insurance.

The next section provides a critical analysis of what constitute material facts in the UK and Saudi jurisdictions. This section considers materiality, moral and physical hazards, knowledge of the insured, knowledge of the insurer, and waiver.

6.6. Material Facts

Based on s 7(3) of IA, which re-enacts s 18(2) of MIA, a circumstance is material if it would influence the judgment of a prudent insurer to either accept the risk or on which terms or at what level of premium. This definition has three key elements that are 'influence', 'judgment', and 'a prudent insurer'. The hypothetical insurer is deemed to be 'experienced, rational, ordinary, prudent, intelligent, fair and reasonable.[564] The' judgment' means formation of the opinion.[565] In addition, the significant of the prudent insurer test is to determine the materiality of a fact and its impact on the reasonable insurer.[566] Attempts to develop this particular test were recognised by adding a test of reasonable insured's opinion[567]; however, these attempts were not developed further in the modern cases.[568] The reasonable insured test meets many difficulties as it differs based on the type of insured, the size of

[564] Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211, 221.
[565] *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476.
[566] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 89.
[567] For example, *Joel v Law Union and Crown Insurance Company* [1908] 2 KB 863, 718.
[568] For example, *Pan Atlantic Insurance Co v Pine Top Insurance Ltd* [1995] 1 AC 501.

business, knowledge, and experience. Thus, in business insurance, it is supposed to maintain prudent insurer test; however, insured may provide expert evidence in case of any complex cases.

The meaning of 'influence' is not covered by MIA or IA to help determine proper materiality test. Thus, there was serious debate in the courts to try and specify the proper test in order to prove the 'influence' by looking at the differences between the decisive influence test, increased risk test, and mere influence test.[569] In *Pan Atlantic Insurance Co v Pine Top Insurance Ltd*[570], the majority of House of Lords affirmed the authority in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd*[571] by rejecting the decisive influence test and the increased risk test[572] in favour of the mere influence test.[573] It is more appropriate to maintain the same test, the mere influence test, as this provision is settled by the common law till now since IA contains nothing to challenge this position.

There have been criticisms regarding how an insured with limited knowledge could appreciate which facts were material. This is an important argument because there is an imbalance in power between the insurer and insured which was little appreciated especially in the case of consumer insurance. However, this has been solved by CIDRA coming into force.

Modern authorities have interpreted materiality in the light of fair presentation, agreed on the positive role of the insurer to enquire and ask questions where needed, and limited the duty of disclosure in a way that goes further than just looking at the meaning of 'every material circumstance'.[574] This interpretation is still relevant after IA coming into force. Furthermore, the Law Commissions found that 'it is

[569] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-081]. See also John Birds, 'The Current Law', in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 138.
[570] [1995] 1 AC 501.
[571] [1984] 1 Lloyd's Rep 476. This case was criticised in Dogan Gultutan, 'The Common Law Pre-Contractual Duty of Disclosure and the Test of Materiality: *Carter* to *Pan Atlantic* – A Factual Analysis' (2015) 26 Insurance Law Journal 168, 172 - 174.
[572] It was also rejected in *St Paul Fire & Marine Insurance Co (UK) Ltd v McDonnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116.
[573] [1995] 1 AC 501, 496. See also, Dogan Gultutan, 'The Common Law Pre-Contractual Duty of Disclosure and the Test of Materiality: *Carter* to *Pan Atlantic* – A Factual Analysis' (2015) 26 Insurance Law Journal 168, 176 - 180 which supported the deceive influence test.
[574] *Garnat Trading & Shipping (Singapore) PTE Ltd, Vung Tau Shipbuilding Industry Joint-Stock Company v Baominh Insurance Corporation* [2010] EWHC 2578 (Comm).

now common for the courts to describe the policyholder's duty in term of making a fair presentation of the risk rather than 'every material circumstance'.[575] In *Garnat Trading & Shipping (Singapore) PTE Ltd v Baominh Insurance Corporation*[576], Clarke J provided a significant interpretation about materiality, as follows[577]:

> A minute disclosure of every material circumstance is not required. The assured complies with the duty if he discloses sufficient to call the attention of the underwriter to the relevant facts and matters in such a way that, if the latter desires further information, he can ask for it. A fair and accurate presentation of a summary of the material facts is sufficient if it would enable a prudent insurer to form a proper judgment, either on the presentation alone, or by asking questions if he was sufficiently put upon enquiry and wanted to know further details, whether to accept the proposal, and, if so, on what terms. Underwriters should listen carefully to what they are being told; they cannot complain if they do not grasp the detail or the implications of it.

Questions that are raised by an insurer in a proposal should be considered as requiring material facts to be disclosed. This is because the insurers' concern is to obtain accurate answers that reflect material issues in order to estimate the premium and to form the policy's terms. The other importance of the direction of the questions is to examine of materiality. This is especially important after IA coming into force because disclosure is now based on enquiry. Thus, any enquiry that is made by the insurer should be counted as in respect of a material fact.

Materiality test is required to be met in business insurance since the duty of disclosure is obviously not abolished even though the basis is changed from a disclosure basis to an enquiry basis. Unlike business insurance, in consumer insurance materiality test is not required to be met as the duty of disclosure is totally abolished and the duty of reasonable care to not make misrepresentation is set instead. Once the insurer ask a question, it is presumed that this question is material to the insurer.

An example is seen in *Dawsons Ltd v Bonnin*[578], where there was a dispute regarding an answer given in the proposal form that was for 'premier cover' under a comprehensive policy against four risks, public liability, damage or loss by accident, by fire, and by theft. The question was with regard to where the vehicle's was garaged. While the answer to this question referred to Cadogan Street,

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[575] The Law Commission and Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation* (Law Com CP No 204, Scot Law Com DP No 155, 2012) paras 5.12- 5.13.
[576] [2010] EWHC 2578 (Comm).
[577] Ibid [135].
[578] (1922) 2 AC 413.

Glasgow; the vehicle was garaged in a wooden shed on a farm near Glasgow. The insurer tried to void the policy because such a non-disclosed fact was material and would induce a prudent underwriter to enter into the contract. However, the House of Lords held that the fact was immaterial.[579] Although this authority may support the impact of material facts on the setting of the premium; the case did not consider the fact that the insured did not disclose the place where the vehicle was garaged even during the performance of the policy. This is because when questions were asked, insurers expect specific and clear answers. These answers may change during the performance of the policy, which should be disclosed as a part of the insured's post-contractual duties. However, the insureds had not disclosed the facts nor corrected the answer even during the performance of the contract to comply with the doctrine of utmost good faith. Since IA, questions should now be considered as material because it covers business insurance and both parties are deemed to have appropriate knowledge and experience unlike the case of consumers. By comparison, in Saudi Arabia, CRIDV have made similar decisions to *Dawsons Ltd v Bonnin*[580] concluding that the insurers' questions were not to obtain material facts as the responses made no impact on the insurer's decisions. [581]

The Saudi jurisdiction considers material facts as an essential element of the doctrine of utmost good faith. Article 2 of ICPP specifies what material facts should be disclosed by stating that they can be 'information that may be significant to any of the parties to an insurance policy'. Further, article 5(1) states that the insured should 'always present full and accurate information when filling out any form required by a company. Do not give any misleading, false or incomplete information or conceal important and material information'. However, some facts do not directly match the insurer's questions but still need to be disclosed to meet the requirement of the doctrine of utmost good faith. There are four main types of these facts to be considered as material.

[579] Ibid 413.
[580] Ibid.
[581] Decision no 89/R/1433H (2012) which was affirmed by the appeal decision no 398/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh, and decision no 125/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

Firstly, any facts which show either an unexpected risk or that the covered risks may include some unusual features.[582] This is because the purpose of the duty is to make both parties have the same level of knowledge about the potential risk, to then allow this risk to be evaluated, to form the contractual terms, and to set the premium. Examples would be where the insured has an inherited disease, a chronic disease, a vehicle is second hand, or machinery is modified or refurbished.

Secondly, facts which would influence the terms of the insurance policy.[583] For example, if a number of thefts occurred in the same area where the proposer lived, the proposer should mention that when entering into an insurance policy against theft. In the UK case of *Bufe v Turner*[584], an insured had a warehouse next to a boat builders' shop which caught fire. Following the fire, the insured requested a fire insurance policy for the warehouse. The insured did not disclose the original fire in the insurance proposal. As a result, the court concluded to void the policy because the insured concealed a material fact which influenced the insured to request the policy.[585]

Thirdly, facts should be disclosed that may impact on the insurer's right of subrogation.[586] For a mere example, in *Tate & sons v Hyslop*[587] where a marine insurance policy issued on goods including crafts and lighters. The insured had an arrangement about lighterage and the liability of the lightermen was to be less than that of common carriers, specifically, for negligence. This arrangement which impacted on the insurer's right of subrogation was not disclosed to the insurer. Consequently, the Court of Appeal held that this fact was material to the prudent insurer to estimate the premium, and the non-disclosure was the reason to void the policy.[588]

Fourthly, the insured may not have disclosed facts that would have been obvious during an ordinary inspection.[589] Accordingly, non-disclosure of these facts does

[582] Bahaa Shukri, *Altameen fe Altatbeeq O Alqada w Alqanon* (Dar Althaqafa 2011) part 2 'Aqd Altameen', 56.
[583] Ibid 57.
[584] (1815) 6 Taunt 338, 128 ER 1065.
[585] Ibid.
[586] Bahaa Shukri, *Altameen fe Altatbeeq O Alqada w Alqanon* (Dar Althaqafa 2011) part 2 'Aqd Altameen', 57.
[587] (1885) 15 QBD 368.
[588] Ibid 369.
[589] Bahaa Shukri, *Altameen fe Altatbeeq O Alqada w Alqanon* (Dar Althaqafa 2011) part 2 'Aqd Altameen', 61.

not count as breach of the doctrine of utmost good faith except where these facts are related to other matters which could not be discovered through ordinary inspection.[590] From the Islamic perspective, 'khiyar al-'ayb', an option caused by defect, is relevant. Mahat well-recognised 'khiyar al-ayb', based on Islamic law, where the contract is formed after inspection of goods in commercial transactions, and there is a defect that was not revealed by ordinary inspection, the contract may be rescinded as a consequence of 'khiyar al-ayb'.[591]

CRIDV consider the right to inspect by the insurer. In a decision no 31/R/1434H (2013) which was affirmed by the appeal decision no 667/a/1435H (2014) in Riyadh, the Committee found that the insurance policy gave the insurer the right to have an inspection in order to establish the real status of the warehouses to be covered by the insurance policy. However, the insurer did not make this inspection in reasonable time, and issued the insurance policy. The Committee denied the insurer's argument to not accept one of the warehouses as it was not in an acceptable condition. This was because the insurer had not made the inspection which was considered a waiver of the insurer's right by the Committee. The Committee reasoned that if the insurer had carried out the inspection, the insurer would have discovered the warehouse's conditions. Further, the insured acted in good faith and provided all material facts which included a description about the condition of the warehouses. However, the insurer did not examine these facts closely and did not specifically ask the insured any more about the poor condition of the warehouse.

There are similarities between the English and Saudi approaches about the role of inspection in providing evidence to prove the real status of the object of the contract to the satisfaction of the contracting parties. For example, the English case, In *Re Universal Non-Tariff Fire Insurance Company v Forbes & Co.*[592], was about materiality and the status of the building that had been inspected by an agent of the insurer regarding a fire insurance policy. There was a dispute about the inspection report and an allegation of misdescription had been made by the insurer; and, consequently, the insurer claimed to void the policy. Even though the policy included a condition that the policy would be void in case of non-disclosure of any

[590] Ibid.
[591] Mohd Afandi Awang Mahat 'Doctrine of Khiyar Al-Ayb as Proposed by Muslim Jurists and its Maqasid in Islamic Transaction' (International Conference on Maqasid Al-Shariah in Public Policy and Governance, Malaysia, June 2015) 3.
[592] (1874-75) LR 19 Eq 485.

material facts about the insured properties, the court held that the fact was immaterial. However, if the fact had been material and had been inspected by the insurer's agent, the insured would not have been in breach, as a consequence. Significantly, these decisions are still relevant after the enforcement of IA as IA does not challenge these authorities.

Material facts may be recognised as physical or moral hazards. However, the knowledge of both insurers and insureds is significant to determine which material facts should be revealed by the insured. Therefore, the following section examines four subsections that are physical and moral hazards, the knowledge of the insured, the knowledge of the insurer, and waiver.

6.6.1. Physical and Moral Hazards

It is still relevant to analyse physical and moral hazards after the coming into force of IA in order to determine materiality of a circumstance. In general, the materiality of a fact related to either physical or moral hazards. Physical hazard includes 'any factors that concern the likelihood or degree of a loss'[593]. An example of physical hazard is the nature of the property, the usage of the property, whether the property has been exposed to risks in the past, or the surrounding risks. For example, in health insurance, consumption of alcohol[594] and smoking are types of physical hazards. In car insurance policies, unusual modifications to the vehicle are considered as physical hazards. In life insurance, physical hazards are age, occupation, and unusual or risky hobbies, and health. For a significant clarification, in *Joel v Law Union and Crown Insurance Co*[595], Fletcher-Moulton LJ illustrated which facts should be disclosed, providing an example for physical hazards in light of the knowledge of a reasonable man. Thus, insurers must be specific when asking questions and willing to ask further questions to reveal the real position of the insured, as follows[596]:

> 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 had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual

[593] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-104].
[594] *Mundi v Lincoln Assurance Co* [2005] EWHC 2678 (Ch), [2006] Lloyd's Rep IR 353.
[595] [1908] 2KB 863.
[596] Ibid 884 - 885.

> 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 liable for non-disclosure in respect of facts which he did not know.

Similarly, under Saudi jurisdiction, physical hazards are considered as material facts as under the UK jurisdiction. In a decision no 146/R/1434H (2013) which was affirmed by the Appeal decision no 76/a/1436H (2015) in Riyadh, CRIDV accepted the insurer's argument regarding the materiality of non-disclosure to reject the insured's claim. The basis of the insurer's argument was that the insured failed to disclose changing the vehicle's engine. The Committee held that this change was a material fact to the insurer, and the insured had breached the duty of disclosure.

On the other hand, moral hazards was defined as 'an increase in the likelihood of it being made to appear falsely that loss or damage had occurred falling within the scope of the policy'[597]. Moral hazards are not recognised specifically in IA similar to MIA, which means that the previous case decisions are still relevant after the enforcement of IA. The Explanatory Notes to the Act indicate that the future interpretation of some of IA provisions 'is likely to be guided by existing case law'.[598]

Moral hazards fall into several categories that are the proposer's insurance history including previous refusals and claim history, criminal convictions[599] even a wrongful conviction[600] unless the conviction is qualified as spent[601], allegations[602] such as about a criminal conviction or the financial position, dishonesty[603], and the insured's financial status[604]. However, previous insurance history is not considered as a material fact by the common law for marine insurance policies.[605] The question

[597] *Sharon's Bakery (Europe) Ltd v AXA Insurance UK Plc, Aviva Insurance Ltd* [2011] EWHC 210 (Comm), [57] per Blair J.
[598] HM Treasury's Explanatory Notes to the Insurance Act 2015, 12 February 2015, para 57.
[599] For example, *Roselodge Ltd v Castle* [1966] 2 Lloyd's Rep 113, where a conviction against the sales director of the assured company was held as a material fact. See also; *Drake Insurance Plc v Provident Insurance Plc* [2004] QB 601; *Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2010] EWHC 2192 (QB).
[600] *March Cabaret Club v Casino Ltd v London* Assurance [1975] 1 Lloyd's Rep 169.
[601] See s 4(3) of *Rehabilitation of Offenders Act* 1974.
[602] *Brotherton v Aseguradora Colseguros (No.2)* [2003] EWHC 335 (Comm), [2003] 2 CLC 629.
[603] Dishonesty is considered by CIDRA as showing the lack of reasonable care unlike IA. For example, *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151.
[604] See for example, *James v CGU Insurance* [2002] Lloyd's Rep IR 206.
[605] *Glicksman v Lancashire & General Assurance Co* [1925] 2 KB 593, 608. See also *Ewer v National Employers' Mutual & General Insurance Association* [1937] 2 All ER 193, 202 - 203

might arise whether this exclusion from marine insurance policies would apply after the enforcement of IA. It seems however that IA does not challenge the common law approach. It was accepted that other situations might impact on insurance policies as moral hazards such as nationality, sex, religion and gender; however, all of these situations are classified as prohibited discrimination after the impact of *Equality Act* 2010.

As an example of dishonesty, in the recent case *Higherdelta Limited v Covea Insurance Plc*[606], where the insurer sought to avoid the contract because of material misrepresentation, the key point was the materiality of the dishonesty as a moral hazard. Lord Bannatyne linked the honesty of the insured's answers and the construction of the insurer's questions, on the one hand, and making an 'innocent mistake' to form a moral hazard, on the other hand, as follows[607]:

> I accordingly accept that his answers to the questions posed were honest even if they were, on a sound construction of the questions, based on a misunderstanding on his part of the questions… I cannot see how an innocent mistake based on a reasonable construction of the questions… can somehow raise an issue of moral hazard.

The allegation should be disclosed was criticised. A leading example of this is seen in *Brotherton v Aseguradora Colseguros (No.2)*[608], where reinsurers were entitled to avoid the reinsurance policy on the grounds of non-disclosure due to allegations of serious misconduct and fraud on behalf of a senior manager of the bank in Colombia which had been seen in media reports. These allegations influenced the decision of the prudent insurer, because they were deemed to be moral hazard.

There has been much debate about when allegations should be considered as material and if the allegations were true or even false. This is because of the recognition of the positive role of insurers to enquire unlike under the old law where the insured held the responsibility to disclose all facts that impacted on the insurer's decision. Importantly, Waller LJ in *North Star Shipping Ltd v Sphere Drake Insurance Plc (the North Star)*[609] found that it was 'unjust' to give the insurer the right to avoid the policy because of a false allegation. Furthermore, Waller LJ

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where the wide proposition was rejected. See also, *Arterial Caravans Ltd v Yorkshire Insurance Co* [1973] 1 Lloyd's Rep 169.

606 [2017] CSOH 84.

607 Ibid [188], [191].

608 [2003] EWHC 335 (Comm), [2003] 2 CLC 629.

609 [2006] EWCA Civ 378, [2006] 1 CLC 606. For further discussion on unfounded allegations, see Franziska Arnold-Dwyer, 'The Disclosure of Unfounded Allegations in Business Insurance' (2014) 3 UCLJLJ 173.

recognised a difficulty in denying the right of avoidance when insurers proved there was an impact of an allegation of fraud on the insurer's decisions whether this allegation was true or false.[610] This interpretation may be developed or considered further by the courts in terms of IA in light of the change from the duty of disclosure to the duty of fair presentation of risks.

S 7(4) of IA requires the insured to disclose any unusual facts. This leads to conclude that the case of allegation as moral hazard is still relevant to be either disclosed or at least 'signposted'. Accordingly, if the insurer requires further information, the insurer shall ask follow-up questions as long as the insured's presentation is fair. This position is for business insurance unlike the position of consumer insurance where the consumer is not required to volunteer information about allegations.

An example for the materiality of a criminal conviction is seen in the case of *Lambert v Co-operative Insurance Society*[611], where a claim made by the insured under a household 'all-risks' policy in which she had failed to disclose a criminal conviction of her husband, even though the insurer had not ask about such criminal convictions. It was held that non-disclosure was the ground for the insurer to avoid the policy. There are certain consequences arising from this case.

First, the insured could not argue that if the insurer did not ask questions about specific information, that this meant that such information was not material.[612] Second, there was no need to have a connection between the non-disclosure and the loss.[613] However, in the future, this policy would be recognised as a consumer insurance policy where the insurer shall ask questions and the insured will have no obligation to offer information. Thus, consumer protection should protect the position of consumers as they may not recognise the importance of some facts to insurers. On the other hand, in business insurance, insureds are required to make a fair presentation even by giving 'signposts' to give insurers a chance to ask questions in order to reveal further information.

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[610] [2006] EWCA Civ 378, [2006] 1 CLC 606, [4] – [5].
[611] [1975] 2 Lloyd's Rep 486 (CA).
[612] John Lowry & Philip Rowling, 'That Wicked Rule, that Evil Doctrine: Reforming the Law on Disclosure in Insurance Contracts' (2012) 75(6) MLR 1099, 1102.
[613] Ibid. For further example, see *March Cabaret Club v Casino Ltd v London* Assurance [1975] 1 Lloyd's Rep 169.

It should be noted that s 4 of *Rehabilitation of Offenders Act* 1974 excludes the requirement to disclose any facts about spent criminal convictions. However, the IA still requires disclosure of previous convictions, even if they are deemed spent in terms of s 4 and any previous breach of the duty of disclosure on this basis will still be relevant.[614] This is reasonable as it provides balance between a previous breach of the duty of disclosure and the exclusion provision under s 4 of the 1974 Act.

The materiality of the insured's insurance history has been recognised by the case law. For example, in *Locker & Wolf Ltd v Western Australian Insurance Co*[615], where the policy was for fire insurance, a previous refusal of motor insurance was held material. This was because the insured failed to disclose this previous refusal to another insurer. A further example is in *Ewer v National Employers' Mutual General Assurance Association Ltd*[616], where it was required to disclose the claims history for all types of insurance, although the policy was for fire insurance. Again, IA does not challenge the position of the previous decisions and they are still relevant after the Act has come into force.

Although this study did not find any relevant CRIDV decisions under Saudi jurisdiction related to moral hazard, there is nothing to prevent Saudi jurisdiction from learning from the UK experience in respect of this issue. This is especially because Saudi regulations recognise 'material facts' as any facts that impact on the decision of the other party. Therefore, these facts can be about moral hazard. Accordingly, further developments in this area of insurance law is recommended to be recognised by Saudi regulations.

6.6.2. Knowledge of the Insured

The insured is supposed to know certain information that is known as 'actual knowledge', based on s 4(2)(a) of IA, and 'constructive knowledge', based on s 4(2)(b). On the one hand, actual knowledge includes blind-eye knowledge based on s 6(1), which means that the individual's knowledge is not only supposed to be his actual knowledge but also 'matters which the individual suspected and of which the individual would have had knowledge but for deliberately refraining from

[614] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-115].
[615] [1936] 1 KB 408, 414.
[616] [1937] 2 All ER 193.

confirming them or enquiring about them'. Blind-eye knowledge is defined, as well, as 'where the assured would become aware of a fact had he or she not wilfully shut his or her eyes to the fact'[617]. On the other hand, constructive knowledge is that which the insured ought to know or would be known by any other person in their capacity as being required for the insurance policy, such as a broker, if the insured is an individual; or by senior management or by any other person if the insured is not individual.

There are seven points to be considered regarding the knowledge of the insured. Firstly, the application of s 4 of IA differs depending on whether the insured is an individual or not. Based on s 4(2), if the insured is an individual, the insured is supposed to know only 'what is known to the individual and what is known to one or more of the individuals who are responsible for the insured's insurance'; while, based on s 4(3), the insured who is not an individual is supposed to know only 'what is known to one or more of the individuals who are part of the insured's senior management or responsible for the insured's insurance'. Further, the term 'known' refers to actual knowledge including blind-eye knowledge and it is not extended to constructive and imputed knowledge as it then becomes complex.[618] This is true as in case of large businesses and multi-national cooperation where the decision makers are include a number of employees, it can be hard to include the constructive knowledge as each employee involves in the formation of an insurance contract; however, this needs further authoritative interpretation by the courts to affirm that constructive knowledge should not be included as this area of law is currently uncertain.

Secondly, s 4(8) indicates that senior management refers to any individual who plays 'significant roles in the making of decisions about how the insured's activities are to be managed or organised'. In addition, this section is restricted by the requirement of 'reasonable search'.[619] Thus, it is not only the knowledge of senior management but also what each individual can reveal by a 'reasonable search'. A

[617] Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211, 230. For further discussion, see Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157.
[618] Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157, 168.
[619] John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-040].

difficulty may arise in the case of large businesses where several numbers of employees take a specific role in making such a decision, and each one has specific and significant knowledge.[620] A further question is which level of senior management should be included and to what extent, especially, for large and multinational businesses. Accordingly, this further uncertainty needs an authoritative interpretation in order to limit and restrict the meaning of senior management in light of the duty to undertake reasonable research. The prudent insurer test and use of expert evidence may play a significant role to satisfy the requirements of this duty.

Thirdly, a difficulty may arise in respect to s 4(5) which interprets the meaning of 'the person connected with a contract of insurance' as the insured or any other person who is covered by the insurance contract. The difficulty may arise because if one of the persons who is connected to the policy or the beneficiaries of the policy do not provide material facts, the whole policy would be impacted and this would affect all parties. An example would be where the insured seeks to have insurance cover for Directors' liability. In this instance, if one director does not provide material facts, the whole policy may be impacted as well other directors.[621]

Fourthly, s 4(3) and s 4(4) include the word 'only' when referring to the new law instead of the previous common law position. It was accepted that, based on the old law, the breach of the duty of disclosure by an agent was an independent breach, although, based on s 19 of MIA, the agent's duty of disclosure was separate from the insured's duty as the 'agent to insure'.[622] However, the 'agent to insure' is now removed by IA. Subsection 4(2)(a) covers knowledge held by a person responsible for the insured's insurance. The duty of disclosure is now totally on the insured as the material facts which are known by his agent or broker are imputed to the insured.[623] In other words, brokers are not required to disclose information that ought to be known to the broker, whereas the insured is required to disclose

[620] See part 8 of The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014). John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 132.
[621] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-050].
[622] *HIH Casualty and General Insurance Co v Chase Manhattan Bank* [2003] Lloyd's Rep IR 230.
[623] James Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) 27 Insurance Law Journal 247, 255.

information that is actually known to the insured's broker.[624] This important issue had been recognised by s 19(b) of MIA to give the insured an excuse if the broker communicated facts too late to the insured. Significantly, this issue is missed by IA. The question then is, as long as the insured holds independently the duty of fair presentation and there is no duty on the broker, whether the insured's breach of the duty of fair presentation may be excused if the broker communicated facts too late to the insured. Kendall and Wright believe that this does not excuse the insured as IA does not include a similar provision as in MIA.[625] However, this should be interpreted in light of the meaning of 'readily available' facts to the insured, and by interpreting that the duty is not to disclose all material facts but to make a 'fair' presentation of them. Thus, this can lead to say that the insured's duty should be considered as to make fair presentation of available facts.

Fifthly, confidential information should limit to the sort of facts that should be imputed to the insured. Depending on s 4(4), 'an insured is not… taken to know confidential information known to an individual if the individual is, or is an employee of, the insured's agent and the information was acquired by the insured's agent (or by an employee of the agent) through a business relationship with a person who is not connected with the contract of insurance'. However, if an agent or a broker held general market information which is not confidential, this knowledge is imputed to the insured. For example, if a broker of two clients holds confidential information of these two clients. Consequently, the broker is not supposed to provide this information for any of them, because there is no connection between their insurance contracts. However, where the information is not confidential, the insured is supposed to know this information through his broker. Significantly, an interesting illustration is made by Kendall and Wright in the 2014 report of the Law Commissions in order to clarify the difficulties of confidential information where the facts ought not to be disclosed, as follows[626]:

> Assume that the individual broker acts for a manufacturer of medical implants which provides claims information to the broker for the purposes of renewing its liability insurance. The information discloses notifications concerning injuries allegedly caused by the off-label use of one of its products by a chain of clinics. The individual

[624] Peter Macdonald Eggers, 'The Fair Presentation of Commercial Risks under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 31.
[625] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) para 3.26.
[626] Ibid para 4.16.

> broker also arranges the liability insurance for the chain of clinics, which is apparently unaware of the claim notifications. Should the broker disclose the notifications to (a) the chain of clinics and/ or (b) the chain's insurers when renewing the chain's insurance with them?... the authors' view is that it probably ought not to be disclosed to the clinic or its insurers.

In *MacGillivray*, it is questioned that 'it is not clear why the insurer should suffer' by holding confidential information from the insured's agent or broker.[627] This is especially where the 'insurer have been deceived, so that the insurance would be voidable and the insured has a remedy against the agent'[628]. However, this perspective may be criticised as it is not clear why the insurer 'should' suffer from information that is not available to the insured himself. The question could arise why the insurer should have an advantage of the agent or broker's confidential information of other clients. The insurer should only know whatever complied with the two elements of what has been revealed as a result of 'reasonable research' and that which has been 'reasonably revealed' to the insured. It is not assumed that other confidential information of the agent's clients shall be used in order not to harm the insurer and to be insurer-friendly.

Sixthly, the insured whether an individual or not is proposed to know reasonable information, whether within the insured's organisation or by other person, that reasonably has been revealed by a 'reasonable search', making enquiries, or from another source such as the insured's agent or broker[629], based on s 4(6). The duty to make a 'reasonable search' is 'novel'; however, some difficulties may face large businesses and Multi-national Corporation.[630] In *MacGillivray*, it says that 'the 'reasonable search' is a somewhat open-ended concept and so can arguably impose on the insured some obligations that the present law may not impose'[631].

The Law Commissions addressed the significance of the 'reasonable search' as it reflects good insurance placement process and the way to deal with 'reasonableness' as they illustrated that 'the "reasonable search" requirement is a key element of our knowledge proposals… We expect that what is "reasonable"

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[627] John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-034].
[628] Ibid.
[629] Ibid [20-036] – [20-037].
[630] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1012.
[631] John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-037]. For further illustration, see David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) 50-56.

will depend on the size, nature and complexity of the business'[632].Further, there is a question in regard to the proof of the duty to make a 'reasonable search', which test should be applied whether subjective or objective to prove compliance with the requirement of this duty.[633] The 2014 Report of the Law Commissions considered the objective test to prove complying with the requirement of the duty to 'reasonable search'[634]; however, it still needs further authoritative interpretation.[635] It is much more appropriate to apply the objective test instead of the subjective test for two reasons. First, it would be standard for similar types of insurance contracts which means that it would be more practical for courts and contracting parties. Second, it would be clearer for the insureds to be understood as the subjective test would consider specific circumstances of each insured which may raise confusion among insureds.

It becomes complicated if fraud is involved in compliance with the duty to have 'reasonable search'. However, the duty of 'reasonable search' would be limited to the data available to the insured. Although 'the data available to the insured is questioned' as to which data is being referred to[636]; it is clear that 'available to the insured' is a fact of each case. In addition, two issues may need to be satisfied being the impact of fraud on the data available to the insured, on the one hand, and the reasonableness of the insured, on the other. In other words, it would not be reasonable to know information that was withheld fraudulently by an agent or an employee.[637] Merkin acknowledged this issue as one of the interpretation of 'reasonably revealed' and 'reasonably research' by saying that 'the phrase 'reasonably revealed' could be taken to refer to what would have been revealed without fraud'[638]. This is true because in case of fraud by an employee or a broker

[632] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) paras 8.78 - 8.79, 8.83.
[633] There is a doubt about the test should be taken, see Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-054].
[634] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 8.83.
[635] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-054].
[636] John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-037].
[637] For further discussion, see Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-060].
[638] Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157, 174.

the insured should be secured from this specific fraud by applying the rule of *Re Hampshire Land Co*[639].

Finally, IA does not consider any provisions to repeal or modify the rule in *Re Hampshire Land Co*[640]. As a result, the rule will still be applied in case of fraud by the agent of the insured till the courts deal with this issue after IA coming into force. In brief, in this case, the insured was secured from the fraud of his agent, and the fraud was against the insurer.[641] Merkin acknowledged this point by saying 'it is less easy to argue that the knowledge of the broker's fraud is not to be imputed to the assured'[642]. In *Deutshe Ruck Akt v Walbrook Insurance Co Ltd*[643], it was pointed out that the agent's fraud became material, if the fraud related directly to the risk, but if the fraud did not relate directly to the risk, the fraud would not be considered material. Significantly, after IA, this rule should be extended to include the senior management of the insured and employees.

By comparison, under Saudi jurisdiction, there is no similar position regarding the knowledge of the insured in Saudi regulations. Article 42 of IMCCR uses general terms to have the reasonable person disclose all material facts that are relevant to the insurance policy. Accordingly, particular provisions are required and could be learned from the UK experience. This could be specifically by adopting the business insurance regime and providing specific provisions that comply with business and professional insurance separate from consumer insurance.

6.6.3. Knowledge of the Insurer

The insurer's knowledge consists of actual knowledge but also includes blind-eye knowledge, based on s 6(1), as well as constructive knowledge.[644] Section 5(1) of IA points to actual knowledge as being the information 'only' 'known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk and if so on what terms'. In referring to individuals, an

[639] [1896] 2 Ch 743.
[640] [1896] 2 Ch 743.
[641] For further discussions, see Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-056] – [7-059].
[642] Robert Merkin, 'What Does an Assured 'Know' for the Purpose of Pre-Contractual Disclosure?' (2016) 27 Insurance Law Journal 157, 173 - 174.
[643] [1994] 4 All ER 181.
[644] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1013.

individual may be the insurer's employee or agent or in any other capacity such as brokers. Again, this provision includes a limitation by including the term 'only'. Thus, any other previous interpretation to expand actual knowledge would not be relevant.

Section 5(2) gives a non-exhaustive list of the information that the insurer ought to know, as being constructive knowledge, i.e. if 'an employee or agent of the insurer knows it and ought reasonably to have passed on the relevant information to an individual', such as information held by claims department.[645] Further, as far as constructive knowledge is concerned, s 5(2) states that 'the relevant information is held by the insurer and is readily available to an individual', such as the insurer's records. Birds raised a significant question in regard to what is 'readily available' especially, for example, where the underwriting department has no right to access the claims department records.[646]

In *Mahli v Abbey Life Assurance Co Ltd*[647], the majority of the Court of Appeal found that there was no imputation of knowledge from the insurer's claims department to the insurer's underwriting department partially as these departments were not in the same location. Although this decision may be criticised as the source of the data is the same for the same insurer. However, if the insurer used two different systems for each department, this ground might reasonably succeed.

Significantly, applying this authority now post-IA may be difficult as IA adopts a different approach from the old law. For instance, the interpretation of 'readily available' should include any information in the insurer's organisation whether this information is in a different department or not as this information is presumed to be known.[648] The interpretation may extend the insurer's role to include the insurer's duty to conduct a search, as long as this search is feasible.[649] Currently, it is up to

[645] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) paras 10-43 to 10-54.
[646] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 135.
[647] [1996] LRLR 237.
[648] David Hertzell, 'The Insurance Act 2015: Background and Philosophy', in Malcolm Clarke, Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 8.
[649] Peter Macdonald Eggers, 'The Fair Presentation of Commercial Risks under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 34.

the courts to interpret the meaning of 'readily available' and its limits. In addition, there will be different positions in light of the new duty of fair presentation.

As far as the interpretation of 'readily available' is concerned, Merkin recognised another significant question whether the insurer is under a duty to 'search electronic files', and if so which test is proper to prove 'readily available' whether a subjective or an objective test.[650] On the other hand, Merkin pointed out another question about which individuals' knowledge within the insurer's organisation should be taken into account.[651] Both questions are complex especially where the underwriting is separate and where the data is massive and many individuals may be involved and hold some knowledge. However, availability may refer to a wider duty than searching electronic files within the insurer's organisation or other organisations such as the insurer's broker organisation as long as these files are available. In addition, it may extend to all data bases that are available in the market. Thus, it may be likely that one can use the objective test to prove the failure of such duty.

However, special circumstances of the actual insurer may be still considered. For example, in the Canadian case *Coronation Insurance Co v Taku Air Transport Ltd*[652], where an airplane crash occurred, and the insurer rejected the claim on the grounds of non-disclosure of the bad accident records and the accuracy of numbers of the seating capacity. Significantly, the Supreme Court of Canada held that the seating capacity was material but the air accident records were not, because these records were in the public domain, which should be known by the insurer as it stated that 'at a minimum, it [the insurer] should review its own files on the applicant, and should make a search of the public record of the air carrier's accidents'[653]. Thus, the question is whether the common law approach in the UK would be similar to the Canadian approach.

Section 5(3) gives a non-exhaustive list of the sort of the circumstances the insurer is presumed to know. These include, as s 5(3) states, 'things which are common knowledge and things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know

[650] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-153].
[651] Ibid [7-152]; see also, The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 10-27.
[652] (1992) 4 CCLI (2d) 115 (SCC), [1991] 3SCR 622.
[653] Ibid 624.

in the ordinary course of business'.[654] The famous example for common knowledge is the case of *Carter v Boehm*[655], where the non-disclosure is about information that was a part of the common knowledge of the insurer.

It is widely accepted that to assess the knowledge of the insurer and the impact of the material facts on the insurer's decision expert evidence shall be led.[656] The court, however, is not bound by these opinions especially where these opinions conflict from insurer to insurer.[657] McCardie J pointed out the court's position on the use of expert evidence in *Yorke v Yorkshire Insurance Co Ltd*[658], saying that 'Expert evidence may frequently afford great assistance to the Court upon questions of novelty or doubt... Judges are always free to test and revise every form of expert testimony'[659]. Nevertheless, if the court can reach its decision on materiality, expert evidence becomes unnecessary.[660] Mance LJ, in *Brotherton v Aseguradora Colseguros (No.2)*[661], illustrated that courts are the 'ultimate decision makers' regarding the determination of the role of the expert, and this remains after IA coming into force. Thus, the common law authorities on this issue are still relevant.

There is no specific provision for determining the knowledge of the insurer under Saudi jurisdiction, and this should be examined by the Saudi regulations following on from the UK experience. Further reform toward more specific and detailed provisions is necessary to have specific and comprehensive detailed insurance law and regulations.

6.6.4. Waiver

Based on IA, there is an exception to the duty of disclosure in the absence of enquiry by the insurer, based on s 3(5), if 'it is something as to which the insurer waives information'. Burton J, in *Sugar Hut Group v Great Lakes Reinsurance*[662],

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[654] Such as in *Carter v Boehm* (1766) 3 Burr 1905. See also, *Glencore International AG v Alpina Insurance Co Ltd* [2004] 1 Lloyd's Rep 111.
[655] (1766) 3 Burr 1905.
[656] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 92.
[657] John Birds, 'The Current Law', in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 140.
[658] [1918] 1 KB 662
[659] Ibid 670.
[660] John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 92.
[661] [2003] EWHC 335 (Comm), [2003] 2 CLC 629.
[662] [2010] EWHC 2636 (Comm).

illustrated this where the insurer had the right to make further enquiries; however, if the insurer failed to ask further questions, it would be a 'a starting point for a waiver'.[663] Accordingly, as a limit for the duty of disclosure, if a reasonable man did not consider some facts as material because of the wording of the proposal, these facts should be waived by the insurer.[664] This leads to say that if the wording of a question misleads a reasonable man into not answering a question accurately, the insurer cannot rely on the inaccuracy of the answer.[665] However, if the problem is due to the wording of the insurer's question, the question is whether this should be counted as a case of waiver or as breach of the insurer's duty to ask questions clearly. Although IA does not indicate the extent to which waiver should be applied and it needs an authoritative interpretation by the courts; this situation should be counted as a consequence of the breach of the insurer's duty to ask clear questions rather than a waiver. Counting this situation as a breach of the insurer's duties of utmost good faith can give the insured a chance to further remedies, and it can limit the insurer's bad faith conducts.

Waiver can be at the pre-contractual stage commonly by an express term such as in *HIH Casualty and General Insurance Co v Chase Manhattan Bank*[666] where the policy included a 'statement of truth', which exempted the insured from the duty of disclosure of material facts or make any representation as this duty is waived by the insurer.[667] Furthermore, waiver can be at the post-contractual stage by acting in several situations, for example, by not seeking to avoid the policy for a long time when the misrepresentation is revealed, such as in *Wise Underwriting Agency Ltd v Grupo Nacional Provincial*[668]. Several situations and requirements of waiver are going to be considered below.

Five requirements for waiver were developed through case law which is still applicable under the new law. In *Wise Underwriting Agency Ltd v Grupo Nacional Provincial*[669], cargo cover was issued for a Cancun retailer who imported luxury goods from Miami; and the claimants, Wise, were entitled to avoid the reinsurance

[663] Ibid [38].
[664] John Birds, 'The Current Law', in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 9.
[665] Ibid 10.
[666] [2003] Lloyd's Rep IR 230.
[667] For instance, [2003] Lloyd's Rep IR 230.
[668] [2003] EWHC 3038 (Comm).
[669] [2003] EWHC 3038 (Comm).

contract on the basis of misrepresentation of a consignment including high-value Rolex watches to Cancun as it was described only as clocks due to a translation error. However, the Court of Appeal found that affirmation grounded to waive the reinsurer's right to avoid the reinsurance policy. Significantly, the waiver requirements were set and adopted by the Court of Appeal, as follows[670]:

> 1. The insurer must have actual knowledge of the facts not disclosed prior to the contract. Constructive knowledge is insufficient.
> 2. The insurer must also know that non-disclosure creates the right to avoid.
> 3. The insurer has a reasonable time in which to decide what to do.
> 4. There must be an unequivocal communication to the assured by words or conduct that the insurer has made an informed choice to affirm the contract.
> 5. Whether such a communication is found depends upon how a reasonable person in the position of the assured would interpret the insurer's words or conduct.

Making an 'informed choice' is addressed in proving waiver. Proof of an 'informed choice' is based on whether to satisfy the position of the reasonable insured who would appreciate that the insurer had made an informed choice, or to satisfy the impact of the insurer's conduct on the actual insured. While the former test provides a balance between the actual conduct of the insurer and the position of the reasonable insured, the latter may lead to difficulties in satisfying the position of the actual insured case-by-case.[671]

There are four common situations where waiver can occur that are: First, a limit on the duty of fair presentation; second, a limit on a specific type of information; third, a limitation of the authority of the insured to represent; fourth, a restriction on the insurer's remedies such as the insurer's right to avoid the insurance policy.[672] Although they are not covered by IA, two significant matters about limitation were decided on in *HIH Casualty and General Insurance Co v Chase Manhattan Bank*[673]. Firstly, if the waiver is particularly for the insured, it does not extend to his agent. Secondly, the waiver cannot exclude fraudulent misrepresentation or fraudulent non-disclosure due to public policy.

Six examples are provided to illustrate when waiver should be considered. Firstly, the most usual situation for waiver is when the insured has left a question unanswered, and the insurer does not require details in regard to this blank answer.

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[670] Ibid [46].
[671] The former test was adopted in *Spriggs v Wessington Court School Ltd* [2005] Lloyd's Rep IR 474.
[672] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-159].
[673] [2003] Lloyd's Rep IR 230.

This would be a waiver made by the insurer about this particular information unless this blank answer had a negative meaning; then, it would be considered as an answer.[674] Accordingly, this should be counted as incorrect information which may in addition be misrepresentation.[675]

Secondly, when a question is specific to a time or the type of insurance, such as in liability insurance, when the insurer asks about any claims made in the last five years.

Thirdly, where the insured is to provide information on refused applications or claims history for specific types of insurance policies. This refers to the fact that it is material to the insurer to know only this specific information.

Fourthly, when the proposal requires an answer to provide information about any motor convictions, this would imply that other convictions were not material to the insurer.[676]

Fifthly, when the policy includes an express contract term that excludes the insured's duty of disclosure and to not misrepresent. Accordingly, the insurer is not allowed to avoid the policy for non-disclosure or misrepresentation as the insurer waives its right to do so.[677]

Finally, in the case of the online proposal where the insurer provides choices to answer some questions, such as 'yes' or 'no' answers, and where the insurer does not provide any space to provide further information, the question is whether this case should be counted as a waiver or not. In *Orakpo v Barclays Insurance Services Ltd*[678], where the insured argued that the insurer's online form did not have any space to provide further information, the Court of Appeal did not consider this case as a waiver. However, this authority can be criticised in the case of consumer insurance, individual trader, and micro-businesses where insureds have limited experience and knowledge to provide further information when the construction of the question limits the answer.

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[674] See for example, *Roberts v Avon Insurance Co* (1956) 2 Lloyd's Rep 240.
[675] John Birds, 'The Current Law', in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 8 - 9.
[676] For example, *Revell v London General Insurance Co Ltd* (1934) 50 L1 LR 114.
[677] For example, *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262.
[678] [1994] CLC 373.

In Saudi jurisdiction, the only regulation that recognises waiver is IRCHIL. Article 84 of IRCHIL sets out that the insurer may waive all or some information that is required to be provided by the insured, and the information that is provided completely or partially based on the waiver, is the information that should be examined to find out whether the insured complies with the requirement of the duty of disclosure. There is no further interpretation of waiver except under article 84. The wording of this article is very general which can cover the six situations of the waiver that are found in the UK approach. This provision is limited to the cooperative health insurance policies under CHIL; thus, all other types of insurance do not apply this provision. Accordingly, Saudi regulations should recognise the need to add further provisions to deal with waiver similar to the IRCHIL and by learning from the UK experience.

The next section critically analyses the requirement of inducement in the UK and Saudi jurisdictions. This requirement is significant as it limits the insured's pre-contractual duties.

6.7. The Requirement of Inducement

The requirement of inducement was introduced, in the UK, by the House of Lords in *Pan Atlantic Insurance Co v Pine Top Insurance Co*[679]. IA introduced the necessity of inducement as a statutory requirement. Particularly, s 7(3) states that 'a circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms'. By s 8(1), the insurer is required to prove the inducement by either not entering into the contract or on entering it on different terms. The inducement needs to be proved even though materiality has been proved. The previous common law authorities are still relevant for interpretation of the requirement of inducement. Accordingly, if the insurer fails to meet the requirements of inducement, no remedy can be awarded.[680] Lord Mustill acknowledged the requirement of inducement by saying that: 'a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract'[681].

[679] [1994] 1 AC 501.
[680] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1014.
[681] [1994] 1 AC 549.

The question had been left in *Pan Atlantic*[682] whether inducement was to be presumed or to be proved as a consequence of proving materiality.[683] Significantly, although IA clearly requires inducement, it says nothing about the presumption of the inducement. Therefore, the previous law is still applicable.

Inducement might be presumed, if the court accepted the materiality of a fact. There is no rule though that says proof of materiality is a presumption of inducement.[684] However, there were some cases where insurers had a good reason preventing them from providing evidence of inducement; thus, proof of materiality was presumed to be a requirement of inducement, such as in *St Paul Fire & Marine Insurance Co (UK) Ltd v McDonnell Dowell Constructors Ltd*[685]. Accordingly, insurers should provide evidence on how they have been induced by material non-disclosure or misrepresentation. Significantly, the Court of Appeal in *Assicurazioni Generali Spa v Arab Insurance Group (B.S.C.)*[686] resolved the issue of the presumption of inducement by requiring it to be proved. The Court of Appeal summarised the relevant issues for inducement, as follows[687]:

> i) In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.
> ii) There is no presumption of law that an insurer or reinsurer is induced to enter in the contract by a material non-disclosure or misrepresentation.
> iii) The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence from evidence from him.
> iv) In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so.

As the requirement of inducement is a 'matter of fact in every case'[688], there is debate on how to prove there has been inducement. It can be proved by showing how an insurer may ask different or further questions which should lead,

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[682] Ibid.
[683] Aittilio Costabel, 'The UK Insurance Act 2015: A Restatement of Marine Insurance Law' (2015) 27 St Thomas L Rev 133, 152.
[684] Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017) 64.
[685] [1995] 2 Lloyd's Rep 116. For another example, in *Marc Rich & Co AG v Portman*, [1996] 1 Lloyd's Rep 430, 442. Longmore J stated that 'the presumption will only come into play in those cases in which 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'.
[686] [2003] 1 WLR 577, [2003] 2 CLC 242.
[687] Ibid [62].
[688] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-090].

consequently, to the imposition of different terms. Further, it is required, first, to prove materiality. The distinction between materiality and inducement is that whereas materiality is about the conduct of a prudent insurer in making the decision, inducement focuses on the actual insurer's conduct.[689]

Case law provides examples regarding the proof of the requirement of inducement as IA does not provide detailed provision on how to prove this requirement. In *Drake Insurance Plc v Provident Insurance Plc*[690], it was important to prove not only whether the non-disclosure induced the insurer to enter into the contract, but also what would have happened if the fact was disclosed. Further, where there was no change in the premium because of non-disclosure of a conviction, which was found at no fault of the insured, inducement cannot be proved. Further, in *Glencore International AG v Alpina Insurance Co Ltd*[691], inducement could not be proved as the total loss was much bigger than the loss would have been if the facts were disclosed. In this case, the policy covered all the risks of loss and the insured claimed for the loss of stored crude oil, but the insurer rejected the claim due to non-disclosure and misrepresentation. However, the court held that even though the insured's non-disclosure and misrepresentation occurred, the insurer could not prove inducement because of the limited impact of the loss as part of the total risk. Further, the prudent insurer would not have been induced into such insurance policy.

In a recent case *Axa Versicherung AG v Arab Insurance Group (BSC)*[692], a 'first loss treaty' was issued to cover USD $500,000 losses for any one accident or occurrence of marine energy construction risks from 1996 to 1997. The reinsurer sought to avoid the reinsurance treaty due to the non-disclosure of past marine energy construction losses based on statistics from 1989 to 1995, which had shown high losses in 1989-1990. The reinsurer was not entitled to avoid the reinsurance treaty because inducement was not proved. The failure to prove inducement was because the reinsurer could not prove that it would not have taken the risk if the statistics were disclosed. The determination of the requirement of inducement had to comply with the requirement of fair presentation. Moreover, the facts had been

[689] Peter MacDonald Eggers, 'The Past and Future of English Insurance Law*:* Good Faith and Warranties' [2012] UCLJLJ 211, 222.
[690] [2004] QB 601.
[691] [2004] 1 Lloyd's Rep 111.
[692] [2017] EWCA Civ 96, [2017] 1 All ER (Comm) 929, [2017] Lloyd's Rep IR 216.

'fairly' disclosed. Later, the Court of Appeal dismissed the reinsurer's appeal. This is an important decision because it interpreted the requirement of inducement in light of the duty of fair presentation. Thus, such elements as 'fairly' disclosed and 'reasonable research' and 'reasonably reveal' are relevant to prove inducement unlike the past position of the common law where these elements were not recognised based on MIA.

The requirement of inducement is part of the Saudi jurisdiction. To prove breach of the duty of disclosure, it is necessary to prove inducement, similar to the UK approach. Inducement has been considered by IMCCR, IRCHIL, and UCMIP. Article 42 of IMCCR requires insurers to inform insureds about their duty of disclosure about any material facts that impact on underwriting the risk. Article 2(16) of UCMIP defines a material fact as 'any fact that affects the company's decision to accept or reject insurance or impacts on the insurance premium or terms and conditions of the contract'. However, article 2 of ICPP does not expressly mention the requirement of inducement but rather implies the requirement of inducement by referring to 'any information that may be significant to any of the parties to an insurance policy'. Saudi regulations do not debate whether to treat inducement as a presumed requirement. In addition, the burden of proof to show inducement is on the insurer.[693]

CRIDV examine the requirement of inducement of material facts to determine the failure of the duty of disclosure and, consequently, to determine the breach of the doctrine of utmost good faith.[694] For example, in a decision no 89/R/1433H (2012) which was affirmed by the Appeal decision no 398/a/1435H (2014) in Riyadh, where there was a dispute about the insurer's claim to not pay out on the policy based on the insured's misrepresentation. The Committee found that the insurer had failed to prove inducement based on this misrepresentation. Accordingly, the facts were not considered material as no inducement had been proved, and the insurer's claim was dismissed. In addition, the insurer was obliged to pay the insured's claim. Another example, in a decision no 85/R/1435H (2014) in Riyadh, the Committee found the insured had breached the doctrine of utmost good faith by non-disclosure

[693] Decision no 38/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.
[694] Decision no 128/R/1435H (2014) which was affirmed by the Appeal decision no 704/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.

of material facts. These facts were about the insured's health records and misrepresentation to the insurer of these material facts induced the insurer to enter into the insurance contract on these particular terms at that premium.

The next section considers legal remedies upon breach of the insureds' pre-contractual duties in both the UK and Saudi jurisdictions. As there are detailed provisions for each jurisdiction, this section divides into two subsections. The first subsection considers legal remedies in the UK for business insurance. The second subsection considers legal remedies in Saudi Arabia.

6.8. Legal Remedies

6.8.1. Legal Remedies in the UK

In terms of s 8 of IA, a 'qualifying breach' occurs on breach of the duty of fair presentation by the insured. A qualifying breach can be either a deliberate or reckless breach or a non-deliberate or reckless breach. IA defines in s 8(5) 'a qualifying breach is deliberate or reckless if the insured knew that it was in breach of the duty of fair presentation, or did not care whether or not it was in breach of that duty'. Otherwise the breach is non-deliberate or reckless breach. The Law Commissions considered recklessness as a 'difficult concept… It requires a lack of interest in making a fair presentation; perhaps an almost complete disregard for the quality of the presentation'[695]. The Law Commissions differentiated between 'not caring' and acting 'carelessly' based on the insured's intent. Thus, if the insured made a statement without caring whether this statement was true or not, this would reflect that the insured did not care and was not acting carelessly.[696] The Law Commissions provided some examples of deliberate conducts, as follows[697]:

> (1) Refraining from disclosing a circumstance which the insured knows to be material;
> (2) Making a data dump or otherwise presenting risk in a particular way in order to conceal certain information (as in the case where a summary is very misleading)… Recklessness might be particularly salient in the data dump context, where an insured does not care whether the insurer will be able to make sense of the information provided, with the result that obviously important information may well be missed.
> (3) Intentionally lying about a material representation, either in the initial presentation or by knowingly giving a false response to an insurer enquiry… It may also be shown by answering a question with no attempt to check the facts.

[695] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) paras 11.43 – 11.47.
[696] Ibid.
[697] Ibid.

It should be noted that IA differs from CIDRA as the latter does not specify what careless breach is. IA combines careless breach and innocent breach under the definition of non-deliberate or reckless breach. However, CIDRA does not regard acting innocently as a breach of the duty to take reasonable care to not make a misrepresentation, which may need further interpretation by the courts to affirm this conclusion.

There are similarities between IA and CIDRA regarding legal remedies upon breach of the insured's pre-contractual duties. There is no assumption of avoidance as a consequence of the breach of the duty of fair presentation of the risks under IA which is similar to CIDRA. Based on IA, if the breach is deliberate or reckless, the insurer may avoid the contract, refuse all claims, and retain the premium[698], which is similar to the legal remedies of deliberate or reckless misrepresentation under CIDRA. Another similarity between IA and CIDRA is the legal remedies for non-deliberate or reckless breach under IA and the legal remedies for careless misrepresentation under CIDRA.

As was shown in chapter 5, there are three possible remedies for non-deliberate or reckless breach. First, if the insurer would not enter into the contract at all, the insurer may avoid the contract, refuse all claims, and return the premium paid.[699] Second, if the insurer would enter into the contract but on different terms, the contract should be treated as if those terms existed.[700] For example, in a liability insurance policy, if specific types of risk should be excluded, the policy would be treated as if those risks were excluded from the day of commencement of the insurance policy. Third, if a higher premium should have been charged, the claim will be reduced proportionately.[701] Again, in the case of subrogation a claim should reduce proportionately in terms of IA. Thus, the amount to be paid by the insurer may reduce proportionately, in terms of the following formula[702]:

$$\mathrm{X} = \frac{Premium\ Actually\ Charged}{Higher\ Premium} \times 100$$

[698] S 2, Schedule 1 of IA.
[699] S 4, Schedule 1 of IA.
[700] S 5, Schedule 1 of IA.
[701] S 6(1), Schedule 1 of IA.
[702] S 6(2), Schedule 1 of IA.

Significantly, the insurer's right to avoid the policy should be exercised in good faith. This is again part of the insurer's post-contractual duty of utmost good faith. For instance, if the insurer cannot prove materiality or inducement, the insurer may be in breach of the post-contractual duty of utmost good faith.[703] Consequently, this duty is a limit on the insurer's right to avoid the insurance policy. This authoritative judicial decision should be followed even after IA coming into force as the doctrine of utmost good faith becomes an interpretative principle which may impose implied terms such as the insurer's duty to exercise its rights and powers.

Insurers may waive their rights, as shown in section 6.6.3, to avoid the policy by either affirmation or estoppel. Both estoppel and affirmation are well-recognised by the common law, and this should apply under IA, as IA does not exclude either estoppel or affirmation provisions. The only issue would be to consider the insurer's role in affirmation, for example by not asking follow-up questions to reveal more information. Affirmation is based on the insurer's conduct or words to waive their rights of avoidance for non-disclosure or misrepresentation as the insurers have full knowledge about the facts; estoppel is when the insurer's conduct induces the insured to think that there is no need to disclose facts as the insurer would not avoid the policy as a consequence of non-disclosure or misrepresentation.[704] A further distinction between affirmation and estoppel was pointed out by Mance J by saying that 'in affirmation (as distinct from estoppel), the actual state of mind of the other party is not the test. Affirmation depends on the objective manifestation of a choice'[705].

Affirmation would be recognised, for example, where the insurer accepted payment of the premium after the insurer had knowledge about non-disclosure of facts; the insurer delayed in communicating with the insured or confirming the insurance cover[706], and the insurer gave a notice of cancellation[707]. For example, in *Insurance Corporation of the Channel Islands v The Royal Hotel Ltd*[708], where there were two insurance policies covering material damage to the hotel building and interruption

[703] *Drake Insurance Plc v Provident Insurance Plc* [2004] QB 601.
[704] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-223]. John Lowry, Philip Rawlings, & Robert Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 134 - 135.
[705] *Insurance Corporation of the Channel Islands v The Royal Hotel Ltd* [1998] Lloyd's Rep IR 151.
[706] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-228].
[707] *Wise Underwriting Agency Ltd v Grupo Nacional Provincial* [2003] EWHC 3038 (Comm).
[708] [1998] Lloyd's Rep IR 151.

to business, the insured claimed for fire. Although the materiality and inducement tests were satisfied, avoidance was not allowed because of waiver as the insurer had known about the non-disclosed facts, and the insurer did not seek to avoid the policy at that time. For another example, in *Argo Systems FZE v Liberty Insurance Pte Ltd*[709], there was a misrepresentation in a letter sent from the insured to the insurer since 2003; however, the insurer knew about this misrepresentation but it took no action at that time. The insurer did not seek to avoid the policy or return the premiums, and when the insured placed a claim, the insurer sought to avoid the policy based on the non-disclosure and misrepresentation. The trial judge found that the insurer affirmed the contract, as the insurer spent seven years to take an action and this period was long to seek the avoidance.

In the case of variation of a policy, the same legal remedies apply to deliberate or reckless breach, or non-deliberate or reckless breach. Two scenarios may be considered. Firstly, if the variation had no effect on the entire policy, the consequences of the breach would impact only on the variation and it would not have any effect on the whole policy.[710] Secondly, if the variation had a direct and significant impact on the entire policy, the consequences of breach would impact on the whole policy.[711] For example, if avoidance is the remedy for a reckless breach of a variation, and the variation has an effect on the whole policy, the whole policy should be avoided, such as in *Limit No.2 Ltd v Axa Versicherung AG*[712].

Termination is not imposed by IA where the insured does not wish to proceed with the contract upon non-deliberate or reckless breach unlike CIDRA, which imposes termination in case of careless misrepresentation. Accordingly, termination is available to consumers as further protection; while, in business insurance, this option is not available unless the contract express otherwise. However, termination in business insurance could provide benefits to the individual trader, micro and small businesses. This is because they need similar protection to consumers due to the lack of their bargaining powers to negotiate such termination provisions at the pre-contractual stage. Hence, it is recommended to adopt this advantage of CIDRA into business insurance by imposing termination provisions to give the right to

[709] [2011] Lloyd's Rep IR 427.
[710] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-202].
[711] Ibid [7-206].
[712] [2008] EWCA Civ 1231, [2009] Lloyd's Rep IR 396.

terminate for businesses that are not in the same bargaining position as insurers. However, if both the insurer and the insured have the same bargaining powers, they may exclude the provisions of termination by contracting out.

6.8.2. Legal Remedies in Saudi Arabia

Saudi regulations are brief in considering remedies upon breach of the doctrine of utmost good faith, specifically, the breach of the duty of disclosure and misrepresentation. In addition, specific remedies apply based on specific types of insurance policies, which means that these remedies are not binding for other policies. For example, IRCHIL covers breach of the duty of disclosure in good faith. If the insured acts without fraud, the insurer must not reject any claims because of errors, inaccuracy, invalidity, or breach of the duty of disclosure, based on article 77 of IRCHIL. This then does consider the case of fraudulent non-disclosure and misrepresentation. Additionally, this regulation does not adopt avoidance as a remedy even if there is fraud, and the only remedy available, in case of fraudulent non-disclosure or misrepresentation, is to reject the insured's claim. This provision is significant due to the level of protection given to insureds and beneficiaries, especially, because this type of insurance is a compulsory insurance for non-governmental employees. However, it seems that this provision needs to be developed, because it may motivate insureds to act carelessly. The question is whether the insurer can reject further claims where the insured acts fraudulently. According to the regulation, there is a gap regarding this issue, and it seems that there is nothing to prevent the insurer rejecting further claims because of a previous fraud.

There is disagreement between article 77 of IRCHIL and the Unified Medical Disclosure Form, part of the Council of Cooperative Health Insurance. This form includes the necessity of providing accurate answers, because insurers have the right, in the case of non-disclosure, to recover all paid indemnity and re-calculate the insurance premium. However, this Form is not consistent with article 77 because the insurers have, on the one hand, the right to recover all paid indemnity, and, on the other hand, insurers must not reject any claims in case of invalid or inaccurate answers. This could lead to conclude that the provision of the Unified Medical Disclosure Form may apply in case of fraud. For instance, if the insurer knows about the fraud after paying the insured's claim, the insurer may recover

paid indemnity already paid. However, this is not clear from the wording of the Unified Medical Disclosure Form because it includes a general statement with no further interpretation. Accordingly, further development is encouraged and urgent for both the Unified Medical Disclosure Form and IRCHIL.

According to article 123 and 127 of IRCHIL and article 14 of the Unified Health Insurance Policy, Cooperative Health Insurance Disputes Committees have the authority to choose proper remedies upon the failure of the insurers or the insureds' in compliance with their duties. Additionally, article 17 of the Rules of Cooperative Health Insurance Disputes Committees sets out that in case of any legal gaps, general rules and provisions of Islamic laws and any other related provisions to the dispute may be considered but not binding. Although, this is not a definitive position, it has a significant advantage as the committees have authority to decide on the applicable provisions depending on the surrounding circumstances on a case-by-case basis. This is because the decision of the committees are not binding in future disputes. Accordingly, it is recommended there should be full consideration of all related provisions specifically in regard of the doctrine of utmost good faith and especially legal remedies.

There are variations of the remedies available on breach of the duty of disclosure between compulsory health insurance policies and compulsory motor insurance policies. Specifically, according to article 6(2) of UCMIP, the insurer has the right to recover the paid indemnity if the insured concealed or failed to disclose material facts prior to conclusion of the policy, which induced the insurer's decision to enter into the contract, or on which terms or premium. Similarly, article 12(7) of ICPP includes that insurers must not repudiate paying indemnity to a third party in the case of breach of motor insurance by the insured; and it is for the insurer to recover any paid indemnity.

Based on two of CRIDV decisions, rejection of the insured's claim is the only remedy in case of breach of the duty of disclosure. In a decision no 146/R/1434H (2013) which was affirmed by the Appeal decision no 76/a/1436H (2015) in Riyadh, CRIDV rejected the insured's claim to recover his loss based on a comprehensive motor insurance policy because the insured failed to disclose a change in the vehicle's engine. The Committee considered this fact as material which had induced the insurer's decision. Thus, the Committee held that the insured

was in breach of his duty of disclosure, and, consequently, rejected his claim. Further, in a decision no 35/R/1435H (2014) in Riyadh, CRIDV rejected the insured's claim to recover health treatment costs due to non-disclosure of the past health record.

There are two main criticisms of these CRIDV decisions. Firstly, CRIDV did not examine whether the insured acted intentionally or carelessly. Further, the CRIDV attitude to only reject claims in case of deliberate breach was not fair for insurers as the insurance policy is retained. This stance might be considered as an advantage for consumer insurance; however, it would not be fair for business insurance policies.

Sharia provisions are considered in resolving insurance disputes. Significantly, reconciliation is considered by CRIDV as an agreed method to settle insurance disputes in general at the agreed indemnity based on the discretion of the contracting parties.[713] This is depending on the Holy Quran 'reconciliation is best'[714]; and the Prophet's tradition 'reconciliation is permitted between Muslims except a reconciliation that permits a forbidden or forbids a permitted'[715]. However, CRIDV should play a positive role in protecting the insured when the negotiation position of the insureds and insurer is not equal especially where the insured has a limited experience, limited knowledge, or is elderly. This is especially important where the breach cannot be proved and is more significant for individual and non-business insurance.

Based on Islamic contract law, significant remedies for the failure of the duty of disclosure may be considered by applying theories of turned and deprecation, if possible.[716] Based on these theories, renegotiation of the insurance policy is permitted to adjust due premium, terms and conditions based on the recent disclosed information. Furthermore, these theories would preserve the insurance policy and

[713] Decision no 243/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 75/R/1428H (2007) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and decision no 248/R/1434H (2013) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[714] The Holy Quran, 4:128.
[715] Bashar Awad Marouf (ed), *AlJame'a Alkabeer (Sunan Alturmathi)* (Dar Algharb Aleslami 1996) part 3 'Alahkam O Alwasaya', 27, Hadith No 1352. Abdullah Bin Zaid Almahmoud, 'Alaqd Sharia't Almotaqedeen' (1984) 10 Islamic Research Journal 145.
[716] Mahmoud Mozafar, *Nazerayet Alaqd* (Dar Hafiz 2002) 197. See also, Abdul RazzaK Alsanhouri, *Alwaseet fe Sharh Alqanoon Almadani* (Munsha'at Alma'aref 2004) part 1 'Masader Aleltizam', 402.

exclude only the invalid or disagreed part. For example, if there is an insurance policy for more than one person, such as a family health insurance policy, and there is a breach of the duty of disclosure regarding only one member of the family in respect of past health problems, surgeries, or pregnancy. Furthermore, based on the theory of deprecation, rather than avoid the whole insurance policy, this person would be excluded from the benefits of the insurance policy.[717] Consequently, this policy should have the flexibility to change its conditions by either increasing or decreasing due premiums, or reducing the insurance coverage by an attached agreement.

On the other hand, according to the turned theory, the insurance policy is preserved but turns from type to type or level to level of insurance policies. For example, if the insured does not disclose all information regarding a health insurance policy in order to reduce the premium, the insurer, based on this theory, may turn to a lower type of health insurance policy due to the disclosed facts without avoidance of the whole policy. However, further amendments to the policy must be in favour of the insurer. It is clear that these theories will preserve and maintain insurance policies; however, these theories will only apply if there is agreement between both contracting parties.

The next section critically analyses provisions of contracting out and basis of contract clauses in the UK. This section compares these provisions with CIDRA, from one hand, and the old law, from the other, where necessary.

6.9. Contracting Out and 'Basis of Contract Clauses'

Basis of contract clauses in proposal forms meant that the insured's answers were converted to terms and warranties of the insurance policy.[718] Thus, any failure in these answers, even if they were irrelevant, allowed the insurer to repudiate its liability to pay claims.[719] For instance, in *Dawsons Ltd v Bonnin*[720], the insurer repudiated its liability to pay claims on the ground of a failure to provide a correct

[717]Abdul RazzaK Alsanhouri, *Alwaseet fe Sharh Alqanoon Almadani* (Munsha'at Alma'aref 2004) part 7(2) 'Aqd Altameen', 1185.
[718] James Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) 27 Insurance Law Journal 247, 253.
[719] Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 49.
[720] [1922] 2 AC 413.

answer about where the insured lorry was garaged, and a breach of warranties; however, this answer was immaterial.

There were two main criticisms of 'basis of contract clauses' especially in the context of consumer insurance.[721] Firstly, insureds including a consumer or even individual trader, micro-businesses, and small businesses were unaware about the meaning of the 'basis of contract clauses' and its impact on the contract.[722] This is especially because the terminology used needs an expert to interpret the meaning of 'basis clause'[723]. Secondly, there was no requirement of a link between the breach and the loss.[724]

As a result of the significant disadvantageous impact of the 'basis of contract clauses', they are abolished in both consumer and business insurance. Depending on IA, contracting out the provisions of basis of contract clauses by s 9 of IA is not permitted for formation of the insurance contract or a variation. After the coming into force of IA, insurers need to write each statement that is provided by the insured to turn this statement into a warranty.[725] Based on s 15 and s 16 of IA, any contract term that may put the insured in a worse position is not allowed for consumer and business insurance policies. Basis of contract clauses did not allow balance between the contracting parties, and were the 'perfect' protection of the insurers' interests.[726]

Unlike consumer insurance policies which do not allow contracting out of the insured's duty of reasonable care to not make misrepresentation, business insurance policies may contract out of many provisions of IA. This includes the duty of fair presentation based on freedom of contracts as s 16(2) of IA requires only to justify the transparency requirement of s 17(2) of IA. Although it is not likely that parties

[721] Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 49.
[722] Ibid.
[723] James Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) 27 Insurance Law Journal 247, 253.
[724] Peter Tyledysley, 'Reform at Last' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 49.
[725] James Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) 27 Insurance Law Journal 247, 253.
[726] Ibid 252.

will contract out IA regime, some insurance policies may be required to apply contracting out provisions of IA according to their complexity.[727]

Section 17 sets out the transparency requirement about disadvantageous terms meaning that insurers must take all steps to clarify these terms to insureds before entering into the contract. Those terms may rely on the old law and apply the duty of disclosure, and may limit the extent of material facts that are relevant to be disclosed.[728] As far as business insurance concerned, it seems that any change in the terms should be written clearly with no room for doubt, to comply with the transparency requirement of s 17 of IA. This is particularly because both parties have the experience to specify and clarify contractual terms. The requirement of s 17 should be shown as 'regulatory costs' rather than a restriction of the freedom of the contract.[729] However, s 17 also maintains the balance between contracting parties especially in the case of the individual trader, small or micro-businesses.

Davey questioned whether exclusion of the insured's duties or/and remedies should extend to cover the broker's breach especially in the case of broker's fraud.[730] On the grounds of public policy, fraud must not be excluded for both the insured and his agent or broker.[731] Further, in *HIH Casualty and General Insurance Co v Chase Manhattan Bank*[732], where waiver was concerned, the clause that waived the insured's duty of disclosure did not extend to his agent or broker. All in all, the extent to which limitation or exclusion clauses can be recognised in business insurance is still uncertain and needs further interpretation by the courts.

Drafting terms should be clear and unambiguous, and these terms should draw to the insured's attention the significance of these terms.[733] In *MacGillivray*, Birds pointed out that 'in some cases, it may be difficult to spell out clearly and

[727] David Hertzell, 'The Insurance Act 2015: Background and Philosophy', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 10.
[728] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [7-033].
[729] James Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) 27 Insurance Law Journal 247, 256.
[730] Ibid 249.
[731] Ibid 250.
[732] [2003] Lloyd's Rep IR 230.
[733] Tamara Goriely, 'Insurance Law Reform: Where Next?' in Peter Tyledysley (ed), *Consumer Insurance Law: Disclosure, representation, and the Basis of Contract Clauses* (Bloomsbury 2013) 239.

unambiguously the effect of the disadvantages term'[734]. Examining clarity of terms is an issue that needs further interpretation by the courts by adopting of either an objective test, based on the reasonable insured, or a subjective test, based on the actual insured in order to prove the insurer's failure to comply with the requirement of s 17. However, it can be said that the prudent insurer test should be looked at to find out whether drafting is clear and unambiguous. However, Birds illustrated the issue by showing the failure of the requirement of s 17 as 'the characteristics of insured persons are to be taken in account'.[735] This view supports the subjective test, which complies with the requirement of s 17. This is because it needs to examine facts, the wording of the contract, and the knowledge and experience of the actual insured.

The actual knowledge of the insured or his agent is looked at in determining the clarity of disadvantageous terms, based on s 17(5) of IA. By s 17(4), two elements will be taken into account to determine meeting the requirement of s 17(2) being the characteristics of the insured persons and the circumstances of the transactions. This would be easily accessible in the case of an individual trader, micro-businesses, and small businesses where a few number of employees are involved. However, the characteristics of insureds in large businesses would be complicated. Consequently, s 17 seems to need a specific authoritative interpretation to clarify to what extent the transparency is required as it is uncertain.

By comparison under Saudi jurisdiction, unlike the UK approach, Saudi approach does not recognise contracting out of the provisions of any law or regulations. Further, Saudi law does not consider facts that are provided by insureds as basis of the contract. Thus, there is no mirror on this point in Saudi jurisdiction. This is an advantage to Saudi jurisdiction for two reasons. First, based on ICPP, all Saudi insurance market is considered as consumers. Thus, it is not recommended to have provisions of contracting out or basis of contract clauses in consumer insurance. This is like the recent UK position based on IA which has not allowed to the contracting out provisions of CIDRA in the case of consumer insurance and basis of contract clauses are abolished. Second, the Saudi insurance experience is still not able to include similar provisions for business insurance customers unless they are

[734] John Birds, Ben Lynch, & Simon Milnes, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [20-060].
[735] Ibid.

individual traders, micro-businesses, as small businesses are protected similar to consumers as the experience is still modest.

6.10. Conclusion

This chapter considers the insured's pre-contractual duties for business insurance in the UK in comparison to Saudi jurisdiction which applies similar duties to the UK, although ICPP considers the whole market as consumers. Three major questions are answered in order to achieve the objectives of this study. First, this chapter analyses and criticises similarities and differences between consumer and business insurance in the UK. Second, it analyses the position of the duty of disclosure, misrepresentation, and the duty of fair presentation in business insurance in the UK and Saudi Arabia. It also criticises and analyses the duty of disclosure and the position of the common law interpretation of the old law for the new regime in the UK. Thirdly, this chapter recognises the Saudi needs to differentiate between consumer and business insurance by learning from the UK experience.

Since IA, there have been significant changes in the insurance law in the UK. The duty of fair presentation provides comprehensive provisions including various types of proper remedies. Termination provisions are recommended for business insurance similar to consumer insurance in order to provide proper protection for individual traders, small, and micro-businesses. Significantly, proving the breach of the duty of fair presentation is covered by IA by imposing provisions in respect of materiality, prudent insurer test, and the requirement of inducement. Similarities between the old law and IA can easily be recognised. Further, similarities to Saudi jurisdiction regarding materiality and the requirement of inducement are found. However, this chapter finds that some areas of IA are still uncertain as they need further interpretation by the courts.

Two criticisms of Saudi regulations were considered. Firstly, the duty of disclosure is based on several regulations in Saudi jurisdiction, which may lead to difficulties for consumers in figuring out all related provisions about pre-contractual duties. This study suggests that it is preferable for the insured's pre-contractual duties to be fully covered in one comprehensive regulation rather than several regulations. Second, detailed provisions regarding the insured's pre-contractual duties are often missed, such as provisions in respect of the insured's knowledge and that of the

insurers, waiver, remedies, renewals, and variations, which require further consideration by the regulator. This need is urgent especially in respect of the legal remedies as ICPP does not provide any remedy in case of breach of consumers' duties. This is because consumers' needs will be met by clear and specific legislation. Remarkably, some legal remedies, including the application of the theory of turned and deprecation, are well-considered by Islamic contracts law. As a result, a strong recommendation is made to support the existence of these theories by Saudi regulations.

This study recommends to learn from the UK experience in respect of three significant matters. First, it is recommended for Saudi jurisdiction to differ between consumer insurance and business insurance. Second, it is recommended to differ between legal remedies in case of deliberate or reckless breach or non-deliberate or reckless breach of the insured's pre-contractual duties. Finally, it is important to highlight that the provision of termination in the case of breach of the insured's pre-contractual duties whether for consumers or businesses is recommended to be recognised by Saudi regulations. This is because these provisions give the insured and the insurer a choice to either proceed with an insurance policy after changing terms or premium or to terminate the policy without any impact on any previous claims or paid premium.

The next chapter critiques and analyses the insured's post-contractual duties in the UK and Saudi jurisdictions. This chapter compares between the continuing duty of disclosure and misrepresentation in both jurisdictions. Further, this chapter analyses some other examples of the insured's post-contractual duties in the UK and Saudi jurisdictions.

CHAPTER 7

INSUREDS' POST-CONTRACTUAL DUTIES OF UTMOST GOOD FAITH

7.1. Introduction

The insured's post-contractual duties of utmost good faith have not been recognised by the new reform in IA and CIDRA in the UK unlike the insured's pre-contractual duties. Fraudulent claims are considered separately as IA contains specific provisions regarding legal remedies. Therefore, after the IA come into force, the doctrine of utmost good faith became unspecified and uncertain. This chapter shall clarify the position of the doctrine of utmost good faith by proposing the imposition of specific duties, specifically, in respect of the insured's post-contractual duties.

On the other hand, Saudi jurisdiction recognises the insured's post-contractual duties of utmost good faith especially for fraudulent claims, which are dealt with in terms of the doctrine of utmost good faith. However, the Saudi jurisdiction fails to provide proper remedies.

Accordingly, this comparison adds value for both jurisdictions by providing a critical analysis of the insured's post-contractual duties and fraudulent claims. This analysis examines the UK case law establish an interpretation for the doctrine of utmost good faith in the UK.

In order to achieve the objectives of this study, two main questions will be addressed in this chapter to establish what are the insured's post-contractual duties in both the UK and Saudi jurisdictions? And what are the major criticisms of these duties?

To answer these questions, this chapter is in five sections looking at the rationale behind the insured's post-contractual duties, the insured's duty to provide required documents, the insured's duty to use the subject of the insurance contract in good

faith, the insured's duties during the progress and settlement of claims, and the insured's duty to not make fraudulent claim.

7.2. The Rationale of the Insured's Post-Contractual Duties

The insureds' post-contractual duties arise after the conclusion of the contract. Noticeably, the insureds' post-contractual duties were regularly recognised by the common law in respect of fraudulent claims.[736] However, fraudulent claims are now dealt with independently of the doctrine of utmost good faith, based on s 12 of IA.

IA does not specifically cover the insured's post-contractual duties. Nevertheless, the Law Commissions discussed the possibility of there being insureds' post-contractual duties not related to fraudulent claims based on the interpretation of the doctrine of utmost good faith.[737] The doctrine of utmost good faith is still relevant after IA as it becomes an interpretative principle. Thus, the common law is still applicable. There are some significant authorities that discussed the insured's post-contractual duties such as *the Litsion Pride*[738], *the Star Sea*[739], and *the Mercandian Continent*[740].

In the *Star Sea*[741], the insurers alleged that the insured had breached the continuing duty of utmost good faith by a failure of disclosure during the court proceedings. This allegation was rejected by the House of Lords because failure to disclose during the proceeding is a matter for the court not the insurer, which was narrower definition than post-contractual duties especially where the remedy served only the insurer not the insured. As a result, it was recognised that there was a limit on the requirement according to the duration of the duty. However, there was a disagreement about the basis of post-contractual duties and their scope as to which actions should be considered as breach, since Lord Clyde and Lord Hobhouse found this duty 'not an absolute'[742] and 'elusive'[743], respectively.

In *The Litsion Pride*[744], the claim was made by the mortgagees to recover the cost

[736] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-015].
[737] The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) para 6.1.
[738] [1985] 1 Lloyd's Rep 437.
[739] [2003] 1 AC 469
[740] [2001] Lloyd's Rep IR 802.
[741] [2003] 1 AC 469, [82].
[742] Ibid [7].
[743] Ibid [54].
[744] [1985] 1 Lloyd's Rep 437.

of a vessel which had been destroyed, but this claim was rejected by the insurer due to non-disclosure about material circumstances and this failure to disclose was seen as fraud. This is because the insured failed to notify the insurer about entering into an 'additional premium area', which was considered as breach of the continuing duty of utmost good faith. The Court found that the scope of the duty of utmost good faith extends to the post-contractual stage. The basis of this duty relies on it being an implied term to disclose material facts and to not misrepresent based on the wording of s 17 of MIA. However, the scope of the post-contractual duty of utmost good faith was overruled by the *Star Sea*[745]. Further, *The Litsion Pride*[746] is still a good law in regard the agency aspect.

However, post-contractual duties as an implied term was considered in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[747]. It was criticised the use of the remedy of avoidance *ab initio,* upon the breach.

In the *Mercandian Continent*[748], the court agreed on the existence of the post-contractual duties of utmost good faith with limitations.[749] Firstly, post-contractual duties did not include fraudulent claims because they were based on the application of the rule of law. This leads to say that if there is no fraudulent intent, the insured owes post-contractual duties of utmost good faith.

Secondly, any breach at the renewal stage of an insurance policy should be considered as breach of the insured's pre-contractual duties rather than a post-contractual breach[750], because the renewal of a contract should be considered as a new contract. Thus, avoidance as a consequence of a breach can apply to a renewed contract only is not applicable for post-contractual issues.

Thirdly, insurers should exercise their rights to seek defence or to settle a claim such as in the case of a subrogation, in good faith by considering the insured's interest. However, this recognises the insurer's post-contractual duties rather than those of the insured.

[745] [2003] 1 AC 469, per Lord Hobhouse at [71].
[746] [1985] 1 Lloyd's Rep 437.
[747] [1994] 3 All ER 581. See also Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-016].
[748] Ibid.
[749] Ibid [22].
[750] Ibid 571.

Fourthly, where an insured seeks a 'held covered' clause. This clause is used in marine insurance policies to notify the insurer about variations in condition in order to continue the cover for an additional agreed premium. In this case, the insured has to make the notification to the insurer. According to the *Star Sea*[751], this situation should be considered as a variation.[752] As a result of this conclusion, the remedy was permitted but avoidance was only of the variation. Longmore LJ clearly reached this conclusion by saying that 'although it is settled that good faith must be observed, it is never suggested that lack of good faith in relation to a matter held covered by the policy avoids the whole contract of insurance'[753].

Fifthly, post-contractual duties should be limited to express or implied terms in order to disclose specific information or facts that should be agreed on by the parties. In the *Mercandian Continent*[754], the Court of Appeal did not find avoidance appropriate in the case of breach.[755] For instance, where the parties agreed on contractual terms that require the insured to disclose specific information to obtain the insurer's consent. For example, in *Australian Associated Motor Insurers Ltd v Ellis*[756], where the policy included a term that required the insured to disclose the need for a modification to obtain the insurer's consent before the modification was made.

The Law Commissions compared civil law jurisdictions based on the Principles of European Insurance Contract Law (PEICL) to the UK jurisdiction in order to illustrate the insured's post-contractual duties.[757] The Law Commissions found that PECIL is a 'helpful way of a regulating the insurance bargain'[758]. Moreover, the Law Commissions found that the insured has a duty to notify the insurer about aggravation of risk. Thus, if the insured failed to notify the insurer, the insurer may refuse to pay the related loss or a proportionate part the claim. Furthermore, in case of the reduction of the risk, the insured has a right to a relevant proportion of the premium to be reduced/ returned, and if the insurer refuses this reduction, the insured has a right to terminate the policy within two months. The Law

[751] [2003] 1 AC 469.
[752] Ibid 370.
[753] [2001] Lloyd's Rep IR 802, 571.
[754] Ibid.
[755] Ibid 571.
[756] (1990) 54 SASR 61, 10 MVR 143, 6 ANZ Insurance Cases 60-957.
[757] The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) para 6.15 – 6.17.
[758] Ibid para 6.43.

Commissions found the European position was based on the duration of the policy.[759] While, in civil law jurisdictions, the policies may extend to more than a year; the UK approach tends to be for annual policies which may renew giving rise to pre-contractual duties at the renewal stage. However, the insured is required to disclose to the insurer any circumstances that may increase the risk during the performance of the contract.[760]

Significantly, after the abolishment of avoidance as a remedy upon breach s 17 of MIA breach of the insureds' post-contractual duties is left with no remedies. This is an advantage of this reform because avoidance was a barrier to impose further obligations due to its harsh impact. Thus, the courts can be more flexible and can impose specific implied terms based on specific circumstances and find appropriate remedies instead of avoidance by expanding the interpretation of the doctrine of utmost good faith as an interpretative principle. Furthermore, the position of PEICL may be accepted by the courts by recognising the doctrine of proportionality and termination. Damages may be recognised as a consequence of breach contractual terms.

By comparison, according to Saudi law and regulations, the insured owes post-contractual duties of utmost good faith. The significance of post-contractual duties is that circumstances and facts may change; accordingly, these changes may impact on the probability of the occurrence of the covered risks.[761]

Article 5 of ICPP specifies the insured's post-contractual duties. In terms of article 5.6 of ICPP, insureds must use the insurance service or product in accordance with certain terms and conditions; avoid risks (article 5(7) of ICPP); and update their information such as either material facts or personal and communication information, address and phone numbers, and if there is failure to disclose this information, consumers may lose their insurance contract rights to claim and hold the insurers liable (article 5(11) of ICPP).

In decision no 14/J/1433H (2012) in Jeddah, CRIDV held that the insured must act

[759] Ibid para 6.18.
[760] See, for example, *Hussain v Brown,* (1996) unreported, as it cited in The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) para 6.22; *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep 154; and *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437.
[761] Ghazy Abu Orabi, *Ahkam Aqd Altameen: Dirasa Moqarana* (Dar Wael 2011) 297.

in good faith by disclosing relevant information and material facts and abstaining from any act that may increase or cause the risk to occur. Moreover, in decision no 09/R/1429H (2008) in Riyadh, where a cargo insurance policy was issued, the insured failed to update the information about the cargo's route. While the route was from Brazil to Saudi Arabia via a direct flight, the actual route was described as being from Brazil to United Arab of Emirates via a direct flight, and from United Arab of Emirates to Saudi Arabia via truck, which was destroyed by an accident and the entire goods were damaged. CRIDV held that the insured was in breach of the post-contractual duty to disclose this material fact by intentionally not providing a proper update to the insurer. Accordingly, CRIDV rejected the insured's claim. This CRIDV decision is similar to the decision in *The Litsion Pride*[762] with regard of notifying the insurer about material circumstances.

Article 8(2) of UCMIP states that the insured has a period of 10 days to disclose any changes in material facts that have been disclosed in the insurance proposal. This Article gives the right to the insurer to withhold insurance cover for 3 working days. Based on article 6, the insurer has to pay the third party, who acts in good faith; then, the insurer has the right to recover any paid indemnity from the insured. Situations where this can be used include using the vehicle in contravention of restrictions under article 6(1)(a), carrying passengers beyond the capacity of the vehicle (article 6(1)(b)), using the vehicle for the public where it is not allowed (article 6(1)(c)), deliberately causing an accident (article 6(3)), failure to notify the insurer in writing within 10 working days about any material changes to the facts previously disclosed in the proposal (article 6(4)), leaving the scene of a car accident (article 6(5)), withholding admission of liability for the accident unjustifiably to harm the insurer (article 6(6)), traffic violation, (article 6(7)). Therefore, it is clear that this regulation recognises the insured's post-contractual duties to act in good faith. However, this is limited to compulsory motor insurance policies.

CRIDV gave several decisions on the application of UCMIP. Moreover, CRIDV appreciated the position of the third party who acted in good faith. In a decision no 13/J/1429H (2008) in Jeddah, the Committee held the insurer must pay the indemnity to the third party who acted in good faith as the third party was not

[762] [1985] 1 Lloyd's Rep 437.

responsible for the insured's breach of the post-contractual duty by delaying the notification of the accident for 21 months. Moreover, the Committee gave the right to the insurer to recover the paid indemnity from the insured as long as the insurer could prove the insured's breach.[763] A similar decision accepted the third party's right to be paid as result of the insured's breach of his post-contractual duty by driving in the opposite directions.[764] However, in decision no 90/D/1435H (2014) in Dammam, where the claim was made by the insured himself, the Committee rejected his claim to be indemnified as he was in breach of the post-contractual duty to disclose any material facts to the insurer and had breach article 6(4) of UCMIP. In addition, based on a decision no 34/J/1429 (2008) which was affirmed by the Appeal decision no 115/a/1435H (2014) in Jeddah, when the insured had made traffic violations in good faith or under force majeure, the Committee held that no breach had occurred and the insurer must indemnify the third party.

Accordingly, both the UK and Saudi jurisdictions accept there are insured's post-contractual duties. Similarities in both jurisdictions can be found where the insured fails to disclose material circumstances to the insurer. Saudi jurisdiction gave the right to the insurer to not pay the insured's claim and to recover any payment from the insured; whereas the UK reform in IA failed to specify both the nature of the insured's post-contractual duties and related remedies. Although it is open to the courts to set proper remedies upon breach the post-contractual duties; this uncertainty creates a significant disadvantage especially for consumer insurance where consumers have limited knowledge about their duties. The law should be clear and specific for both contracting parties, and this study suggested that the law makers should consider insureds' post-contractual duties for both business and consumer insurance in the same clear and particular way as the insureds' pre-

[763] Similar to a decision no 55/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 72/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 32/J/1430H (2009) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 22/D/1435H (2014) which was affirmed by the Appeal decision no 257/a/1436 (2015) of the Committees for Resolution Insurance Disputes and Violations in Dammam; decision no 34/D/1435H (2014) which was affirmed by the Appeal decision no 449/a/1436 (2015) of the Committees for Resolution Insurance Disputes and Violations in Dammam; and decision no 05/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

[764] Decision no 34/J/1429H (2008) which was affirmed by the Appeal decision no 115/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Jeddah. Similar to a decision no 113/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah; decision no 42/J/1429H (2008) of the Committees for Resolution Insurance Disputes and Violations in Jeddah.

contractual duties by not only considering the duties and remedies upon breach but also to specify the nature of these duties whether applying these duties on the basis of implied terms or an independent duties than the doctrine of utmost good faith. As a result, this would limit the uncertainty, and the law would become more specific, accessible, and predictable.

Accordingly, it is important to find out and analyse examples of the insureds' post-contractual duties from other common law jurisdictions such as Australia in order to contribute to the discussion of the interpretation of the doctrine of utmost good faith after the amendment to s 17 of MIA, and by comparing the findings with the Saudi jurisdiction. The next section comparatively analyses the insured's duty to provide required documents. The critical analysis examines the application of this duty after the enforcement of IA.

7.3. The Insured's Duty to Provide Required Documents

In *Goshawk Dedicated Ltd v Tyser & Co Ltd*[765], the insurance contract included an implied term which required the insured to provide certain documents to the insurers during the performance of the contract. The conclusion of the Court of Appeal is significant because it highlights that the purpose of this continuing duty is to make fair presentation which is consistent with the recent regime in the UK. The Court of Appeal supported this conclusion by considering the House of Lords' decisions in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*[766], as following[767]:

> An example of such an implication, made for the purposes of business efficacy but informed by the insurance context of good faith, can be found in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*… where Hobhouse J accepted an implied term which extended to the obligation to keep proper accounting records and to make them reasonably available to reinsurers as being something which 'would probably be imported anyway by the duty of good faith' (at 614).

However, the question is whether the court could now imply the term, even though the legislation now does not recognise it under s 17 of MIA as amended, in accordance with the idea being promoted here that the doctrine of utmost good faith itself now may impose implied terms.

[765] [2007] Lloyd's Rep IR 224.
[766] [1985] 2 Ll Rep 599, 613 - 614.
[767] [2007] Lloyd's Rep IR 224, [49], [53].

While Saudi regulations do not recognise this duty, CRIDV had recgonised it. In a decision no 93/J/1429H (2008) in Jeddah, the insured acted in bad faith by not complying with the policy terms, failing to provide required documents to the insurer. In this case, the insurer had issued a car transport insurance policy. The policy required the insured to provide licenses and all documents of the cars in case of total loss, as the insurer had the right to retain those cars. An accident occurred to the car-transporter transferring these cars, and all cars were destroyed. Accordingly, the insurer paid the indemnity to the insured, and claimed the car licenses and documents; however, the insured deliberately did not comply with the insurance policy's terms. The Committee held that the insured's act reflected bad faith as the insured received the indemnity and delayed to provide the documents without good reason to harm the insurer. Thus, the insured was obliged to return the full indemnity that had been paid and to pay damages including vehicles repair expenses that were paid by the insurer, as well as vehicle storage cost. Similarly, in a decision no 246/D/1436H (2015) which was affirmed by the Appeal decision no 48/a/1437 (2016) in Dammam, the Committee found that the insured's withholding of required documents was the reason to reject the claim as the insured had breach the post-contractual duty to provide required documents to the insurer in a maximum of 90 days as required by the policy.[768]

Accordingly, both Saudi and the UK laws and regulations have not recognised the insured's duty to provide required documents to the insurer. However, case law and CRIDV have considered this duty as a post-contractual duty. From the UK side, this duty needs to be developed to be in line with the idea of the doctrine of utmost good faith as an interpretative principle which may imply terms into insurance contracts. If the common law considers the breach of this duty as a breach of an implied term, further remedies can be sought including damages based on breach of the contract. On the other hand, this study recommends further developments in Saudi regulations to recognise this duty expressly and to specify remedies in case of breach.

The next section comparatively analyses the insured's duty to use the subject of insurance contract in good faith. The critical analysis shall examine the application

[768] Similar to a decision no 60/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam.

of this example after the commencement of IA.

7.4. The Insured's Duty to Use the Subject of Insurance Contract in Good Faith

The insured owes a duty to use the subject of the insurance contract in good faith. An unexpected or unusual use should be considered as breach of the post-contractual duties associated with utmost good faith. However this specific duty is not covered by IA.

To illustrate this point, an example is provided from Australia. In *Pegela Pty Ltd v National Mutual Life Association of Australasia Ltd*[769], the Supreme Court of Victoria had lengthy deliberations to consider that the insured's use of a life insurance policy as a means of risk-free arbitrage had breach the insured's continuing duty of utmost good faith based on s 13 of ICA.[770]

Similarly, in Saudi Arabia, there is no specific provision in respect of this duty. However, in a decision no 94/D/1429H (2008) in Dammam, where use of an insured vehicle for commercial uses was examined as a possible breach of the insured's post-contractual duty to use the subject of the insurance contract in good faith. Furthermore, the insurer failed to prove the insured's breach as the Official Traffic Report and hospital report found there had been no passengers except for the driver, the insured, which supported the insured's defence that the vehicle had not been used for commercial uses. The Committee rejected the insurer's claim based on the lack of evidence.

Consequently, this area needs further developments by the UK and Saudi jurisdictions. From the UK side, again, this duty should be developed further in line with the current position of the doctrine of utmost good faith as an interpretative principle which may imply terms into insurance contracts. Thus, it is suggested that this duty and its related remedies should be considered specifically and with no doubts especially for consumer insurance due to lack of knowledge, experience, and the level of awareness. On the Saudi side, further developments are recommended to recognise this duty expressly by Saudi regulations and to determine the remedies in case of breach. Again, this consideration would raise

[769] [2006] VSC 507 (13 April 2006)
[770] Ibid [859] – [896].

predictability, accessibility and limited the uncertainty in regard the interpretation of the doctrine of utmost good faith.

The next section comparatively analyses the insured's duty during the progress and settlement of claims. The critical analysis shall examine the application of this after the commencement of IA.

7.5. The Insured's Duties during the Progress and Settlement of Claims

The insured's duties during the progress and settlement of claims are not contained in the UK legislation but have been developed through case law. Two main points arise. Firstly, although the common cause of an exaggerated claim is usually fraudulent, it can sometimes be made with no fraudulent intent. In that situation, the doctrine of utmost good faith plays a significant role.[771] For example, in *Ewer v National Employers' Mutual General Insurance Association Ltd*[772], MacKinnon J illustrated this as he stated that 'I do not think he was doing that as in any way a fraudulent claim, but as a possible figure to start off with, as a bargaining figure'[773]. In this scenario, the insurer may allege that the insured has acted in bad faith, however, the burden of proof of the fraud is on the insurer. Significantly, in *Danepoint Ltd. v Allied Underwriting Insurance Ltd*[774], it was found that the exaggeration itself should not be counted as fraud except if the exaggeration was combined with misrepresentation or concealment.[775] This is especially where the determination of loss is not clear or 'a matter of opinion'; however, where the value 'is or should be clear-cut' and the information is accessed by the insured, exaggeration is not easy to be excused and may be more likely to be fraudulent. [776] This was illustrated further in *Danepoint*[777] to distinguish between exaggeration as a fraudulent claim and when it is not based on the value of the claim, as following[778]:

> In some the exaggeration of the claim was not regarded as fraudulent: see, for example… Thomas J. (as he then was) in *Nsubuga v. Commercial Union* [1998] 2 Lloyd's Rep. 682 at 686, referred to the "commercial reality that people will often put forward a claim that is more than they believe that they will recover". The

[771] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-028].
[772] [1937] 2 All ER 193.
[773] Ibid 203.
[774] [2005] EWHC 2318 (TCC).
[775] Ibid [56].
[776] Ibid [56].
[777] Ibid.
[778] Ibid [54], [56].

> judge…made the point that it "would not generally in those circumstances be right to conclude readily that someone had behaved fraudulently merely because he put forward an amount greater than that which he reasonably believed he would recover".

Secondly, the insured should act in good faith through settlement of a claim. This allows the insurers' to settle a claim with a third party, does not to waive the insurer's right of subrogation, and the insured must not seek a settlement with a third party without the insurers' consent[779]. These situations would be considered breach of the insured's post-contractual duties. Further, what remedies are available for the insured's breach of the continuing duty of utmost good faith are uncertain, but damages can be strongly suggested especially where the insurer suffers loss. Again then, appropriate remedies are still open to question and to the courts to specify based on the surrounding circumstances of breach.

Similarly, under Saudi jurisdiction, there is no specific provision about the insured's post-contractual duty during the progress and settlement of claims except in respect of fraudulent claims. However, CRIDV does recognise this type of insured's duty. For example, in a decision no 81/R/1435H (2014) which was affirmed by the Appeal decision no 181/a/1435H (2014) in Riyadh, where the insurer rejected to pay indemnity for the insured who held a medical professional liability insurance for medical malpractice. This was because a claim had been made against the insured in respect of medical malpractice by his patient. The insured did not notify the insurer immediately about this claim as the insurance policy required. Furthermore, the insurer had the right to represent the insured in case any claims were made against him. The insurer rejected to pay the indemnity which led to imprisonment of the insured. Nevertheless, the Committee rejected the insurer's claim to not pay the indemnity because the insurance policy did not include a time limit within which to notify the insurer about any claim against the insured. Surprisingly, the Committee considered this requirement as an arbitrary term because the insured had attended all court sessions which reflected his interest in not accepting the decision that was made against him. As a result, the Committee held that the reason for the insurer requiring this term had been met by the insured, and there had been no increase of the risk to the insurer based on the insured's act. Finally, the Committee held that the indemnity had to be paid in full, the term that required the insured to notify was invalid, and damages were awarded as

[779] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-029].

compensation for imprisonment.

There were three criticisms of the CRIDV decision. Firstly, the Committee looked at the fact there was no time limit within which to notify the insurer about any claims against the insured. This failure to indicate the time limit should be considered in the context of other facts including that the insured handled the claim that was made against him and appealed. However, the insured did not notify the insurer during all of these procedures, which supported the insurer's allegation of the insured's breach being deliberate as the insured had known he should have notified the insurer.

Secondly, there may be doubt in respect of the Committee's decision to recognise the term as arbitrary. This is because the term is common in many types of insurance policies to notify the insurer about any material facts that are relevant. Furthermore, the disclosure of these facts is part of the post-contractual duty of utmost good faith, and concealing this information is reflective bad faith act or at least a careless conduct.

Thirdly, the Committee accepted attendance at the trial and the appeal as enough conduct to achieve the purpose of the insurer's right to represent the insured, which seems incorrect. This is because the representation that is made by the insurer is not necessarily the same as the representation that is made by the insured himself, as the insurer has legal consultants and more experience especially where the insured is a consumer.

Accordingly, further developments are recommended for UK and Saudi law as they have not examined the insured's duties during the progress and settlement of claims. From the UK side, this duty requires to be developed further based on the doctrine of utmost good faith as an interpretative principle which may imply terms to the insurance contracts especially after the development of the consumer insurance regime, which requires unambiguous and specific duties. On the Saudi side, it is recommended there should be further developments to recognise this duty expressly by Saudi regulations and to determine the appropriate remedies in case of breach.

The next section comparatively analyses the insured's duty not to make fraudulent claims. The critical analysis shall examine the application of IA by comparing the new legislation with the old law.

7.6. The Duty not to Make Fraudulent Claims

An ABI report found that in 2013 there were over 118,500 fraudulent claims with a total value of £1.3 billion.[780]. In terms of ss 2 – 4 of the *Fraud Act* 2006, fraud is using dishonesty and deceit to either seek benefits to the fraudster or another or put the other party in a disadvantageous position or to seek loss to others. The law in this area had been uncertain about the nature of fraudulent claims. The Law Commissions referred to this area of law as 'convoluted and confused'[781]. It says that 'the law in this area prior to the introduction of the Act (IA) was at best unsettled and at worst confused and incoherent'[782].

There were two main problems depending on the connection between fraudulent claims and the doctrine of utmost good faith. Firstly, the common law held that a fraudulent claim was a breach of the insured's post-contractual duty of utmost good faith. Secondly, the courts emphasised that the fraudster cannot ever benefit. In the *Star Sea*[783], Lord Hobhouse found that 'the fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing'[784]. This also found in the old case *Britton v The Royal Insurance Company*[785], where Willes J stated that 'the law is, that a person who has made such a fraudulent claim could not be permitted to recover at all'[786].

The English and Scottish Law Commissions recommended that fraudulent claims should have separate remedies from the doctrine of utmost good faith to clarify the law in this area as the law was uncertain.[787] The separation of fraudulent claims from the doctrine of utmost good faith in order to have their own specific remedies was an advantage for IA especially after the uncertainty of remedies for breach of

[780] See The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353, Scot Law Com No 238, 2014) para 19.1.
[781] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 19.3.
[782] Simon Rainey & David Walsh, 'Remedies for Fraudulent Claims under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 66.
[783] [2003] 1 AC 469.
[784] Ibid [62].
[785] [1866] 4 F & F 905 176 ER 843.
[786] Ibid 909.
[787] Simon Rainey & David Walsh, 'Remedies for Fraudulent Claims under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 60.

the doctrine of utmost good faith based on the amended s 17 of MIA. However, consideration of the doctrine of utmost good faith may still be relevant as the doctrine of utmost good faith becomes an interpretative principle, which may be relied on in fraudulent claims. This is because s 12 of IA only looks at the remedies in the case of fraudulent claims and does not provide a definition or any specification about the requirements of fraudulent claims. Moreover, s 12 applies to both consumer and business insurance.

S 12 of IA has solved two main problems. First, the nature of fraudulent claims had been questioned whether they were to be dealt with as based on an implied term or the rule of law.[788] Second, the related remedy was based on the breach of the doctrine of utmost good faith which meant that the insurer was entitled to avoid the policy, which was inconsistent with how fraudulent claims were to be treated.

By comparison, under the Saudi jurisdiction, fraud means any illegal act, providing deliberately incorrect information, or deliberate concealment of material facts which induces the other party's decision, and to gain ineligible benefits from the insurance policy during its performance.[789] The Saudi regime relies mainly on AFR to examine the insured's behaviour when the insured makes a claim. However, further situations may be considered as fraudulent claims based on CRIDV and differences between frauds, abuse, and misleading are recognised by IRCHIL.

Fraud is defined as intentional deceit by a contracting party to obtain benefits or privileges that are not permitted to the relevant individual or entity, by article 1(38) of IRCHIL; abuse however is defined as any practices by a contracting party 'which may lead to obtain benefits or privileges that are not eligible to receive without the intent to defraud, deceive, misrepresent or distort facts for the purpose of obtaining such benefits and privileges', based on article 1(39) of IRCHIL. Misleading is defined as any behaviour, which is not covered by the definition of fraud of an individual or entity, by article 1(40) of IRCHIL. Accordingly, both abuse and misleading behaviours will be breach without the intent to fraud. The essential difference between these definitions is the recognition of the intent; however, this regulation does not provide further details on how to specify this intent.

[788] For further details, *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others* [2003] 1 AC 469.
[789] Bahaa Shukri, *Bohooth fe Altameen* (Dar Althaqafa 2012) 721. See also Ghazy Abu Orabi, *Ahkam Aqd Altameen: Dirasa Moqarana* (Dar Wael 2011) 312.

Accordingly, this will be based on the discretion of Committees to determine whether the action is covered by the fraud, abuse, or misleading definitions based on the surrounding facts and circumstances.

7.6.1. Deterring Fraud

7.6.1.1. Deterring Fraud in the UK

Fraudulent claims are not defined by IA; it only addresses related remedies. The gap is left to be filled by the courts in order to specify when a claim should be identified as a fraudulent claim.[790] Accordingly, this uncertainty is a disadvantage of IA because the requirements of breach of the duty to not claim fraudulently are ambiguous. However, fraudulent claims can be 'where a claim is for a loss known to be non-existent or exaggerated[791], the part of the claim which is non-existent or exaggerated should not itself be immaterial or insubstantial'[792]. As a result of this definition, there are several types of fraudulent claims. However, fraudulent devices or collateral lies was questioned, and, recently, fraudulent devices were deemed not part of the fraudulent claims rule.

'Fraudulent devices' is defined as where 'a genuine claim is supported by fraudulent evidence which conceals the fact that the insurer has a defence to the claim or otherwise improves the insured's prospects of obtaining recovery'.[793] This is for instance includes production of a false invoice, receipt, or a witness statement. Significant issues developed where the law encouraged insurers either to increase the levels of evidence required in order to reject the insureds' claim or to define the fraud by a way that was not reflected in the law.[794] Moreover, the ability to distinguish between the entire fraudulent claim and the fraudulent devices was called into question.[795]

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[790] Simon Rainey & David Walsh, 'Remedies for Fraudulent Claims under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 75.
[791] For example, *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209, [21].
[792] Robert Merkin & Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1022.
[793] Philip Rawling & John Lowry, 'Insurance Fraud: The "Convoluted and Confused" State of the Law' [2016] Law Q Rev 132, 96.
[794] Ibid 116.
[795] Ibid.

As a result of these criticisms, the position of fraudulent devices was changed by *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*[796]. According to *Versloot*, fraudulent devices would not be considered under the rule on fraudulent claims. The Supreme Court overruled significant previous authorities in this area of law[797], such as *the Litsion Pride*[798], where collateral lies were deemed irrelevant to the claim, and the lie was seen as an attempt to not pay an additional premium and was not related to the claim at all, as follows[799]:

> The treatment of *The Litsion Pride* by Lord Hobhouse in *The Star Sea* is, to my mind, more consistent with the exclusion of collateral lies from the fraudulent claims rule than with their inclusion… With hindsight**, it may be that the better analysis of *The Litsion Pride* is that the lie told was not part of the presentation of the claim at all, but rather part of a dishonest antecedent attempt to avoid liability to pay the additional premium for taking the ship into a war zone**. Likewise the present point was far from arising in *The Mercandian Continent*, where the lie was in no sense part of the presentation of the claim, indeed was not even directed to the insurers, but rather amounted to a misplaced attempt to serve their interests. (Bold added).

Significantly, in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*[800], the Supreme Court did not apply the fraudulent claims rule to a claim that was supported by collateral lies because these lies did not materially influence the insurer's decision whether to pay the claim, and the use of fraudulent devices could not be treated as a fraudulent claim.[801] This was because the insurer is liable to indemnify a genuine claim; even although it may be supported by collateral lies.[802] However, the insured cannot gain a benefit according to lies but can only recover for a genuine claim.[803] The law in *Versloot*[804] remains after IA, although it is said that 'the Supreme Court judgment in *Versloot*… has complicated the application of this remedy'[805].

On the other hand, Lord Mance found that the fraudulent claims rule included the use of fraudulent devices based on the doctrine of utmost good faith.[806] The major point here was to discuss the basis of the lies which was a breach of the doctrine of

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[796] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543.
[797] Peter MacDonald Eggers & Simon Picken, *Good Faith and Insurance Contracts* (4th edn, Informa Law from Routledge 2017) [11.65] – [11.66].
[798] [1985] 1 Lloyd's Rep. 437.
[799] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543, [74-75].
[800] Ibid.
[801] Ibid [105] per Lord Toulson.
[802] Ibid [26]
[803] Ibid.
[804] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543.
[805] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) 139.
[806] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543, [119].

utmost good faith; even though they did not result in a specific loss. The view of Lord Mance is significant and consistent with the interpretation of 'utmost' good faith.[807]

Similarly, for example, in the New Zealand case, *Stemson v AMP General Insurance* (NZ) *Ltd*[808], the Court of Appeal of New Zealand held that the remedy for a fraudulent claim was the same remedy used for use of a fraudulent device, and rejected the insured's claim which had been based on fraudulent device.[809] The question should be asked what the impact of 'utmost' is if it is not interpreted as the greatest and highest level of good faith. With respect to the Lordships, they did not follow this interpretation.

To conclude, as a result of *Versloot*[810], the Supreme Court found that there was a distinction between fraudulent claims and fraudulent devices as a consequence of the absence of a definition of fraudulent claims by IA. Therefore, the insurer cannot rely on the rule for fraudulent claims in respect of the insured's collateral lies except where the contract expressly recognises the insurer's right to forfeit the contract upon the insured's use of fraudulent devices or collateral lies.[811] These terms are common in fire insurance policies; however, after the position of the common law in *Versloot*[812], these terms would be common in other insurance policies such as

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[807] Ibid [119]. For further discussion about the basis of fraudulent claim and the role of the doctrine of utmost good faith, as following:

> A conceptual point which remained unsettled was however the relationship between any such principle and the rule enshrined in section 17 of the Marine Insurance Act 1906… In *Black King Shipping Corpn v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437 Hirst J held, in the context of a fraudulent device (a dishonest backdating of a notice of entry into the Gulf, unnecessary and irrelevant to the claim in law, but believed by owners to be relevant at the time they made it), that section 17 applied to enable avoidance ab initio, while operating at the same time, in Hirst J's view, to give underwriters an alternative option simply to rely on the fraud as a defence to the particular claim. This theory did not survive academic criticism or subsequent authority: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The "Star Sea")* [2003] 1 AC 469, paras 61–62 and 71, per Lord Hobhouse, where the fraudulent claims principle is put as the consequence of a rule of law—albeit, one may add, a rule of law no doubt deriving from the foundation of good faith on which insurance rests (see para 114 above), but tailored to the post-contractual position. See also the view expressed in Agapitos v Agnew, para 45(d), and the later decision in *Axa General Insurance Co Ltd v Gottlieb* [2005] 1 All ER (Comm) 445, para 31 (identifying the fraudulent claims rule as "a special common law rule").

[808] [2006] NZPC 3, [2006] UKPC 30, [2007] 1 NZLR 289.

[809] Ibid [35] – [36].

[810] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543.

[811] Baris Soyer, 'Case Comment: Versloot Dredging BV & Anor v HDI Gerling Industrie Versicherung AG & Ors [2016] UKSC 45' (UKSC Blog 15 Aug 2016) <http://ukscblog.com/case-comment-versloot-dredging-bv-anor-v-hdi-gerling-industrie-versicherung-ag-ors-2016-uksc-45/> accessed 1st May 2018.

[812] [2006] NZPC 3, [2006] UKPC 30, [2007] 1 NZLR 289.

marine insurance policies.[813] Furthermore, the question may arise after the separation of fraudulent claims from the doctrine of utmost good faith, on the one hand, and the distinction between fraudulent claims and fraudulent devices, on the other hand, whether to consider fraudulent devices as breach of the insured's post-contractual duties. This is especially because the doctrine of utmost good faith is not defined, although it was considered in *Versloot*[814] that 'the case enunciates any wider obligations of post-contract good faith in relation to merely culpable non-disclosure or misrepresentation, it has been finally and authoritatively disapproved in *The Star Sea*'[815]. However, as the doctrine of utmost good faith becomes an interpretative principles, it may open up further judicial discussion on the interpretation of the amended s 17 of MIA.

7.6.1.2. Deterring Fraud in Saudi Arabia

As shown above, fraud is recognised in Saudi jurisdiction mainly in a separate regulation, AFR. AFR distinguishes between fraud in business insurance and non-business insurance unlike the rest of Saudi law and regulations. This is an advantage and a significant conduct by Saudi regulation as it is the only recognition of the importance to differentiate between business and consumer insurance. Moreover, it would give a significant sign and support to differentiate further between business and consumer insurance for other duties and remedies regarding the doctrine of utmost good faith. Further, there are other indicators of fraud based on the party who carried out fraud and whether it took place prior to conclusion of the policy or at the claim stage, based on article 45 of AFR. Article 45(b) of AFR provides examples of basic situations of fraud during the performance of the contract that are submitting claims for false loss, misrepresenting facts to have the claim covered by the policy, and exaggerating the value of the loss. Moreover, fraud against the insurer will occur by 'committing fraud in the purchase or execution of an insurance product to obtain an illegitimate coverage or payment', based on article 7(c) of AFR. However, this regulation is not limited to fraud committed by the insured but

[813] Baris Soyer, 'Case Comment: Versloot Dredging BV & Anor v HDI Gerling Industrie Versicherung AG & Ors [2016] UKSC 45' (UKSC Blog 15 Aug 2016) <http://ukscblog.com/case-comment-versloot-dredging-bv-anor-v-hdi-gerling-industrie-versicherung-ag-ors-2016-uksc-45/> accessed 1st May 2018.
[814] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543.
[815] Ibid [121].

extends to any third-party who may act in favour of the insured, based on article 45 of AFR.

For non-business insureds, indicators of fraud are divided into three principal categories including, for example, general conduct, payment, and coverage, which are the common fraud situations. There are significant similarities between the indicators for non-business and business insured frauds. Significantly, regarding the insured's general conduct, the regulation provides indicators of frauds including not only hiding facts about the insurance policy or providing incorrect or inaccurate answers and information about the loss to insurers or a third party or an authority, such as experts and police, which is similar to business insurance; but also abstaining from preventing or limiting the loss.[816] Other indicators under this regulation are in regard to the cover and payment. For instance, where the insured requests changing terms and conditions frequently or prior to a loss, again similar to business insurance; requests the cover be paid to different accounts or to a third party; tries to settle the claim quickly by accepting a lower indemnity; has a problematic financial situation; claims immediately once the policy is valid; provides incomplete, inaccurate documents; provides inconsistent dates with dates in other documents or reports such as police or a hospital reports; and fail to provide original documents.

For non-business motor insurance policies, article 8(7) of UCMIP covers three types of fraud that are, first, the pre-existence of fraudulent claims by the insured; second, use of fraudulent methods by insureds, agents, or others, such as a driver, to get the benefits of the insurance cover; third, where the loss is a result of a deliberate act. The advantage of this provision is that it includes any fraudulent act by any individual or party connected to the insured. This significantly protects the insurer from actions of the insured anyone else not party to the contract.

AFR deals with other signs of fraud in business insurance. Indicators for specific insurance policies such as fire, cargo, and motor insurance policies are considered separately. For example, in cargo insurance policies, inconsistencies between the actual weight, goods' prices, or the kind of goods and the provided information are considered as fraud. For fire insurance policies, indicators focus on the source of

[816] Table 3: Typical Policyholder Fraud Indicator of AFR.

the fire and related circumstances. For instance, when the loss occurs only in a single building that is covered by the policy whereas other buildings are not covered by insurance; the cause of fire is unknown or unexpected; fire alarms have not detected the fire or were switched off. For general motor insurance policies, indicators are including, for example, finding a relationship between the insured and other involved parties in an accident; increasing the amount of the actual loss; and delaying to contact authorities such as police after the accident.

Accordingly, the significance of this regulation is due to the important role that it plays in deterring fraud and protecting the insurer from the most common frauds. Indicators to deter fraud are comprehensive, and they are supposed to help insurers monitor insurance activities. On the one hand, these indicators are significant legal presumptions for insurers when seeking evidence of the insured's fraud because the burden of proof is on the insurer. On the other hand, CRIDV can enforce these indicators to deter fraud.

On comparing Saudi and the UK laws and regulations on deterring fraud, it seems that Saudi jurisdiction provides detailed provisions to deter fraud unlike in the UK. Deterring fraud, based on IA, is uncertain and needs further developments by the judiciary in order to determine the requirements of fraud in light of the recent change in the role of the doctrine of utmost good faith.

7.6.2. Legal Remedies

7.6.2.1.Legal Remedies in the UK

Notably IA, provides particular remedies for fraudulent claims. Specifically, the insurer has the right not to pay out on the fraudulent claim under s 12(1)(a), or can recover any payment that is made in respect of a fraudulent claim (s 12(1)(b)). The insurer give notice to the insured to terminate the contract from the time of the fraudulent act (s 12(1)(b)). This termination will have only a prospective effect. Accordingly, in case of termination, the insurer may reject all claims that are made after the fraudulent claim even if they are genuine claims (s 12(1)(a)), and the insurer is not obliged to return any paid premiums to the insured (s 12(2)(b)). This is more advantageous than termination under the old law which forfeited not only the claim but also any valid claim prior to the fraudulent claim; thus, the insured

was required to return any payments made before the fraudulent claim.[817] Another advantage in respect of termination is that previous, genuine and paid claims are not impacted by the fraudulent claim. In other words, there is no need to return any paid genuine claims to the insurer as long as these genuine claims are made before the fraudulent claim.

Two significant arguments have been made in respect of the termination as IA does not specify when termination should be elected for, and whether the insurer's right is subject to waiver or estoppel. Firstly, IA fails to give a time limit within which the insurer may terminate the policy. According to Kendall and Wright, the 'termination may be made at any time (subject to waiver or estoppel'[818]. However, this perspective does not consider the insurer's post-contractual duty to exercise its rights in compliance with the doctrine of utmost good faith. Accordingly, the insurer is still obliged to exercise the right to terminate the policy in good faith and within a reasonable time; otherwise the insurer's right to terminate may be deemed to be waived, even though the waiver of this right is not recognised by IA. However, taking a reasonable time to elect to terminate should not be considered as waiver of the insurer's right where the insurer delays to communicate with the insured after the fraudulent claim is made.[819]

Second, the gap in the legislation regarding the timing of termination may lead to disputes where there is a genuine claim after the fraudulent claim is made, but the insurer does not elect to terminate at the time of the fraudulent claim.[820] There is a questions then whether the insurer might notify the insured about termination to avoid paying valid claims.[821] To answer this question, it is necessary to interpret the doctrine of utmost good faith as requiring the insurer to exercise its rights under post-contractual duties in good faith. Therefore, if on examination of the circumstances, the insurer delays in notifying the insured about termination to the prejudice of the liability to pay valid claims, this should be considered as breach of

[817] *Axa General Insurance v Gottlieb* [2005] EWCA Civ 112, [2005] Lloyd's Rep IR 369, [26], [32].
[818] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) 138.
[819] Ibid 140.
[820] Simon Rainey & David Walsh, 'Remedies for Fraudulent Claims under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 76.
[821] Ibid.

the insurer's post-contractual duties of utmost good faith. Furthermore, the insurer should pay the valid claim, and the right to terminate should be waived.

It was argued whether damages might be awarded in the case of fraudulent claims especially for the cost of investigation.[822] The Law Commissions discussed this point, and found that it would be difficult to assess the cost of investigation especially where the investigation was conducted by the insurer itself.[823] Based on the old law, damages were not awarded in the case of fraudulent claims as the remedy for breach of the doctrine of utmost good faith was avoidance.[824] However, it was held that damages for deceit might be possible against a fraudster especially for the cost of investigation of a fraudulent claim but this rule of law was not certain.[825] As a result, by abolishing avoidance as a remedy for breach of the doctrine of utmost good faith, and after setting specific remedies for fraudulent claims, damages are now considered in the case of fraudulent claims as a remedy where there has been deceit in respect of the cost to investigate especially as breach of the doctrine of utmost good faith is left without specific remedies. It is now open to the courts to consider a new position recognising damages as a remedy upon breach of the insured's post-contractual duties.

To sum up, the strength of IA due to the separation of fraudulent claims from the doctrine of utmost good faith is because of two reasons. The first reason is because IA has put the nature of this duty on a statutory basis. The second reason is that provides a variety of remedies unlike avoidance previously which was a harsh remedy. This strength is significant as the doctrine of utmost good faith is now left without any remedy for breach in terms of the amended s 17 of MIA. Accordingly, IA provides obvious position in regard to remedies of fraudulent claims.

7.6.2.2.Legal Remedies in Saudi Arabia

There is no similar obvious approach in Saudi Arabia as the UK. Instead, article 10 of Anti-Fraud Regulation sets a general provision where there has been fraud by

[822] Ibid 69.
[823] The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) para 7.40.
[824] David Kendall & Harry Wright, *A Practical Guide to the Insurance Act 2015 (Practical Insurance Guides)* (Informa Law from Routledge 2017) 137.
[825] Simon Rainey & David Walsh, 'Remedies for Fraudulent Claims under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 69.

insureds that non-compliance with this regulation should be considered as a breach of LSCIC and IRLSCIC. Although the regulation considers many indicators of fraud; the remedy does not cover the insurer's interest. In fact, this remedy is improper and uncertain which needs further development. There should then be further urgent reform of available remedies under this regulation to meet the insured's fraudulent claims.

Similarly uncertain is article 123 of IRCHIL which gives the right to the Committees to recommend and set proper remedies. Further, the Committees apply remedies in respect of the insured's bad faith, abuse, or fraud, based on article 87 of IRLSCIC. Again, both provisions are uncertain and lack specification. Further development of legal remedies for fraudulent claims is recommended.

By article 6 of UCMIP, the insurer has the right to recover paid indemnity in respect of the insured's fraudulent claims. Although, the insurer may claim to recover a paid indemnity from the insured or to not pay a third party as a result of bad faith; the policy sets a limit to this provision by binding the insurer to pay the indemnity to a third party, who acts in good faith, based on article 8(7) of UCMIP, as shown above in section 7.2. However, this limit does not conflict with the insurer's right to recover any indemnity paid to a third party from the insured. By this provision, the regulation maintains the principle of good faith in all dealings including in favour of third parties, allowing a balanced set of remedies. Significantly, by article 7 of UCMIP, the insured's rights under the policy 'shall be forfeited if the claim involves fraud'.

CRIDV provides that the insured's claim is rejected in case of a fraudulent claims similar to section 12(1)(a) of IA. In a decision no 131/R/1433H (2012) which was affirmed by the Appeal decision no 346/a/1435H (2014) in Riyadh, CRIDV rejected the insured's claim which was proven to be fraudulent claim, as the insured failed to prove that it was genuine.[826] In a decision no 14/J/1433H (2012), the insured claimed for full indemnity for a stolen vehicle and damages for late payment. Later, the insured changed the claim to a claim for total loss of the vehicle without providing any further evidence. The insurer rejected the claim because the insured's allegations about his stolen vehicle was not clear as the vehicle included a high

[826] Similar to a decision no 375/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; and a decision no 264/R/1433H (2012) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

standard security system which required the original key to run the vehicle. Thus, the insurer rejected the insured's claim because of the suspicion of bad faith and fraud as the original keys of the vehicle were missing. The Committee found the claim was fraudulent as the insured acted in bad faith. Moreover, the Committee held that contracting parties must comply with the doctrine of utmost good faith prior to conclusion of the policy, during the performance of the policy, and at the claim stage. As part of the post-contractual duties, the insured must provide correct material facts in good faith, and the insured must not increase the insured risks. As the insured was not complying with the doctrine of utmost good faith, the insured's right to claim was forfeited.

Accordingly, it is clear that the Saudi approach in respect of rejection of fraudulent claims as the principal remedy needs to develop and include other remedies similar to the UK approach including recovery of payments and the right to terminate the insurance policy in order to give balance to both contracting parties. As shown in the UK jurisdiction, the UK has made significant changes to legal remedies for fraudulent claims in terms of IA. This study recommends adopting the UK approach regarding legal remedies to gain the benefits of the recent UK reform by having clear and balanced provisions.

7.7. Conclusion

The insured's post-contractual duties are included in Saudi regulations unlike the UK approach where the insured's post-contractual duties are not clear based on the recent reform. The interpretation of the previous case law remains relevant until the courts either accept the previous position or consider a different basis relying on recognition of the doctrine of utmost good faith as an interpretative principle. This leads to assume that as the doctrine of utmost good faith may now recognise implied terms, the judiciary may accept implied terms in insurance policies regarding the insured's post-contractual duties. However, all of this area of law remains uncertain in respect of determination of the duties, the basis of these duties and their remedies.

Fraudulent claims are regulated separately from the doctrine of utmost good faith, as IA imposes specific and well-developed remedies in the case of a fraudulent claims. However, IA has failed to define a fraudulent claim. It now is open to the courts to develop this area and fill this statutory gap. On the other hand, the Saudi

approach has an entire regulation about fraud and provides indicators of fraud for each type of insurance. However, AFR fails to provide proper remedies in the case of the insured's fraud. Accordingly, this study supports that Saudi regulations should learn from the UK approach by considering similar remedies to fill this gap.

The next chapter analyses the insurer's pre-contractual duties in the UK and Saudi jurisdictions. This chapter critically compares the duty of disclosure and critically analyses examples of the insurer's pre-contractual duties in both jurisdictions.

CHAPTER 8

INSURERS' PRE-CONTRACTUAL DUTIES OF UTMOST GOOD FAITH

8.1. Introduction

The doctrine of utmost good faith has a reciprocal effect, which imposes duties on both insureds and insurers.[827] However, whilst CIDRA and IA have recognised the insureds' pre-contractual duties for consumers and businesses, they fail to consider insurers' duties. The scope of insurers' duties, particularly, pre-contractual duties has been questioned[828], and insurers' post-contractual duties shall be discussed in the following chapter. Accordingly, due to the significance of identifying the scope of the insurers' pre-contractual duties, this chapter critically analyses the scope of the insurers' pre-contractual duties by identifying the common law position; providing examples from commonwealth jurisdictions to assist with identifying the potential effects of the doctrine of utmost good faith after the enactment of IA in the UK; and comparing the UK jurisdiction to the Saudi jurisdiction.

Two main questions shall be addressed in this chapter: what are the insurers' post-contractual duties in both the UK and Saudi jurisdictions, and what criticisms face these duties? To answer these questions, this chapter is divided into four sections looking at the insurers' duty of disclosure; the insurers' duty to inform insureds' about the consequences of breach of the insurance contract; the insurers' duty to consider the insureds' needs when proposing an insurance policy; and the insurers' duty to ensure the accuracy of the insureds' disclosure.

[827] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 159. See also, Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 38.

[828] Peter Mann, 'The Elusive Second Quadrant of Utmost Good Faith: What is the Scope of an Insurer's Pre-Contractual Duty of Utmost Good Faith?' (2016) 27 Insurance Law Journal 176.

8.2. The Insurers' Duty of Disclosure

Insurers as well as insureds are bound by the duty of disclosure, and the insurer's concealment of either material facts or policy terms that are not clear to the insured should count as breach of the duty of utmost good faith. Material facts can be, for instance, 'the existence of fraud in connection with the risk..., any defence which… may be relied on at a later stage…, and foreign illegality'[829].

In *Carter v Boehm*[830], Lord Mansfield considered both parties to be under the duty of good faith and entitled to the same remedy for breach, as he stated that 'good faith forbids either party by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary… the policy would be void, against the underwriter if he concealed'[831]. However, Lord Mansfield did not expand on the insurer's duties, but his Lordship provided a specific example of the insurer's duty, where non-disclosure would induce the insured's decision to enter into the contract.[832] His Lordship stated that 'the policy would equally be void, against the underwriter, 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'[833].

The principal issue regarding the insurers' pre-contractual duty of disclosure is whether the insurer holds the 'duty to speak'. The existence of the insurer's duty to speak and related remedies are questioned.[834] Aikens J illustrated the existence of the duty to speak and its impact on the remedy for breach in *HIH Casualty and General Insurance Ltd & Ors v Chase Manhattan Bank & Ors*[835] by stating that 'of course, without a duty to speak up, then there could be no right to damages'[836].

[829] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 43.
[830] (1766) 3 Burr. 1905.
[831] Ibid 1910.
[832] Ibid 1909.
[833] (1766) 3 Burr 1905, 1909.
[834] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 40.
[835] [2001] CLC 48.
[836] Ibid [110].

The question whether the insurer has the duty to speak had been raised in *Ted Baker Plc v AXA Insurance UK Plc*[837]. The Court of Appeal discussed the existence of the duty to speak in insurance contracts. Further, the Court of Appeal referred to *Drake Insurance Plc v Provident Insurance Plc*[838], where Pill LJ stated the insurer's post-contractual duty was very limited; however, the insurers' duty of good faith was required to disclose what the insurer had in mind before avoiding the contract.[839] Sir Christopher Clarke pointed out that the insurer was expected to disclose information, and the insurer's concealment was misleading. Sir Clarke stated that 'TB was… entitled to expect that if the insurers regarded the Category 7 material… as outstanding, due… then, acting honestly and responsibly, they should have told her. Not to do so was misleading'[840]. Significantly, Sir Clarke did not consider the insurer's duty as dependent on the doctrine of utmost good faith, and this conclusion did not require examining of the extent of the insurer's duty to speak. This was because linking the duty to the doctrine of utmost good faith would extend the possibilities where the insurer might hold the duty to speak.[841] However, Sir Clarke recognised clearly even though with hesitation that the nature of insurance contracts as they rely on the doctrine of utmost good faith that would increase the chance to have the duty by stating that 'such a nature will, if it does anything, increase the likelihood of a party having a duty to speak'[842]. As it is said 'if it does anything' referring to the doctrine of utmost good faith, the doctrine can be seen as a principle that may impose implied terms. Accordingly, the insurer's duty to speak can be considered as an implied duty in insurance contracts. The extent of this may be greater due to the nature of the doctrine, however, it is significant to extend the interpretation of the doctrine especially for consumer insurance contracts, which should give further consumer protection to the UK consumer insurance market.

As an example from a commonwealth jurisdiction, there is no doubt about the insurers' duty of disclosure in Canada. Insurers have a positive obligation to disclose and to not misrepresent all material facts to the insureds in most provinces in Canada.[843] This disclosure may either be for obtaining information that is

[837] [2017] EWCA Civ 4097.
[838] [2004] QB 601.
[839] [2017] EWCA Civ 4097, [71].
[840] Ibid [87].
[841] Ibid [89].
[842] Ibid.
[843] See for example, Ontario Insurance Act, RSO. 1990, c18, s 185, which states that:

relevant to the proposed insurance[844] or information that must be disclosed by the insured in the proposal.[845]

For a further example, in *Young v Tower Insurance Limited*[846], the High Court of New Zealand discussed why the duty of good faith should be implied in insurance contracts as the duty has a reciprocal application, and the interpretation of the duty should not be merely limited to the duty of disclosure, as follows[847]:

> [T]his duty extends beyond a mere obligation on the insurer and the insured of continued disclosure… I find, as a bare minimum that the duty requires the insurer to: (a) disclose all material information that the insurer knows or ought to have known, including, but not limited to, the initial formation of the contract… (b) Act reasonably, fairly and transparently, including but not limited to the initial formation of the contract.

Under the Saudi jurisdiction, article 53(1) of IRCICCL and article 32 of ICPP cover the insurers' pre-contractual duty of disclosure. By articles 24 - 26 of IRCICCL, insurers have to provide accurate and detailed information about the insurance products and covered risks to insureds. Further, by article 16 of IMCCR, insurers should take and monitor their reasonable measures to ensure that consumers understand and are aware about information. Article 11 of IMCCR considers integrity as an obligation on insurers by adopting that insurers must act honestly, fairly, and transparently when dealing with insureds. Further, this article commits insurers to follow best practice to protect the insured's interest.

The insured's remedy in terms of Lord Mansfield's judgment was that the insurance contract was void. Later, avoidance was codified by s 17 of MIA as the only available remedy. However, there were two main problems with avoidance. Firstly, avoidance was not favourable to the insured and it prevented use of other remedies. After the enactment of IA, avoidance is totally abolished, which gives the common

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> 'Where an insurer fails to disclose or misrepresents a fact material to the insurance, the contract is voidable by the insured, but, in the absence of fraud, the contract is not by reason of such failure or misrepresentation voidable after the contract has been in effect for two years'

[844] Ibid s 148.
[845] Ibid s 227 - 233. See for example, *Taylor v London Assurance Corp* [1934] 2 DLR 657 (CA), revd [1935] SCR 422.
[846] [2016] NZHC 2956.
[847] Ibid [163].

law the opportunity to develop other remedies in the case of the insurers' breach of the duty of disclosure.[848]

Further, it may be possible that instead of avoidance, the recovery of premiums paid may also not be as suitable a remedy for the insureds as would be a claim of damages.[849] As the purpose of Lord Mansfield's decision was to prevent fraud by either party, insurers' fraudulent non-disclosure or misrepresentation is seen as a breach of the insurers' pre-contractual duties of utmost good faith.[850] Consequently, damages can be awarded based on the tort of deceit, whereas if the misrepresentation is negligent the insured may still be awarded damages based on *Misrepresentation Act* 1967.[851]

In order to analyse the insurers' duty of disclosure and remedies available upon breach, it is significant to critically analyse the common law position. The leading case in the UK jurisdiction is *Banque Financiere de la Cite S.A. (Formerly Banque Keyser Ullmann S.A.) v Westgate Insurance Co. Ltd. (Formerly Hodge General & Mercantile Co. Ltd.)*[852]. In this case, a combination of banks provided a loan to Mr Ballestero who provided securities including gemstones, which were fraudulently overvalued, and credit insurance policies that included an exclusion clause avoiding liability in the event of fraud. Mr Lee, an employee of the broker, had to obtain three layers of insurance policies; however, Mr Lee acted fraudulently by issuing a cover for the full amount on behalf of the insurers; however, only one layer of cover existed. The insurers became aware of the fraud by Mr Lee, but did not notify the banks. Mr Ballestero acted fraudulently as he did not repay the loan to the banks and disappeared. Then, the banks became aware about the fraudulent gemstones and the fraud of Mr Lee. Accordingly, the banks claimed for damages because the insurers were in breach of the pre-contractual duty of utmost good faith as the insurers had been aware of Mr. Lee's fraud. However, the insurers refused to pay the insurance cover because of the exclusion clause that excluded fraud.

[848] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 43.
[849] Ibid 45.
[850] Ibid 40.
[851] Ibid 40.
[852] [1990] 3 WLR 364, [1991] 2 AC 249.

There are three main points about this decision to be critically examined. First, the scope of the insurers' pre-contractual duties of utmost good faith; second, the test of materiality; and, third, damages as a remedy upon breach of insurers' pre-contractual duties of utmost good faith.

Firstly, the Court of Appeal agreed that the insurer was required to disclose material facts to the insured at the pre-contractual stage based on s 17 of MIA; however the scope of this duty was questioned. The Court of Appeal rejected the wider view of Steyn J, the judge at first instance, about applying the test of good faith and fair dealing by stating that 'in the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent'[853]. However, it is questionable that the Court of Appeal did not consider the impact of adding 'utmost' good faith in insurance contracts when considering honesty and fair dealing in the context of general commercial contracts. The effect of 'utmost' might require imposing further obligations on the contracting parties as it requires the insured to disclose all relevant material facts. This became significant when the insurers failure to disclose induced the insured's decision to enter into the contract. This perspective would be consistent with Lord Mansfield's view when his Lordship stated that 'good faith forbids either party by concealing what he privately knows'[854]. However, the Court of Appeal focused only on causation rather than the fact of concealing significant material fact about the provided securities.[855]

Secondly, Steyn J's view was further problematic in respect of the scope of materiality. The Court of Appeal found that Steyn J's view was not broad or clear enough; and applied two tests to identify the materiality of a circumstance whether the breach related to the nature of the risk and what level of recoverability of a claim was required for prudent insured to consider entering into the contract.[856] Significantly, by applying the view of Steyn J, it may be that not only does the test of materiality include the duty to disclose significant facts but also to provide advice

[853] [1989] 3 WLR 25, [1990] 1 QB 665, [1989] 3 WLR 25, 772.
[854] (1766) 3 Burr 1905, 1910. See also Susan Hodges, *Cases and Materials on Marine Insurance Law* (Routledge Cavendish 1999) 242.
[855] For further reading about the conclusion of causation and the ground to apply damages, see John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 161 – 170.
[856] [1989] 3 WLR 25, [1990] 1 QB 665, [1989] 3 WLR 25, 772.

or guidance to the insured.[857] The view of Steyn J is similar to the Saudi position which expands the scope of the duty of disclosure.

Saudi insurance regulations define the insurers' duty of disclosure as a pre-contractual duty, and specify which information must be disclosed prior to conclusion of an insurance policy. Insurers have to provide proper advice about offers and available insurance products to insureds.[858] According to article 10.1 of ICPP, the insurers' pre-contractual duty of disclosure requires the insurer to provide information about the activity of the insurer, and any other related financial institution, full information about insurance products and their limit and exceptions.[859] This information may not be practical for consumer insurance, but is significant for business insurance, because large business, insureds need to know the financial position of the insurer, which may impact on their decision to pursue the policy if the insurer's financial position includes some serious issues or plans such as for merger and acquisitions.

Article 11 of ICPP specifies the minimum information that must be disclosed by the insurers which includes information about: rights; responsibilities; duties; commissions; costs; insurance cover; details of the premium, any condition of the payment including paying in timely manner, and impacts of discounting the payment; duration of the insurance policy; advantages and exceptions; procedures for settlement of claims; how to complain; any clause may be amended by the insurance company after the validity of the contract; any restriction or unusual condition may harm the consumer's interest in anyway; renewal process and if any clauses could be renegotiated; cancelation of the insurance policy and its effects; and answering any related consumers' enquiries regarding insurance policy.[860]

Thirdly, the Court of Appeal held that damages could not be a remedy upon breach of the insurers' pre-contractual duties.[861] Lord Templeman stated that 'I agree with

[857] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 42.
[858] Article 36-37 of IMCCR and article 10 of ICPP.
[859] Similarly, article 84 - 86, and 101 of IRCHIL recognise similar provisions about the insurers' duty of disclosure.
[860] See also, article 30, 37, and 42 of IMCCR.
[861] See also, *Norwich Union Life Insurance Society v Qureshi* [1999] Lloyd's Rep IR 453, where the Court of Appeal found that the avoidance was the only available remedy rather than damages upon the breach in insurer's pre-contractual duty of utmost good faith.

the court of appeal that a breach of the obligation does not sound in damages'[862]. It was argued by the Court of Appeal that the cause of the loss was not because of the insurers' non-disclosure, and it was not because of Mr Lee's fraud but the inability of Mr Ballestero to repay the loan. Thus, on the grounds of causation, the claim failed. However, this did not take into account the insured's interest. In other words, allowing avoidance instead of damages would not favour the insured especially when there was a loss, but it would be in favour of the insurer.[863]

Similarly, damages were not accepted in *Bank of Nova Scotia v Hellenic Mutual War Risks Association Ltd*[864], where the Court of Appeal examined the possibility of damages. The Court of Appeal distinguished the law of Torts, specifically, the US approach on bad faith, and, second, the tort of negligence. To illustrate their decision, the Court of Appeal explained there were four reasons behind not relying on tort, as following[865]:

> First, the powers of the court to grant relief when there has been non-disclosure of material facts stems from the jurisdiction originally exercised by the courts of equity to prevent imposition. Since duress and undue influence as such gave rise to no claim for damages, the court saw no reason in principle why non-disclosure as such should do so.
>
> Second, the decision in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 established that, where an underwriter seeks the remedy of avoidance of a policy, the actual effect of the non-disclosure on his mind is irrelevant and what matters is the effect of the non-disclosure on the mind of a notional prudent underwriter. This principle illustrated one of the conceptual difficulties involved in upholding the remedy by way of damages.
>
> Third, the clear inference from the Marine Insurance Act 1906 is that parliament did not contemplate that a breach of the obligation of utmost good faith would give rise to a claim to damages in the course of such contract.
>
> Fourth, since in the case of a contract *uberrimae fidei* the obligation to disclose a known material fact is an absolute one, and attaches with equal force whether the failure is attributable to 'fraud, carelessness, inadvertence, indifference, mistake, error of judgment or even to [the] failure to appreciate its materiality' … a decision of the breach of such an obligation in every case and by itself constituted a tort, if it caused damage, could give rise to great potential hardship to insurers and even more, perhaps, to insured persons.

Learning some lessons from other commonwealth jurisdictions is important for the UK. For example, in Australia, damages can be awarded upon breach of s 13 of ICA which considers the doctrine of utmost good faith as an implied term. Although it was questioned whether the basis of the doctrine of utmost good faith prior the

[862] [1990] 3 WLR 364, [1991] 2 AC 249, 387.
[863] Özlem Gürses, 'An English Insurer's Pre-Contractual Duty of Utmost Good Faith' (2012) 23 Insurance Law Journal 51.
[864] [1990] 2 WLR 547, [1990] 1 QB 818.
[865] Ibid 888 - 889.

conclusion of the contract could still exist as an implied term, the wording of s 13 of ICA states that 'in respect of any matter arising under or in relation to [the contract of insurance]', and 'in relation' should include the pre-contractual stage. Furthermore, in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*[866], the High Court of Australia found that the duty of utmost good faith 'is more important than a term implied in the insurance contract', and 'the duty imposes obligations on both insurers and insureds as long as their conducts have legal consequences.[867]

Even though considering the duty of utmost good faith as an implied term is not the position under common law[868], it has a significant advantage in allowing damages upon breach of the doctrine of utmost good faith instead of avoidance which had caused difficulties under s 17 of MIA prior to reform.[869] However, as avoidance is abolished after IA, the amended wording of s 17 of MIA shows further interpretation may be possible to allow damages or other remedies. This is especially because avoidance was not the appropriate remedy for the insured in the case of the insurer's breach of utmost good faith.[870]

A similarity can be found between the decision in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*[871] and the interpretation by the Law Commissions that the duty of utmost good faith be considered as an interpretative principle which may impose implied terms. The Law Commissions stated that 'good faith provides a background when considering whether it is necessary to imply a particular term'[872].

Saudi jurisdiction sets significant legal remedies for breach of the insurers' duty of disclosure. Nevertheless, these remedies are limited, not comprehensive, and relate to professional practice rather than the rules of contract. Article 9 of IMCCR and article 9 of OIAR set out general provisions covering non-compliance with any

[866] [2007] 235 CLR 1, 62 ACSR 609, [2007] HCA 36, [178] per Kirby J.
[867] Ibid [178] per Kirby J.
[868] Peter Mann, 'The Elusive Second Quadrant of Utmost Good Faith: What is the Scope of an Insurer's Pre-Contractual Duty of Utmost Good Faith?' (2016) 27 Insurance Law Journal 176.
[869] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 38.
[870] Peter Mann, 'The Elusive Second Quadrant of Utmost Good Faith: What is the Scope of an Insurer's Pre-Contractual Duty of Utmost Good Faith?' (2016) 27 Insurance Law Journal 176. See Özlem Gürses, 'An English Insurer's Pre-Contractual Duty of Utmost Good Faith' (2012) 23 Insurance Law Journal 51.
[871] [2007] 235 CLR 1, 62 ACSR 609, [2007] HCA 36, [178] per Kirby J.
[872] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Summary* (Law Com No 353, Scot Law Com No 238, 2014) para 30.23.

requirements of the whole regulations. In addition, in terms of IMCCR and OIAR, any breach of these regulations are considered as a violation of LSCIC and its implementing regulation and the licensing conditions. Accordingly, the insurer will be subjected to an enforcement action by SAMA to either pay no more than one million Saudi Riyals, a prison term of no more than four years, or both, based on article 21 of LSCIC. Further, according to article 76 of IRCCLC, the insurers licence may be withdrawn for the following reasons: first, if the company 'does not fulfil requirements of the law or rules', and, second, if 'SAMA finds that insureds' rights, beneficiaries or shareholders are subject to loss due to the method used of engaging in activity'. The use of these penalties can be criticised.

The major criticism is that these penalties are not appropriate in relation to the failure of the insurers' pre-contractual duties as these penalties are more appropriate to a violation of professional practice. The other criticism is that the penalties do not benefit a particular insured but SAMA since SAMA's goal is to have a suitable and effective insurance market, while the insured's goal is to gain indemnity, recover any loss, or to make amendments to the policy's conditions in the insured's favour. It is important therefore to investigate how CRIDV reaches its decisions in order to identify which remedies are adopted from the practice side. CRIDV commonly commit insurers to pay insureds' claims, or cancel the insurance policies and return premiums paid. Damages are recognised by CRIDV as long as the insured can prove the loss.[873]

For example, in a decision no 335/R/1433H (2012) which was affirmed by the Appeal decision no 4/a/1436H (2015) in Riyadh, CRIDV obliged the insurer to cancel the insurance policy according to the insured's request, and to return premiums paid to the insured. This was based on the insurer's breach of the pre-contractual duty of disclosure by failing to disclose the cancellation procedures and its costs to the insured. CRIDV found that the insurer did not comply with the requirement of the doctrine of utmost good faith and violated article 15 of IMCCR.

In conclusion, the insurers' duty of disclosure is recognised in both the UK and Saudi jurisdictions. While the common law tended to limit the insurers' duty of

[873] Decision no 704/R/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh, and decision no 1/R/1435H (2014) which was affirmed by the Appeal decision no 236/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

disclosure in order not to expand the scope of the duty; Saudi regulations provide detailed provisions about it. The legal remedies are still uncertain for both jurisdictions.

The next section comparatively analyses the insurers' duty to inform insureds about the consequences of breach of the insurance contract. The critical analysis examines several examples in order to illustrate this duty.

8.3. Insurers' Duty to Inform Insureds about the Consequences of Breach of the Insurance Contract

The insurers' duty to notify the insureds about the results of breach of the contract of insurance is debatable. To analyse this duty, examples from the commonwealth jurisdictions are provided. For instance, in *Australian Associated Motor Insurers Ltd v Ellis*[874], the insurer owed the duty to disclose the consequences of breach the policy terms and conditions by the insured. In this case, the insured had a comprehensive insurance policy for their car and the policy required them to obtain insurer's consent for any modification. The insured made a change without obtaining the insurer's consent; later, the car had been involved in an accident which did not relate to this modification. The insurer did not accept the insured's claim due to the unauthorised modification. It was held that the insurer had been in breach of its duty of good faith, because the insurer did not inform the insured about the consequences of breach of the condition of the policy.[875]

Similarly, in *Suncorp General Insurance Ltd v Cheihk*[876], the New South Wales Court of Appeal held that it was the insurers' duty to ensure that the insureds were informed 'clearly' about their duty of disclosure and the significance of this duty.[877]

However, the extent of the duty of good faith to inform the insured about the consequences of breach of the policy's terms was argued in *Re Zurich Australian Insurance Ltd*[878]. According to this authority, the condition in *Australian Associated Motor Insurers Ltd v Ellis*[879] was assessed as 'unusual' and was a

[874] (1990) 54 SASR 61, 10 MVR 143, 6 ANZ Insurance Cases 60-957, 76,323 per Cox J.
[875] Ibid 76,330 – 76,331.
[876] [1999] NSWCA 238.
[877] Ibid [40] per Giles JA.
[878] [1999] 2 Qd R 203, (1999) 10 ANZ Insurance Cases 61-429.
[879] (1990) 54 SASR 61, 10 MVR 143, 6 ANZ Insurance Cases 60-957, 76,323per Cox J.

common condition in comprehensive motor insurance policies.[880] The prudent insured should be aware about common insurance policies conditions. This authority rejected the approach of turning the duty of good faith to the duty to 'coddle insureds'.[881]

Another example is in *Kelly v New Zealand Insurance Co Ltd*[882], where the claim of breach of the duty of good faith by the insurer was declined because the insured was aware about the policy's terms; however, the insured did not comply with these terms. This decision is similar to the authority of *Re Zurich Australian Insurance Ltd*[883] which examined the awareness of the insured. Thus, the insurer's duty to inform the insured is subject to the insured's awareness. Further, it was right of the court in *Re Zurich Australian Insurance Ltd* to reject the authority of *Australian Associated Motor Insurers Ltd v Ellis*[884] because the insured's awareness was not examined, and the duty of good faith was expanded by an inappropriate application.

Accordingly, based on the new regime in the UK, the question is whether the common law may adopt such a duty and expand the interpretation of the doctrine of utmost good faith referred to in s 17 of MIA. To answer this question, looking at the conduct of the Court of Appeal, in *Banque Financiere de la Cite S.A. (Formerly Banque Keyser Ullmann S.A.) v Westgate Insurance Co. Ltd. (Formerly Hodge General & Mercantile Co. Ltd.)*[885], may be significant. The Court of Appeal rejected the interpretation of the doctrine of utmost good faith given by the first instance judge. The insurers' duty to inform insureds' about the consequences of breach of insurance contracts is likely to be rejected but that is not certain.

However, where this duty is not rejected, the significant question shall be what are the legal remedies available to the insureds? It seems that recission of the whole policy may be considered by the insured, or damages in case of any loss to the insured, although damages are not certain to be awarded in the UK jurisdiction.

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[880] [1999] 2 Qd R 203, (1999) 10 ANZ Insurance Cases 61-429, [79].

[881] Ibid [79] – [81], as it was stated that:

> The court found that the insurer was in breach of the implied duty found in section 13 because it had not notified the insured of the consequence of breaching condition 5. This decision appears to me, with respect, wrong. A duty, the essence of which is to act honestly, is elevated to an obligation in an insurer to coddle its insured.

[882] (1993) 7 ANZ Insurance Cases 61-197, 78,248.

[883] [1999] 2 Qd R 203, (1999) 10 ANZ Insurance Cases 61-429.

[884] (1990) 54 SASR 61, 10 MVR 143, 6 ANZ Insurance Cases 60-957.

[885] [1990] 3 WLR 364, [1991] 2 AC 249.

However, if the insurer failed to comply with this duty fraudulently, damages can be awarded on the ground of deceit. The common law should have regard to the new regime of dividing the insurance market into consumers and businesses as the knowledge of consumers is limited, and, significantly, recognising this duty should provide further consumer protection.

Saudi regulations do not include the insurers' duty to inform the insured about the consequences of breach of the insurance policy's terms in particular. However, Saudi regulations expand the duty of disclosure to a wider application, as shown in section 8(2). The insurers' duty to inform the insured about the consequences of breach of the insurance policy's terms is part of the insurers' duty of disclosure. Furthermore, the expansion of the insurers' duties can be understood in terms of article 11 of IMCCR, which requires integrity as an obligation on insurers by ordering that they must act honestly, fairly, and transparently when dealing with insureds. Transparency should be interpreted to include the insurers' duty to inform the insured about the consequences of breach of the insurance policy's terms. In the case of the insurers' breach, remedies are not specified. Therefore, the same argument that is considered in section 8.2 should be considered in respect of the insurers' breach to inform the insured about the consequences of breach the insurance policy's terms. Moreover, CRIDV apply damages with no restrictions as long as the insured can prove his loss.

For example, in a decision no 70/R/1435H (2014) which was affirmed by the Appeal decision no 269/a/1436H (2015) in Riyadh, CRIDV obliged the insurer to pay the insured's claim that had been rejected by the insurer when processing the claim, and to pay damages for the cost of travel. This was because the insurer failed to ensure that the policy terms were clarified and understood by the insured.

CRIDV provided two reasons of this decision: first, it found that the insurer had breached article 53(1) of IRLSCIC which states that 'the company shall, before issuing an insurance policy, give the policyholder access to the terms, conditions and exclusions of the policy', as the insurer failed to prove the contrary. Second, CRIDV illustrated that the doctrine of utmost good faith is one of the major principles of insurance contracts which commits both parties to disclose all material facts about the insured risk based on enquiry or not depending on article 15 of IMCCR. Article 15 states that 'companies must communicate all relevant

information to customers in a timely manner to enable them to make informed decisions'.[886] Thus, it is clear that CRIDV recognise this duty and applies other practical remedies than those just in favour of SAMA.

The next section comparatively analyses the insurers' duty to consider the insureds' needs when proposing insurance policies. Several examples are provided to analyse this duty.

8.4. The Insurers' Duty to Consider the Insureds' needs when proposing Insurance Policies

Insurers must consider the insureds' needs when proposing insurance policies.[887] The importance of this provision is to avoid any misunderstanding and limit the opportunity for mistakes by insureds when forming the insurance policy. To analyse this duty, an example from the Australian jurisdiction is provided.

In *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd*[888], where a liability insurance policy was issued to the insured who wished to have an insurance cover against all liabilities, the insurance cover did not match the insured's needs. It was held that since the insured had commercial experience, the insured's claim about the insurer's breach of the duty of utmost good faith because the policy did not meet the insured's needs failed. This is consistent with the insured's awareness test that was in *Re Zurich Australian Insurance Ltd*[889]. The Supreme Court of Western Australia in *Speno* held that[890]:

> [T]here was "a duty to speak" on the part of Zurich to inform Speno that the policies which it was providing did not extend to Speno the cover it had specifically requested. The information was clearly within the category of matters material to the question whether, in the particular circumstances a prudent prospective insured would want to know. Consequently, in my opinion, there was a breach of the duty of the utmost good faith on the part of Zurich.

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[886] Similar decisions had been made by CRIDV in a decision no 195/R/1434H (2013) which was affirmed by the Appeal decision no 231/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh, and decision no 306/R/1433H (2012) which was affirmed by the Appeal decision no 629/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

[887] Craig Brown 'An Insurer's Pre-Contractual Obligations in Canadian Insurance Law' (2012) 23 Insurance Law Journal 80.

[888] (2000) 23 WAR 291, (2001) 11 ANZ Insurance Cases 61-485, [2000] WASCA 408, BC200007850.

[889] [1999] 2 Qd R 203, (1999) 10 ANZ Insurance Cases 61-429, [42].

[890] (2000) 23 WAR 291, (2001) 11 ANZ Insurance Cases 61-485, [2000] WASCA 408, BC200007850, [46].

Again, looking at the new regime in the UK, the question should be asked whether the common law can adopt the insurers' duty to consider the insureds' needs when proposing insurance policies, and if so what are the legal remedies available to the insureds. Expanding the interpretation of the doctrine of utmost good faith in terms of s 17 of MIA is not absolute as this area of law is uncertain. Remedies are likely to be rescission or damages if losses occur. Again, damages are not certain to be awarded in the UK as the courts have rejected applying damages. However, this position may change after the abolishment of avoidance under IA.

The other example of breach of the insurer's duty of utmost good faith is in case of the insured's mistake of choosing the insurance policy while the insurer had known about this mistake or had contributed to this mistake being made by misrepresentation.[891] There are two scenarios based on this assumption. Firstly, if the insurer had known about the insured's mistake but had concealed it without any misrepresentation. Secondly, if the insureds' mistake was based on the insurer's misrepresentation. According to the second scenario, damages can be claimed as a result of misrepresentation based on s 2(1) of *Misrepresentation Act* 1967. The question is whether damages can be awarded in the first example if the insured suffers a loss.

If the concealment was based on fraudulent intent, damages can be awarded based on the tort of deceit, but if the concealment is not fraudulent, the remedy becomes uncertain. The concealment based on the Lord Mansfield's judgment is fraud as he stated 'the keeping back of such a circumstance is a fraud, and therefore the policy is void'[892]. However, voiding the policy will not give an advantage to the insured unless the insured knows about the concealment prior to the occurrence of the risk. Thus, accepting damages as a remedy could prevent insurers taking a negative role when forming an insurance policy.

In Saudi jurisdiction, based on article 42 of IMCCR, it is the insurers' obligation to specify consumers' needs and proposed insured risks. Insurers have to provide proper advice about offers and available insurance products to insureds by ensuring that the offer is the best choice for the insured.[893] Furthermore, article 11 of IMCCR

[891] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-044].
[892] (1766) 3 Burr. 1905, 1910.
[893] Article 24 - 26 of IRCICCL.

considers integrity as an obligation on insurers by ordering that they must act honestly, fairly, and transparently when dealing with insureds.

Identifying which advice can be provided to insureds in order to recognise their insurance needs becomes a part of the insurers' pre-contractual duty, according to IMCCR and the first principle of ICPP. Moreover, the significance of this advice is to enable insureds to make 'informed decisions' regarding entering into a specific insurance policy, based on article 15 of ICPP.[894] Particularly, this advice must include at a minimum, answering how a specific proposed insurance policy would meet the insured's needs. Furthermore, where there is more than one insurance policy, the advice must consider differences between these options including, for examples, costs and benefits.[895] However, providing advice to the insured to give him a chance to make an 'informed decision' can be criticised when issuing an online insurance policy where the insured is making the policy based on the information that is available on the website or through aggregator websites. Thus, it seems that providing advice should be accessible to the insured as part of the insurers' duties.

In case of the insurers' breach, remedies are not specified in particular. Therefore, the same arguments given in section 8.2 should be considered regarding the insurers' breach. In a decision no 10/J/1431H (2010) in Jeddah, CRIDV held that the insurer owed the duty to propose an insurance policy that met the insured's needs, as the insured wished to have a professional liability insurance policy to cover the insured's employees in all Saudi regions whereas the policy was for only one region. However, the insurer proved that the policy was issued exactly based on the insured's request, and the insured failed to prove the contrary. CRIDV held that the failure of this duty could not be proved and as the insurer had requested to terminate the policy, the policy should terminate and any premium that was provided for the period had to return to the insured.

The next section comparatively analyses the insurers' duty to ensure the accuracy of the insureds' disclosure by providing examples for the purpose of the critical analysis.

[894] See also, article 15 and 34 of IMCCR.
[895] Ibid.

8.5. The Insurers' Duty to Ensure the Accuracy of the Insureds' Disclosure

It is the insurers' duty to ensure the accuracy of the insured's disclosure. Lord Mansfield in *Carter v Boehm*[896] recognised it as he stated that 'the under-writer at London, in May 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September 1769'[897]. In *Joel v Law Union and Crown Insurance Company*[898], the Court of Appeal found that insurers owed the duty to ensure the accuracy of the insured's disclosure not its 'truthfulness', as it considered that 'the duty of the Court to require the insurers to establish clearly that the insured consented to the accuracy, and not the truthfulness, of his statements being made a condition of the validity of the policy'[899]. In respect of IA, the insurer is expected to play a positive role by ensuring the accuracy of the insured's disclosure, as s 5(2)(3) of IA includes information that readily available to the knowledge of the insurer. Thus, it is not expected anymore that the insurer has a negative role at the formation of the insurance contract, and it is suggested that the insurers and their brokers use all available sources as long as it is not a confidential information for the brokers to ensure the accuracy of the insureds' disclosure.

A similar position was found in the Canadian case *Coronation Insurance Co v Taku Air Transport Ltd*[900], where there had been an airplane crash. The insurer did not pay the insured's claim because of the failure to disclose a bad accident record and the accuracy of numbers of the seating capacity. The Supreme Court of Canada held that the seating capacity was material information but the air accident records were not relevant. This was because these records were in the public domain, which should be known by the insurer as it stated that 'at a minimum, it [the insurer] should review its own files on the applicant, and should make a search of the public record of the air carrier's accidents'[901].

The significant question is, which remedy should be applied upon the breach of this duty by the insurer? Again, remedies are uncertain especially after the enactment

[896] (1766) 3 Burr 1905.
[897] Ibid 1914.
[898] [1908] 2 KB 863.
[899] Ibid 886, per Fletcher Moulton LJ.
[900] (1992) 4 CCLI (2d) 115 (SCC).
[901] Ibid.

of IA. However, rescission and damages are appropriate remedies, as shown in the previous sections.

Saudi regulations do not include the insurers' duty to ensure the accuracy of the insured's disclosure in particular. However, as Saudi regulations expand the duty of disclosure to a wider application, as shown in section 8.2, the extent of the insurers' duties can be understood based on article 11 of IMCCR, which requires integrity as an obligation on insurers by adopting that they must act honestly, fairly, and transparently when dealing with insureds. The insurers are assumed to act both honestly and transparently. In the case of the insurers' breach, the remedies are not clear. Again, the same argument considered in section 8.2 should be applied in respect of this breach. Further, no CRIDV decisions can be found in relation to this type of insurers' pre-contractual duty; however, it can be assumed that CRIDV may apply similar remedies that are applied in case of the breach of other insurers' duties such as the rescission and damages.

8.6. Conclusion

The insurers' pre-contractual duties are dealt with similarly by the UK and Saudi jurisdictions. The duty of disclosure is recognised in both jurisdictions. While the UK common law tended to limit the insurers' duty of disclosure in order to not expand the scope of the duty; Saudi regulations provide detailed provisions about it. Further, as long as the new regime in the UK is silent about the insurers' duties, the scope of the insurers' duties will still be based on the common law authorities. However, in terms of the consideration of the doctrine of utmost good faith being an interpretative principle which may impose implied terms, further interpretation or even changing this area of law may be required by the courts in the future.

Both jurisdictions fail to provide proper remedies. While the courts rejected damages in the UK, Saudi regulations adopt very strict remedies, which are not in the interest of the insureds but SAMA; even though CRIDV apply proper remedies including damages. The major criticism of CRIDV decisions is that these decisions are not binding in future disputes. Therefore, both jurisdictions fail to consider the insured's interest in respect of the granting of remedies. The main obstacle against awarding damages in the UK jurisdiction was avoidance, the courts may now be able to make further significant changes in considering an award of damages upon

breach of the insurers' pre-contractual duties after IA and the abolishment of the sole remedy of avoidance. Finally it is important to interpret more strictly the insurer's pre-contractual duties of utmost good faith in the case of consumer insurance contracts than in business insurance by maintaining a clear position in respect of the accuracy of the disclosure, the accuracy of matching the insurance policy to the insureds' needs, and to notify the insureds about the consequences of breach of their duties and contractual terms.

CHAPTER 9

INSURERS' POST-CONTRACTUAL DUTIES OF UTMOST GOOD FAITH

9.1. Introduction

Insurers' post-contractual duties of utmost good faith have not recognised by the UK new regime, IA and CIDRA. Furthermore, after the enforcement of IA, the status of the doctrine of utmost good faith becomes uncertain. This chapter shall attempt to clarify the position of the doctrine of utmost good faith by suggesting the inclusion of specific duties, particularly, in respect of the insurers' post-contractual duties.

Under the Saudi jurisdiction, conversely, there is a significant recognition of the insurers' post-contractual duties, especially, in respect of the insurers' duties of utmost good faith during the settlement of claims; however, it fails to provide proper and relevant remedies.

Accordingly, this comparison shall add value to both jurisdictions by providing a critical analysis of insurers' post-contractual duties in order to contribute to the interpretation of the doctrine of utmost good faith. This is because the scope of insurers' post-contractual duties of utmost good faith is not obvious and is uncertain in the UK.[902] Accordingly, this chapter shall highlight several examples of insurers' post-contractual duties. Further, a traditional example of the insurers' post-contractual duties is the duty to pay valid claims in reasonable time. However, this classic example shall not be considered in this study because this scenario is covered separately by s 28 of *Enterprise Act* 2016. Therefore, due to the separation between the duties in respect of the insurer's late payment and the doctrine of utmost good faith, these provisions are out of the scope of this chapter.

[902] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 52.

Two main questions shall be addressed in this chapter in order to achieve the objectives of this study about what the insurer's post-contractual duties are in both the UK and Saudi jurisdictions, and what are the major criticisms facing these duties. To answer these questions, this chapter is in three sections being the insurers' duties of utmost good faith during investigation of the claim, the insurers' duties to act in good faith when exercising their discretion, rights, and powers, and the insurers' duties of utmost good faith during the settlement of claims.

9.2. The Insurers' Duty of Utmost Good Faith during the Claim Investigation

Insurers commonly investigate insureds' claims to find out whether the claim is valid under the insurance policy. This investigation requires further information from the insured about the particular claim and identifies the appropriate actions and rights. All of these procedures should be followed in good faith. A failure to investigate in good faith would be seen from the insurers' conduct through the investigation.

There are two possibilities: First, whether the claim is a recoverable under the policy; second, where the claim is not recoverable, whether the claim is a fraudulent claim. In the first scenario, if the claim would not be recoverable under the insurance policy, nothing would be available for the insured and the cost of the insurer's investigation could not be recovered as long the claim was not fraudulent. In the second scenario, where the insurer investigates a fraudulent claim, the insurer may collect damages for any cost of the insurer's investigation.[903] As shown in chapter 6, damages for deceit might be awarded against a fraudster especially for the cost of the investigation of a fraudulent claim.[904] For example, in *Aviva v Brown*[905] the court found that the insured acted not only dishonestly but fraudulently after examining the awareness of the insured as he was a businessman and a clever insured.[906] Thus, the insurer succeeded in his claim for the costs of accommodation during the claim investigation, based on the lack of good faith by the insured. On the other hand, if the insurer fails to act in good faith by not

[903] *London Assurance v Clare* (1937) 57 L1L Rep 254, 270.
[904] Simon Rainey & David Walsh, 'Remedies for Fraudulent Claims under the Insurance Act 2015', in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 69.
[905] [2011] EWHC 362 (QB).
[906] Ibid [91].

conducting an investigation[907], taking improper procedures for the investigation, and causing losses to the insured, recovering these losses should be available to the insured on the ground of the insurer's breach of the post-contractual duty of utmost good faith.

By comparison, under Saudi jurisdiction, article 52(h) of IMCCR requires insurers to conduct a reasonable investigation of the insureds' claims within 10 days for individual insureds, and 30 days for business insureds. Two points can be made. Firstly, the Saudi approach requires the insurer to conduct a reasonable investigation, although the reasonableness test of the investigation is in question. The test that should be applied to prove the reasonableness is not clear whether it should be the prudent insurer test or the actual insurer test. It seems that the prudent insurer test is more appropriate to find out whether all required procedures have been followed. Thus, expert evidence can be strongly relevant to identify the insurer's breach.

Secondly, article 52(h) distinguishes between the case of consumer insurance and business insurance with regard to the time period within which the reasonable investigation is to be concluded by the insurer. This is significant, as the insurer does not need to spend a long time investigating a consumer claim and the consumer should be indemnified immediately or the consumer should at least know why they may not be indemnified. There is no equivalent in the UK as IA and CIDRA do not consider insurers' post-contractual duties at all. However, this point may be of interest in the UK, which distinguishes between consumer and business insurance, when conducting an investigation for insureds' claims.

The question is whether damages may be available in case of breach of the insurers' post-contractual duty of utmost good faith in both the UK and Saudi jurisdictions. By recognising the doctrine of utmost good faith as an interpretative principle in the UK, which may generate implied terms regarding the insurer's post-contractual duties, damages for breach may be considered by the courts especially after abolition of avoidance as a sole remedy, which had been a barrier for application of damages. Although, this area of law is uncertain and it needs judicial interpretation to confirm the proper remedy in case of the insurers' breach; this study suggested

[907] See also, Kelly Godfrey, 'The Duty of Utmost Good Faith — The Great Unknown of Modern Insurance Law' (2002) 14 Insurance Law Journal 56.

that to apply damages in case of breach the insurer's post-contractual duties depending on the consideration of the insurer's duties as implied terms in each insurance contracts. On the other hand, Saudi jurisdiction applies damages without any limitation as long as the insured can prove his losses.[908]

The next section comparatively analyses the insurers' duty to act in good faith when exercising their discretions, rights, and powers. The critical analysis examine several examples of the application of this duty.

9.3. The Insurers' Duties to Act in Good Faith when Exercising their Discretions, Rights, and Powers

Insurers hold powers, discretion, and significant rights during the performance of the contract of insurance, for example, insurers must provide their consent and approval such as in medical and motor insurance policies. Several examples are provided to critically analyse this section and to predict the potential interpretation of the duties on behalf of the insurer as this area of law is uncertain.[909] Firstly, in *Hobartville Stud Pty Ltd v Union Insurance Co Ltd*[910], the court held that the insurer's consent should not be unreasonably withheld as a part of the duty of good faith.[911]

Secondly, in liability insurance policies, insurers hold the right of subrogation, and the right to a defence on behalf of the insured. These rights, powers, and discretions should be conducted in good faith. For example, in *Gan Insurance Co Ltd v Tai Ping (No2)*[912], the Court of Appeal illustrated that, as follows[913]:

> Reinsurers' power to act on behalf of and to bind insurers would be subject to similar limitations: it should, at the least, be exercised in good faith and in the common interest on the basis of the facts giving rise to the particular claim and not arbitrarily… liability insurances commonly contain conditions requiring the insured to refrain from making any admission or settlement without insurers' approval (as well as usually entitling insurers to take over the defence of any third party claim)… I would therefore accept as a general qualification, that any withholding of approval by reinsurers should take place in good faith.

[908] See for example, decision no 31/R/1434H (2013) which was affirmed by the Appeal decision no 667/a/1435 (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.
[909] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 166.
[910] (1991) 6 ANZ Insurance Cases 61-032.
[911] Ibid 76,910. See also Alison Padfield, *Insurance Claims* (4th edn, Bloomsbury Professional 2016) 144.
[912] [2001] CLC 1103.
[913] Ibid [54], [55], [67], and [77].

Furthermore, in *the Mercandian Continent*[914], Longmore LJ recognised a situation where the insurer's post-contractual duty of utmost good faith might be implied by looking at the insurer's duty to conduct a defence in good faith to protect the insured's interest. His Lordship stated that 'interests of the insured and the insurers may not be the same but they will be required to act in good faith towards each other... The insured's protection lies in the duty which the law imposes on the insurer to exercise his power to conduct the defence in good faith'[915].

Similarly, an example from the Australian jurisdiction, in *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd*[916], where an Australian court set an obligation on the insurer to use its rights in good faith whether the insurer decides to take a defence out for the insured or not. It stated that[917]:

> This duty of good faith… must… not only control the actions of an insurer who has taken over its insured's defence but will apply equally to the insurer's exercise of its power of granting or withholding consent to the making of admissions etc. even if it elects not to take over the defence.

Thirdly, in *Groom v Crocker*[918], the Court of Appeal considered good faith as part of the insurer's powers. It stated that 'the effect of the provisions... is… to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they bona fide consider to be the common interest of themselves and their assured'[919].

Fourthly, the insurer has the right to reject a claim if it is not covered under the insurance policy; however, the insurer must provide reasons for this decision. In other words, it is the insurer's duty not to reject a claim that is covered by the policy including any claim to terminate or avoid the policy.[920] As a result, if the insurer cannot provide reasonable reasons to reject a specific claim, the insurer would be in breach of the continuing duty of good faith.[921] Thus, a rejection to settle a valid claim should be counted as a breach of the insurer's post-contractual duty of utmost

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[914] [2001] CLC 1836.
[915] Ibid [22].
[916] (1974) 130 CLR 1, 2 ALR 321, 48 ALJR 136, BC7400010. Similarly, see also *Edwards v The Hunter Valley Co-op Dairy Co Ltd & another* (1992) 7 ANZ Insurance Cases 61-113.
[917] (1974) 130 CLR 1, 2 ALR 321, 48 ALJR 136, BC7400010, 31.
[918] [1938] 2 All ER 394, [1939] 1 KB 194.
[919] Ibid 203. See also *Cormack v Washbourne* [2000] CLC 1039, 1048.
[920] Alison Padfield, *Insurance Claims* (4th edn, Bloomsbury Professional 2016) 212.
[921] *RAF England v Zurich Australian Insurance Ltd* (unreported, Dis Ct of Adelaide, Kitchen J, 30 July 1991) as mentioned in Kelly Godfrey, 'The Duty of Utmost Good Faith — The Great Unknown of Modern Insurance Law' (2002) 14 Insurance Law Journal 56.

good faith. Moreover, damages can be awarded in light of the late payment provisions based on s 28 of the *Enterprise Act* 2016 in case of non-payment or any unreasonable delay to pay a valid claim. This is because the provisions for late payment are implied in every insurance contract; thus damages are available as a remedy as a consequence of breach the contract. However, the question whether damages for insured losses can be awarded is still uncertain, and needs further deliberation by the court.

A similar position is found in Saudi jurisdiction. According to article 52(i) of IMCCR, if the claim accepted the insurer's decision shall include that the insurer must acknowledge the amount of the settlement, any reduction in this amount, and justification in case the claim is partially rejected; and if the claim is rejected, reasons to reject the whole claim must be provided.

For example, in a decision no 27/D/1437H (2016) which was affirmed by the Appeal decision no 120/a/1437H (2016) in Dammam, CRIDV obliged the insurer to pay the insured's claim which had been rejected when the insurer processed the claim. Further, CRIDV referred the case to the General Department of Insurance Companies Control to investigate the insurer's violation of IMCCR as the insurer settled the insured's claim by assessing the vehicle as a total loss whereas it should not have been. Accordingly, CRIDV found that the insurer had breached article 52(i) and article 16 of IMCCR which states that 'companies must take reasonable measures to ensure the accuracy and clarity of the information provided to customers and make such information available in writing'. This was because the total loss report was ambiguous and lacked justification and accuracy as the report stated that it was a 'futility to repair the vehicle economically'. CRIDV found this statement did not reflect the actual situation in respect of the vehicle and the wording of this statement was inaccurate and not obvious. Therefore, CRIDV found that if the vehicle was considered as a total loss on the basis of the insurer's sole view, it would not be only unjust to the insured and be an arbitrary interpretation of the policy, but also it would be in violation of article 52(f) of IMCCR, which obliged insurers to follow fairness and integrity when settling claims. Finally, CRIDV justified its decision by referring to article 9 of the same regulation which states that 'non-compliance with the requirements set forth in This Code will be deemed a breach of the Law on Supervision of Cooperative Insurance Companies and its Implementing Regulations and the licensing conditions and may subject the

companies to enforcement action'.[922] Accordingly, it clearly appears that CRIDV sharply dealt with the insurers' breach of post-contractual duties.

Fifthly, insurers had the right to avoid generally the policy upon breach of the insured's pre-contractual duties based on s17 of MIA before the enactment of IA and on specific types of breach after CIDRA and IA. However, this right was to be exercised in good faith; otherwise, the insurer would breach its post-contractual duty of utmost good faith. For example, in *Drake Insurance Plc v Provident Insurance Plc*[923], if the insurer could not prove materiality or inducement, the insurer would be in breach of the post-contractual duty of utmost good faith.[924] Interestingly, Rix LJ linked the insurer's post-contractual duty of utmost good faith with the insurer's knowledge by saying that 'knowledge or shut-eye knowledge of the fact that the accident was a no fault accident would have made it a matter of bad faith to avoid the policy'[925].

Significantly, in *Drake Insurance Plc v Provident Insurance Plc*[926], Clarke LJ not only recognised the insurer's duty to exercise the right of avoidance in good faith, but also required the insurer to make a proper inquiry where needed to give the insured a chance to update the information. This perspective is essential under the modern regime in the UK, as CIDRA and IA require the insurer to have a positive role by making enquiries and asking follow-up questions. This is especially where the insured may make only signposts about a material fact which requires the insurer to ask further questions or waive the right to know this information. Clarke LJ stated that, as follows[927]:

> A failure to make any inquiry of the insured before taking the drastic step of avoiding the policy was… a breach by the insurer of the duty of good faith… the duty of good faith required them at least to tell the insured what they had in mind and give him an opportunity to update them... All that was required was a simple inquiry… an insurer shall show the utmost good faith, the principle, in my judgment, required that inquiry to be made before the "wholly one-sided" remedy of avoidance was exercised.

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[922] Similar decisions had been made by CRIDV, for example, decision no 285/R/1435H (2014) which was affirmed by the Appeal decision no 398/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh, and decision no 70/D/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Dammam.
[923] [2004] QB 601.
[924] Ibid. Similar position was in *Strive Shipping Corp v Hellenic Mutual War Risks Association* [2002] EWHC 203 (Comm), [2002] Lloyd's Rep IR 669. However, this position was rejected in *Brotherton v Aseguradora Colseguros (No.2)* [2003] EWHC 335 (Comm), [2003] 2 CLC 629.
[925] Ibid [91] per Rix LJ.
[926] Ibid.
[927] Ibid [177].

As these duties are not specified by IA or CIDRA, it is open to the common law to add further interpretation as to which act should be considered as a breach of the insurers' post-contractual duties or to maintain the common law position in this area of law. In any event, this would give the common law the flexibility to interpret good faith in several ways based on the surrounding circumstances of each case. Consequently, upon the abolishment of avoidance as a remedy under s 17 of MIA, it is uncertain how the courts will regard legal remedies upon breach of the insurers' post-contractual duties; however, it has been said that this removal is 'likely to yield positive results… by adopting entirely new remedies depending on different circumstances'[928].

By comparison, under Saudi jurisdiction, Saudi regulations show lack of consideration of the insurers' duties to act in good faith when exercising their discretions, rights, and powers except under article 52(f) and 52(i) of IMCCR, where the similarity between article 52(i) and the UK approach was shown.

According to article 52(f) of IMCCR which requires the insurer to handle the claim in a fair manner, 'fair manner' can be interpreted as exercising powers and rights fairly. Interestingly, in the Arabic version, this article states particularly integrity, fairness, and non-discrimination. Accordingly, the insurers are obliged when exercised their rights and powers during the claim handling to act in good faith by preventing any unfair exercise of their powers and rights.

As a consequence, the UK approach has recognised the insurers' duties to act in good faith when exercising their rights, discretion, and powers at a reasonable level. On the other hand, the Saudi approach does not show similar recognition of such significant duties. Thus, it is recommended for the Saudi approach to learn from the UK experience to develop this area of law due to its significance, especially when the insurer exercise their right to avoid the policy. Further, for both jurisdictions, developing proper remedies particularly damages upon breach of these duties is significant.

The next section comparatively analyses the insurer's duty of utmost good faith during the settlement of claims. The critical analysis examine several examples of

[928] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 51.

the application of this duty.

9.4. The Insurers' Duty of Utmost Good Faith during the Settlement of Claims

Insurers have the right to negotiate the settlement of a claim under some types of insurance policies such as liability policies. This negotiation and making offers not only shall be in good faith, but also shall disclose any facts that the insured may be interested to know about the claim decisions including the consequences of the settlement.[929] For example, in *Fargnoli v GA Bonus, plc*[930], Lord Penrose illustrated that the doctrine of utmost good faith is reciprocal; therefore, insurers owe duties of utmost good faith when dealing with claims. His Lordship stated that 'it must be open to question whether an insurer would be in good faith in delaying an admission of liability, or in advancing spurious defences to a claim, or to put the insured the proof of what the insurer knows is true, or in delaying settlement of claims'[931].

Furthermore, it is accepted that where there is a reasonable offer provided by a third party consistent with the policy conditions, the insurer shall accept this offer.[932] Consequently, the insurer's failure to act in good faith probably may lead to a delay in the payment, which allows damages on the grounds of the late payment provisions of the *Enterprise Act* 2016. However, remedies are questioned where the claim should be rejected but the insurer's conduct includes a failure to disclose any facts that the insured may be interested to know.

There is no doubt that the insurer is under an implied duty to handle the claim reasonably by taking into account the insureds' interest[933], such as in *Groom v Crocker*[934]. This should include failure to disclose any conflict of interests that arise during the settlement of a claim which is a breach of the insurer's post-contractual duty of utmost good faith. However, the common law position is not clear in this respect.[935] An observation was made by the Court of Appeal in *the Mercandian*

[929] Kelly Godfrey, 'The Duty of Utmost Good Faith — The Great Unknown of Modern Insurance Law' (2002) 14 Insurance Law Journal 56, 5.
[930] [1997] CLC 653.
[931] Ibid 670 - 671.
[932] Peter Havenga, 'Good Faith in Insurance Contracts – Some Lessons from Australia' (1996) 8 SA Merc LJ 75.
[933] Baris Soyer, 'The Insurer's Duty of Good Faith: Is the Path Now Clear for the Introduction for New Remedies?' in Malcolm Clarke & Baris Soyer (eds), *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge 2017) 46.
[934] [1938] 2 All ER 394, [1939] 1 KB 194.
[935] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) [6-060].

Continent[936] which required acting in good faith by both parties during the claim handling. For a further example from the Australian jurisdiction, in *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd*[937], the High Court of Australia stated that 'its [the insurer] power of restraining settlement by the insured must be exercised in good faith having regard to the interests of the insured as well as to its own interests… both in the defence of actions against the insured and in their settlement'[938].

A further example was seen in the recent New Zealand authority *Young v Tower Insurance Limited*[939], the High Court of New Zealand illustrated the existence of the insurers' post-contractual duty of good faith in relation to claims handling.[940] The High Court ended this argument by giving specific reasons for the existence of insurers' post-contractual duty of utmost good faith during handling of the claim; providing the minimum scope of this duty; and it held damages as a remedy for the breach, and it noted as follows[941]:

> While the duty to disclose all material facts is often enforced against the insured, I have no doubt that a corresponding duty, especially at the stage of lodging and processing a claim, applies to the insurer… I find, as a bare minimum that the duty requires the insurer to:[942]
>
> (a) Disclose all material information that the insurer knows or ought to have known, including, but not limited to… during and after the lodgement of a claim;
>
> (b) Act reasonably, fairly and transparently, including but not limited to… during and after the lodgement of a claim; and
>
> (c) Process the claim in a reasonable time… this, however, must take into account the time required to properly investigate and assess all aspects of the claim… Factors that may need to be taken into account include the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside an insurer's control.
>
> I find that nominal damages… should be awarded for the defendant's [insurer's] failure to disclose this document to the plaintiff.

Although the interpretation of the implied term of the duty of good faith in *Young v Tower Insurance Limited*[943] was considered by the High Court of New Zealand in

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[936] [2001] CIC 1836.
[937] (1974) 130 CLR 1, 2 ALR 321, 48 ALJR 136, BC7400010.
[938] Ibid 27, 31 - 32.
[939] [2016] NZHC 2956.
[940] Ibid [157] – [158]. In this case, the High Court clarified the duty of good faith in insurance contracts due to the uncertainty of the existence of this duty as the New Zealand *Marine Insurance Act* 1908 abolished s 17 which requires the doctrine of utmost good faith, which was stated the similar wording of s 17 of MIA.
[941] Ibid [159], [163] – [166].
[942] This interpretation of the implied duty of utmost good faith was also considered in *Kilduff v Tower Insurance Limited* [2018] NZHC 704 (17 April 2018) [107] – [108].
[943] [2016] NZHC 2956.

Kilduff v Tower Insurance Limited[944], Gendall J found that there was no breach by the insurer as long as the insurer acted in good faith and no damages might be awarded.[945] In this case, the insured alleged that the insurer breached an implied duty of good faith because the settlement offered was inadequate and the insurer unreasonably delayed carrying out works and to make payment.[946] However, Gendall J took a significant stance by illustrating this implied duty in light of the surrounding circumstances as he stated that[947]:

> It must be accepted here that responsibility for this is not Tower's alone. One reason is the unique factor of the Christchurch earthquake sequence… Tower suggests it was consistently attempting to get experts on site to carry out further investigations, but says it was delayed in doing so by the plaintiffs. In particular, the plaintiffs did not allow Tower's experts access to the house.

Peter Havenga, who provided some examples from South Africa, considers the insurer's technical defence as a breach of the continuing duty of utmost good faith.[948] Although the doctrine of utmost good faith should be considered as a general and an interpretative principle for all matters of insurance contracts in the UK, relying on a technical defence is far more than the rationale of the doctrine of utmost good faith especially for business insurance, which may use a technical defence as both parties are professional, but there could be a room for it too in consumer insurance based on the level of the insureds' awareness.

In the Saudi jurisdiction, insurance regulations treat insurers' post-contractual duties of utmost good faith in settlement of claims in details by including that once any changes occur to disclosed clauses, communications information, claims filing procedures, or any other conditions of the policy, insurers have to notify consumers directly and immediately.[949] Moreover, article 52 of IMCCR provides detailed provisions about the insurer's duties during claims handling. Similarities can be seen between the Saudi approach and the approach in New Zealand in *Young v Tower Insurance Limited*[950]. However, the Saudi approach is more detailed by Article 52(a)-(j), as follows:

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[944] [2018] NZHC 704 (17 April 2018).
[945] Ibid [115] – [116], [125].
[946] Ibid [105].
[947] Ibid [119] – [120].
[948] Peter Havenga, 'Good Faith in Insurance Contracts – Some Lessons from Australia' (1996) 8 SA Merc LJ 75.
[949] Article 12(2) and (3) of ICPP. See also article 51 of IMCCR.
[950] [2016] NZHC 2956.

- Insurers are required to respond to claims in prompt manner, by article 52(a).
- Insurers shall provide all required documents to place a claim, by article 52(b).
- Insurers shall explain all steps about filing claims to the insured, by article 52(d).
- Insurers shall acknowledge the insured about receiving the claim, by article 52(c).
- Insurers shall notify the insured about any missed documents within 7 days from receiving the claim, by article 52(c).[951]
- Insurers shall inform the insured about the progress of the received claim, at least, every 15 working days, by article 52(e).
- Insurers shall handle the claim in a fair manner, which reflects the role of the doctrine of good faith, by article 52(f).[952]
- Insurers shall notify the insured in writing about the insurer's decision whether to accept or refuse the claim, by article 52(i).[953]
- Insurers shall explain to the insured how to appeal against the insurer's decision if the settlement is not accepted by the insured, by article 52(j).[954]

Article 44 of IRCICCL sets a general provision as a period limitation for insurers to settle insured's claims. This Article differentiates between the time limit for settlement of individual and business. Specifically, for individual insureds, the insurer shall settle the claim within 15 days from the day of receiving all required documents of the claim, and another 15 days may be added on giving reasons for this extension. For business insureds, the insurer shall settle the claim within 45 days from the day of receiving all required documents, and if any extension is needed, notice about this including reasons should be given.

Although the Saudi regulations have recognised in detail the insurers' post-contractual duties of utmost good faith during settlement of claim, remedies are not

[951] A similar provision is set by article 7 of UCMIP.
[952] Ibid.
[953] Ibid.
[954] Ibid.

discussed in case of breach these duties. Therefore, it is important to investigate the decisions of CRIDV in respect of the breach of the insurers' post-contractual duties. The only regulation that mentions a legal remedy is UCMIP. In terms of article 7, it states that if the insurer fails to settle the insured's claim within the time period, which is 15 days, and without justified reasons, damages can be awarded for any losses in relation to the insurer's breach.[955] CRIDV have widely recognised damages as a consequence of breach of the insurers' duties during settlement of the claim in all insurance disputes, including motor insurance. This is especially, where an insurer exceeds the time limit period unreasonably and breaches the provisions of article 44 of IRCICCL.[956]

To conclude, the UK approach takes into account the insurers' post-contractual duties during the settlement of claims. On the other hand, the Saudi approach has detailed and specific provisions covering these duties, which is similar to the modern approach in New Zealand. Both the UK and Saudi jurisdictions do not give specific remedies on breach of the insurers' duties. However, damages are commonly recognised in the Saudi jurisdiction whereas, in the UK, damages as a remedy is still uncertain.

9.5. Conclusion

The insurers' post-contractual duties are specifically addressed by the Saudi regulations unlike the UK approach where the insurers' post-contractual duties are not recoginsed by the modern regime.

The interpretation of the common law is still relevant but this depends on whether the doctrine of utmost good faith is accepted as an interpretative principle. This leads to assume that as the doctrine of utmost good faith may recognise implied contractual terms, the courts may impose implied terms in insurance policies regarding the insured's post-contractual duties. Different examples are provided

[955] See also, article 8(6) of UCMIP.

[956] See for example, decision no 121/R/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 41/R/1435H (2014) which was affirmed by the Appeal decision no 273/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 221/R/1434H (2013) which was affirmed by the Appeal decision no 112/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 78/R/1433H (2012) which was affirmed by the Appeal decision no 374/a/1435H (2014) of the Committees for Resolution Insurance Disputes and Violations in Riyadh; decision no 265/R/1434H (2013) which was affirmed by the Appeal decision no 151/a/1436H (2015) of the Committees for Resolution Insurance Disputes and Violations in Riyadh.

consistent with the new regime of the doctrine of utmost good faith being an interpretative principle. However, the scope of the insurers' post-contractual duties is still uncertain and needs further development by judiciary. This may include expanding the scope of these duties especially for consumer insurance, where consumers need to know what are the insurers' duties and their rights. In comparison, Saudi jurisdiction shows a significant level of recognition of the insurers' post-contractual duties. Remarkably, both jurisdictions show uncertainty regarding legal remedies. While the UK approach is totally uncertain about remedies especially damages based on the new position of the doctrine of utmost good faith after the enactment of IA, the Saudi approach applies damages widely and strictly deals with the insurers' breach and violations of Saudi regulations. However, it is recommended for both jurisdictions to set out specific provisions for remedies especially for consumer insurance policies.

CONCLUSION

Insurance contracts rely on the doctrine of utmost good faith in the UK and Saudi Arabia. Although there is no doubt about this aspect of insurance contracts, this area of law has been developed recently in both jurisdictions. The developments are significant especially in the UK, however, there is uncertainty in related issues especially about the interpretation of the doctrine of utmost good faith now in terms of the amended s 17 of MIA.

This study was undertaken to critically analyse insurance law with regard to the doctrine of utmost good faith in Saudi and the UK but was not intended to recommend replacement of the doctrine, this study intended to provide potential key proposals for the use of the doctrine of utmost good faith and to limit uncertainty in the law. This is because the recent reform in the UK was essential; however, the reform focuses on one party, the insured, rather than providing balance obligations on both the insurer and the insured. Producing recommendations is one of the possibilities of a comparative study and its final step, according to Siems.[957]

As this is a comparative study, an essential step is to use comparative analysis to evaluate Saudi law.[958] The study critically analyses, evaluates and explores significant developments of insurance law with respect to the doctrine of utmost good faith especially after the introduction of consumer protection in 2014 in Saudi Arabia. However, the study considers key proposals to have more specific and comprehensive law and regulations.

The aim of this thesis is to provide a comparative analysis of the doctrine of utmost good faith and mutual duties of insurers and insureds between the UK and Saudi insurance laws and regulations to develop recommendations for Saudi Arabia. This should accordingly contribute to the development of insurance law in Saudi Arabia. The critical analysis of the UK law is significant for this thesis, and accordingly, as

[957] Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 13.
[958] Ibid 23.

some areas of law are uncertain, this study contributes towards clarifying this uncertainty.

For both jurisdictions, this study intends to provide further predictability about the status of the doctrine of utmost good faith. For Saudi jurisdiction, this study proposed that adoption of business insurance regime including the duty of fair presentation of risks and its related remedies along with the duty of disclosure but on the inquiry basis rather than the disclosure basis; adoption of the duty of reasonable care to not make misrepresentation in consumer insurance and its related remedies; and abolish the duty of disclosure in consumer insurance. Further, it is proposed to have specific remedies for types of breach of insureds and insurers' pre and post-contractual duties instead of applying general contracts law in this specific area of law. Saudi insurance law should move forward by applying conventional insurance instead of Takaful due to several challenges in the application of Takaful insurance. For the UK jurisdiction, it is proposed that moving to the duty of good faith would limit the uncertainty of the law and raise the predictability of the meaning instead of the confusion between these two concepts, as these concepts were seen interchangeable. As well as, the UK insurance law does not consider the case of the insured's post-contractual duties and the insurer's pre and post-contractual duties; thus, this study proposed to consider specific significant duties for both parties; which would raise the predictability of the law and limit uncertainty especially for consumer insurance. Further specific outcomes are recognised below for each particular jurisdiction.

According to Siems, it is possible to suggest law reform to improve efficiency or fairness for the domestic law (in this study the Saudi law) and to offer advice for the foreign law (in this study the UK law) by taking differences between legal systems into account.[959] This perspective is applied in this study. The following points shall contribute to clarifying the law and providing a balanced approach to the interpretation of the doctrine of utmost good faith in both jurisdictions, and to highlight the areas that need to be addressed by further studies.

[959] Ibid 23.

A. Outcomes For the UK Jurisdiction

1- The interpretation of the doctrine of utmost good faith may be wider after the coming into force of IA by imposing further duties on both insureds and insurers. This is because the specific meaning of the doctrine remains uncertain especially after the abolishment of ss18-20 of MIA. This can be seen as an advantage when one examines the Law Commissions' proposal to use the doctrine as an interpretative principle for not only the interpretation of the duty of fair presentation, but also to impose implied terms affecting both insurers and insureds. Therefore, the courts may now be able to imply clear insured's post-contractual duties and insurers' pre and post contractual duties based on the doctrine of utmost good faith.

2- As chapter 4 shows the distinction between 'utmost good faith' and 'good faith' is not clear except for underlining the significance of the doctrine of good faith. However, from the practical point of view, this distinction was unremarkable especially from the points of view of clients of insurance companies. Accordingly, this study supports simply applying the doctrine of good faith. This is because, firstly, contract law does not generally rely on the doctrine of good faith except for a few types of contracts.[960] Secondly, this approach follows Lord Mansfield in *Carter v Boehm*[961]. Thirdly, it limits the argument about the differences between 'good faith' and 'utmost good faith' in practice especially for consumer insurance. Fourthly, the study does not discover that there is any significance of adding 'utmost' to 'good faith'. Fifthly, many academic and judicial views found that the terms 'good faith' and 'utmost good faith' are interchangeable.

3- One of the significant advantage of the modern reform in the UK is to apply consumer protection. As this study shows in chapter 5, it may not be reasonable to include micro-businesses and individual traders as large businesses and multi-national corporations. This study proposes to extend

[960] See for example, *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265*; Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm).
[961] (1766) 3 Burr 1905.

consumer protection provisions to include both micro-businesses and individual traders.

4- This study proposes to call for further studies in the future in respect of the application of business insurance noting how the courts treat individual trader and micro-businesses disputes, and how they deal with the way the different sizes of business comply with their insureds' duties. Examining reasonableness and the balance of bargaining powers between insurers and insureds is proposed for further studies.

5- According to chapter 5, the study proposes special rules for insurers in the case of contracting online by specifying particular requirements and to impose further protection for consumers by increasing their level of awareness.

6- As the study shows in chapter 6, in terms of s 4 and 6 of IA, the interpretation of 'senior management', 'reasonable research', and 'readily available' regarding the insurer's and insured's knowledge is uncertain. The study proposes that courts may take a narrower approach in order to limit the interpretation of the insured's and insurer's knowledge especially for large businesses and multi-national corporations, where the decision involves several parties and persons.

7- Chapter 6 discusses that the rules for contracting out of the regulations do not apply for consumers, only businesses. The study looks at the conduct of insurers with individual traders and micro-businesses, noting they do not have the extent of experience of large businesses and are therefore more similar to consumers. Accordingly, this study proposes to exclude micro-businesses and individual traders from the application of the contracting out provisions. It can be said that s 17 of IA contains the requirement of transparency with regard to contracting out; however, this requirement is not enough to protect, for example, consumers, and because of similarities between the position of consumers and micro-businesses and individual traders, this proposal is reasonable.

8- Abolishment of avoidance by the insurer allows room to adopt a new approach. Payment of damages on breach of the doctrine of utmost good

faith is widely accepted by other jurisdictions such as Australia and New Zealand. Currently, there are no real barriers to the courts granting damages awards especially if the courts would now follow the Law Commissions' approach relying on the doctrine of utmost good faith as an interpretative principle. As chapter 4 illustrates, the doctrine of utmost good faith may be seen to impose implied terms and duties in insurance contracts, so any breach can be considered as a breach of an implied term, and damages may be awarded as a consequence of a breach of the contract.

9- As chapter 6 shows, termination is proposed to be the remedy for non-deliberate or reckless breach especially for micro-businesses and individual traders as provided under CIDRA, as both micro-businesses and individual traders are in a similar position to consumers in respect of experience, level of awareness, and having limited bargaining powers.

10- The study proposes in chapter 7 several that the insureds' post-contractual duties of utmost good faith could be implied in insurance contracts. These duties are the insured's duty to provide required documents, the insured's duties to use the subject of the insurance contract in good faith, and the insured's duties during the settlement of claims.

Chapter 7 discusses the Supreme Court's decision in *Versloot*[962] not to include fraudulent devices under the rule of fraudulent claims. The study proposes that the use of fraudulent devices be considered as breach of the insured's post-contractual duty of 'utmost' good faith, especially in business insurance.

The study further proposes that remedies upon breach of the insureds' post-contractual duties of utmost good faith should be proportionately and termination. The impact of making the duties implied terms would result in the possibility of an award of damages for breach of the insurance contract.

11- As the study shows in chapter 8, it is proposed to include insurers' pre-contractual duties of utmost good faith as implied terms of insurance contracts, as the doctrine of utmost good faith has a reciprocal effect for

[962] [2016] UKSC 45, [2017] AC 1, [2016] 3 WLR 543.

insurers and insureds. The pre-contractual duties are the insurers' duty of disclosure of material facts that may impact the insured's position; the insurers' duty to inform the insureds' about the consequences of breach of the insurance contract especially for consumer insurance; and the insurers' duty to ensure the accuracy of the insureds' disclosure. Again, the study proposes that damages could be sought for breach of this duty if it is considered as implied term.

12- Chapter 9 further shows that the insurers' post-contractual duties of utmost good faith can also be implied in insurance contracts including the insurer's duties during the claim investigation, the insurers' duties to act in good faith when exercising their discretions, powers, and rights, and the insurer's duties during the settlement of claims. Again, the study proposes to accept damages as the impact of implying the duties to allow damages to be claimed for the breach of this implied term.

B. Outcomes For Saudi Jurisdiction

1- Takaful insurance law should not be recognised in Saudi Arabia. The study shows that the donation basis of Takaful insurance does not comply with the approach of Saudi laws and regulations such as LSCIC, IRLSCIC, IMCCR, and ICPP, which are based on commercial law and regulations. Consequently, there is a contradiction in the Saudi jurisdiction, on the one hand. On the other hand, there are many difficulties and challenges in Takaful insurance. The prohibition of conventional insurance goes back to the 1970s, and the law makers should take into account the views of modern Islamic scholars throughout these years. Islamic scholars in Saudi Arabia currently are much more open to accept changes and to appreciate society's needs. Significantly, this study proposes to apply conventional insurance instead of Takaful insurance in Saudi Arabia, as the nature and the basis of Takaful insurance challenge the existence of significant duties such as the duty of disclosure.

2- The study proposes to the law makers and SAMA to have a unified and comprehensive insurance law that includes legal concepts, rights, and duties instead of developing several regulations. This change is important because,

firstly, it should limit repetition and avoid contradiction. Secondly, it is significant for CRIDV when solving insurance disputes. Thirdly, it is also significant for contracting parties especially consumers to have easier access to their rights and duties. Fourthly, academics can study insurance law appropriately and develop further discussions and studies. The study also proposes that the law makers recognise the invalidity of insurance provisions of CCL 1931, as chapter 2 shows that this law is in reality invalid, old, not clearly understood, and it has been used only as a guide for arbitrators.

3- Saudi laws and regulations and Sharia principles require the existence of the doctrine of good faith. However, Saudi laws and regulations fail to explicitly state this requirement unlike the duty of disclosure. The study proposes to recognise the doctrine of good faith by a clear wording especially in terms of consumer protection under ICPP.

4- Unlike the laws and regulations, CRIDV recognise the doctrine of utmost good faith. However, this study finds no significant need to distinguish between 'good faith' and 'utmost good faith' under Sharia law, as the root of the doctrine of good faith is accepted to a high standard by Sharia law. This study proposes to consider simply 'good faith' because the distinction between these doctrines gives rise to several concerns when compared to the UK jurisdiction. Accordingly, Saudi laws and regulation should learn from the UK experience to prevent the same difficulties as long as Islamic principles can support this conclusion.

5- As the study shows in chapter 5 and 6, the Saudi approach has been remarkably improved by applying consumer protection to the insurance industry. However, the disadvantage is that this approach does not differ between consumers and businesses. Accordingly, this study proposes to learn from the UK jurisdiction. It is proposed that consumer insurance should not include small, medium, and large businesses and multi-national corporations, but it is proposed that micro-businesses and individual traders should be included under consumer protection provisions especially for the Saudi insurance industry where the insurance industry is modern and the awareness level is still modest.

6- As this study proposes to adopt the UK experience to distinguish between consumer and business insurance, this study also proposes to adopt a similar approach as in the UK of applying the duty of reasonable care to not make misrepresentation and abolish the duty of disclosure for consumer insurance. The study proposes to adopt the duty of fair presentation of risks for business insurance based on enquiry rather than disclosure.

7- As shown in chapter 6, it is put to the law maker and SAMA to consider provisions about physical and moral hazards which include previous refusals, claims history, criminal conviction excepts those considered as spent based on Saudi law, dishonesty, and the insured's financial status for business insurance similar to the UK. This study also proposes to the law maker and SAMA to consider the knowledge of the insurer and insured by reforming article 42 of IMCCR 2008 which only refers to the insured's knowledge relying on a 'reasonable person' test. Although this test is accepted for consumer insurance, it is too basic for business insurance. Learning from the UK experience would be significant for Saudi insurance industry especially by learning from s 4 and 6 of IA.

   As far as chapter 6 is concerned, the study suggests to the law maker and SAMA to recognise the insurer's right of waiver in a specific provision such as article 84 of IRCHIL 2014 which recognises the case of waiver; however, this regulation is limited to cooperative health insurance and is not for all types of insurance.

8- Saudi laws and regulations provide detailed provisions about insurers and insureds' duties, but they fail to provide legal remedies upon the breach of the duties. This approach reflects uncertainty and lack of predictability when resolving insurance disputes. However, CRIDV apply numerous legal remedies including damages, avoiding liability for the insured, termination, returning premiums, and reconciliation. The study proposes that these remedies should be codified to maintain stability and predictability in the insurance industry.

   The study proposes that CRIDV should maintain a balance of power between contracting parties especially for consumers as the lack of

experience in negotiation may impact their rights. Otherwise, the study proposes to exclude consumers' disputes from the application for reconciliation.

It is proposed as well to consider proportionate remedies similar to the model that is applied in the UK jurisdiction by differentiating the remedies in case of deliberate and reckless breach and innocent or careless breach of both consumer and business insurance.

9- As chapter 7 shows, it is proposed to the law maker and SAMA to recognise clearly the insured's post-contractual duties of utmost good faith including the insured's duty to provide required documents, the insured's duties to use the subject of insurance contract in good faith, and the insured's duties during the settlement of claims. Although CRIDV decisions considered some of these duties, CRIDV shall not be bound by any previous CRIDV decisions when resolving future disputes, as was considered in decision no 22/D/1435H (2014) which was affirmed by the Appeal decision no 257/a/1436H (2015).

As far as chapter 7 is concerned, although Saudi laws and regulations define fraud and how to deter it, they fail to provide appropriate legal remedies. Accordingly, this study proposes to learn from the UK experience by considering s 12 of IA that is about legal remedies in case of fraudulent claims.

10- As the study shows in chapter 8, it is proposed for the law maker and SAMA to specify further duties to the insurers' pre-contractual duties of utmost good faith including the insurers' duty to inform the insureds' about the consequences of breach of the insurance contract, and the insurers' duty to ensure the accuracy of the insureds' disclosure especially for consumer insurance. The study also proposes to consider specific legal remedies on breach of the insurers' pre-contractual duties of utmost good faith by including termination, return of premiums paid, and an award of damages.

11- As the study shows in chapter 9, it is proposed for the law maker and SAMA to specify further duties to the insurers' duties to act in good faith when exercising their discretions, powers, and rights. The study also proposes to

consider specific legal remedies upon breach of insurers' post-contractual duties of utmost good faith by including termination, return premiums of paid, and payment of damages.

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