Global Business & Development Law Journal

Volume 13 | Issue 1 Article 3

1-1-2000

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I. INTRODUCTION

Commercial laws[1] and civil laws[2] in the Republic of South Korea (Korea) are the major authority[3] governing Korean insurance contracts. The laws originated

1. Korean commercial laws are mainly incorporated in the Commercial Code, Law No. 1000 (1962), as amended No. 5591 (1998) [hereinafter Commercial Code], and its various supplementary laws and provision. The Korean Commercial Code, under Article 1, is supplemented by the Civil Code and corresponds to the United States [hereinafter U.S.] Uniform Commercial Code [hereinafter UCC]. The Korean Commercial Code is based on the merchant status of the participants and not on the nature of the transaction. Rudolp B. Schlesinger et al., COMPARATIVE LAW, 542 n.2 (1988). Thus, the Korean Commercial Code is not as complete and sophisticated in dealing with complicated or strategic commercial issues, nor is it as flexible and responsive to the perceived needs of the commercial and legal communities, when compared with the U.S. U.C.C. Jae Yeol Kwon, *An Isolation in Systems of Law: Differences Between the Commercial Code of U.S. and Korea*, 29 LOY. L.A. L. REV. 1095, 1100 (1996). The Korean Commercial Code includes provisions about commercial transactions (Book II), corporations (Book III), insurance (Book IV), and maritime commerce (Book V). It does not, however, include provisions about international trade, which is left to be subject to international trade laws and practices, or provisions about the negotiable instruments, which are governed separately by the Bills of Act, Law No. 1001 (1962), as amended (1995) and the Checks Act Law, Law No. 1002 (1962), as amended (1995). The U.S. U.C.C. provides for the sale and lease of goods, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, bulk sales, warehouse receipts, bills of lading and other documents of title, investment securities, and secured transactions.

2. In Korea, civil laws are mainly incorporated in the Civil Code, Law No. 471(1958), as amended No. 4199 (1990) [hereinafter Civil Code] which has the provisions concerning contracts, torts, property and the sale of goods. As the major source for laws governing insurance contracts the Civil Code and the Commercial Code are supplementary, and the latter prevails over the former because the latter is a special law, compared with the general status of the former.

3. In Korea, there are other sources for laws governing insurance contracts in addition to the Commercial Code and the Civil Code, such as various kinds of special laws and case laws. Although case law does not play such a positive role in the Korean legal system, compared with the U.S. system, because the doctrine of *stare decisis* is not strictly applied in Korea, the prejudications of the higher courts predominantly influence the lower courts.

from continental civil laws.[4] The relevant provisions in the Commercial Code are Book III (corporate law), Book IV (insurance contract law), and Book V (maritime law). These laws may be characterized as a blend of continental civil laws and Anglo-American laws.[5] Major parts of Book IV come from German, Japanese, United States (U.S.), and British insurance contract laws, with the latter referring specifically to the Marine Insurance Act of 1906. There is no fundamental difference between United States and Korean insurance contract laws from a theoretical perspective. The civil law regulating commercial contracts is basically indistinguishable from common law, even though they are quite different from other legal domains. There is, however, a unique feature in Korean insurance contract laws; namely, it often invokes U.S. insurance laws and case precedents to interpret and supplement Korean insurance contract law provisions that are specifically based on U.S. laws.

Despite the similarities, there are some major, formal differences between Korean and U.S. laws. First, while U.S. laws vary from state to state,[6] all Korean laws are enacted by the national legislative body. Second, while the United States invokes insurance laws to regulate insurance contracts in both the personal and commercial domains, Korea uses *insurance contract laws* to regulate insurance contracts and *insurance business law* to regulate the insurance business. This article gives a broad review of Korean insurance contract laws in life and non-life insurance contracts. Legal characteristics, third party insurance contracts, general insurance clauses, representation and content of the insurance contracts, excluded risks, and the legal situation of the insured is also generally discussed. Finally, there is a general comparison between Korean and U.S. laws, in particular, noting the differences in the areas of misrepresentation, change or increase of the risks, and the legal status of an insured.

4. Because Japanese ruled over Korea from 1910 to 1945, the Korean Commercial Code and the Civil Code have historically originated from Japanese Codes, which in turn originated mainly from German laws.

5. The corporate law in Book III is substantially affected by U.S. law as well as German law, and the maritime law in Book V is enacted by adopting the so called Hague-Visby Rules, Hague Rules, and the Hamburg Rules.

6. In the United States, "a debate has been waging since the passage of the McCarran-Ferguson Act" in 1945 on whether regulation at the federal level would be more effective than that at the state level, "With the passage of the Act, each state was granted the authority to regulate the insurance industry in its jurisdiction." Each of the 50 states, the District of Colombia, and the four territories of the United States has its own insurance department, with actuaries, accountants, and insurance examiners among its employees. The state insurance department is continually involved with regulatory development and insurer financial reviews." An insurance company must be authorized by the states insurance department before it may conduct business there. These licensing requirements include satisfying the minimum capital and surplus requirements for all the lines of business it wishes to sell in that jurisdiction. On an ongoing basis, the insurer must comply with the rate-making and the financial reporting laws of that state. Thus, a company operating in more than one state must keep up with the specific laws of each particular state." The key advantage of federal regulation is the uniformity of laws affecting an insurer operating in multiple jurisdictions. "Since companies operating in more than one state must adhere to the laws and financial reporting requirements of each state, federal regulation would greatly reduce the time and expenses involved with compliance." For the uniformity of regulation in the United States, the National Association of Insurance Commission (NAIC), a private, non-profit organization, "has been actively involved in model legislation, most recently in investment practices and risk based capital requirements." Thus, most states subsequently adopting these statutes are becoming more uniform in regulation, regardless of the lack of federal regulation." See Jean Lemaine &Krupa Subramanian, Insurance Regulation in Europe and the United States, 34-35 (1997).

II. AN OUTLINE OF INSURANCE REGULATIONS IN KOREA

A. *Regulation of Business*

There are two main bodies of law regulating insurance in Korea: the Insurance Business Act,[7] which regulates and supervises the insurance business as public insurance law; its counterpart in the private insurance law, the Insurance Contract Law.[8] In addition, there are special laws that apply to public insurance programs that are managed by the government and mutual-aid insurance associations. The associations are operated by members of the association, but supervised by a governmental agency under a specific law that regulates that particular association. For example, special laws control automobile accident compensation insurance,[9] nuclear accident compensation insurance,[10] export insurance,[11] postal life insurance,[12] workmen's compensation insurance,[13] medical insurance,[14] and soldier's life and accident compensation insurance.[15] More detailed regulatory measures are announced by Presidential Decrees and Minister's Ordinances.[16] As in most other countries, nearly every aspect of the Korean insurance industry is closely supervised by the government because of the significant and far-reaching effects the industry has on the public.[17]

7. Insurance Business Act, Law No. 973 (1962), as amended No. 5591 (1998) [hereinafter Insurance Business Act], is composed of general provisions (Chapter I, arts. 1-4), qualification of the insured (Chapter II, arts. 5-143), regulations of insurance solicitation (Chapter III, arts. 144-159), the Insurance Supervisory Service, insurance arbitration, the insurance guarantee fund (Chapter IV, arts. 160-197), insurance organization (Chapter V, arts. 198-207), supplementary provisions (Chapter VI, arts. 208-210), and penal provisions (Chapter VII, arts. 211-229). The Insurance Business Law also has some characteristics of private insurance law to regulate the organizations of the insurer, marketing and underwriting in insurance businesses, transfer of insurance contracts, and other matters related to insurance contracts, as a special law to the Commercial Code.

8. Commercial Code, *supra* note 1, at Chapter 4.

9. Automobile Accident Compensation Security Law, Law No. 1314 (1963), as amended No. 5104 (1991). This law requires all automobile owners to purchase this insurance. The required insured amount is low.

10. Nuclear Accident Compensation Security Law, Law No. 2094 (1969), as amended No. 4940 (1995).

11. Export Insurance Law, Law No. 2063 (1968), as amended No. 5454 (1997).

12. Postal Insurance Law, Law No. 3610 (1982), as amended No. 5563 (1998). The public may purchase an inexpensive life insurance operated by the Ministry of Communication through the post office.

13. Workmen's Accident Compensation Act, Law No. 1438 (1963), as amended (1989).

14. Medical Insurance Act, Law No. 2942 (1976), as amended (1987).

15. Soldier's Insurance Law, Law No. 1036 (1962), as amended No. 5482 (1991). *See* Eun Sup Lee & Jeong-Hwa, *Regulation of the Insurance Industry in Korea*, 6 J. INT'L L. & PRAC. 35 (1997).

16. The Enforcement Decree of the Insurance Business Law, Presidential Decree No. 8865 (1978), as amended No. 15752 (1998).

17. The Korean insurance regulatory system follows the "substantial supervision" model, which involves continuous governmental supervision in all business activities, from the licensing of insurance companies to the individual business contacts with policyholders. In addition, there is also the "public announcement" model and the "designated authority" model. In the public announcement model, insurance companies are required to make periodic public notices of their balance sheets and other business reports, but other matters are left to self-regulation. This system is the most passive regulatory system and is seldom practiced today. Historically, this model was practiced in the United Kingdom from the 1870s to the 1930s. That is, the Life Assurance Companies Act of 1870 and the amending statutes until the 1930's only required that insurers deposit a sum of money with the court as security. In the designated governmental authority model, the insurers must satisfy certain requirements prescribed by law, and then the permission to do business becomes automatic without any further governmental interventions. Under this system, the government's role is limited to determinating the

While the Insurance Business Act only regulates the business practices of private insurance companies, Insurance Contract Law is a part of the general commercial law. It regulates the contract making process in both general commercial law and insurance business.

Three institutions are responsible for supervising the insurance business in Korea: the Minister of Finance and Economy (the "Minister"), the Financial Supervisory Commission (the "Commission"), and the Financial Supervisory Service (the "Service") as a sub-agency of the Ministry. The Minister establishes and executes insurance policies, grants licenses to those qualified to engage in the insurance business, permits the establishment of domestic business offices by foreign insurers,[18] authorizes dissolution and mergers, approves the conclusion of insurance contracts with persons who are not insurers, and orders the increase or decrease of the capital or the foundation fund of an insurer.[19]

The Commission,[20] a legal entity under the office of the Prime Minister and created under the Law of Establishment of the Financial Supervisory Institute, enacts and modifies regulations to supervise financial institutions and regulates their business.[21] In addition to regulating insurance brokers, the Commission is also in charge of regulating an insurer's concurrent operations of other businesses[22] as well as regulating the insurer's reserves and use of profits by the reappraisal of sales.[23]

requirements for a business license and for continued operation, Eun Sup Lee & Jeong-Hwa, *supra* note 15, at 35-36, n.18.

18. In granting licenses for the insurance business for foreign insurers, Korea has adopted the national or most-favored-nations treatment under the spirit of the Uruguay Round Agreement on Trade-Related Services. For example, Article II-I of that Agreement states "with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service supplies of any other country," and Article XVII-I states that "each Member shall accord to services and service suppliers of any other Member with respect to all measures affecting the supply of services, and treatment no less favorable than that it accords to its own like services and service suppliers. It is usually required for foreign insurers seeking admission into a market to prove that they are lawfully organized and licensed in their respective home jurisdictions.

19. Insurance Business Act, *supra* note 7, arts. 4-6, 20, 50-2, 116, 201.

20. The Insurance Supervisory Commission is composed of nine commissioners: the Governor, the Vice-Governor, the Vice-Minster of Finance and Economy, the Vice-President of the Korean Bank, the President of Deposit Corporation, the Representative from the business field, and three experts recommended by the ministers concerned and the commission's Governor, according to the Law of Establishment of the Financial Supervisory Institute, Law No. 5490, art. 4 (1997).

21. *See id.* art. 17.

22. In Korea, an insurer, in principle, is prohibited from operating any business other than insurance, except the following: (a) The business of acting as an agent of another insurer with regard to transactions insurance business-related of another insurer or intermediating in such transactions, and (b) a business incidental to the respective insurance business.

23. The Commission has the authority to amend the articles of incorporation and basic documents, such as documents revealing the method of business, to operate insurance-related businesses in a foreign country. The Commission also has the authority to increase the capital of a foundation fund, the right to issue an order, and the right to supervise the insurance business. Insurance Business Act, *supra note* 7, arts. 9, 5-2, 97, 150-2, 7, 24, 17, 35, 100, 112, 116, 14, 15, 16, 18,19-2, 20-2, 107, 128, 108, 111, 113,142, 143, 181, 12-4, 20, 20-2, 151, 199, 201, 207, 149, 147, 96, 138, 6-3, 93.

The Service, a special legal entity without paid-in capital, supervises the insurance business[24] under the direction of the Commission. Except for certain fundamental matters like granting business licenses, the Minister of Finance and Economy entrusts the Service with full authority, particularly in matters of insurance supervision.[25] The Governor of the Service may re-delegate much of his authority under the law to non-profit insurance associations, such as the Korean Life Insurance Association and the Korean Non-life Insurance Association, in order to foster self-regulation within the industry. The Service is responsible for inspecting the insurers' business practices and finances.[26] Inspections may extend to all aspects of business operations, including: insurance solicitation,[27] registration of actuaries and adjusters,[28] permission given to insurance brokers,[29] and inspection of the insurers, insurance agents, adjusters, and related organizations.[30]

B. Insurance Contract Laws

Insurance contract laws which regulate legal relationships between insurers and policyholders or the insured in private insurance, especially in for-profit insurance, are incorporated in Book IV of the Commercial Code.[31] The Commercial Code is composed of general rules in Chapter I,[32] provisions pertaining to non-life insurance in Chapter II,[33] and provisions pertaining to life insurance in Chapter III.[34] Although Book IV of the Commercial Code pertains to laws regulating commercial transactions,[35] it is important not to view it simply as a part of commercial transaction laws, but rather as a special series of provisions in the Commercial Code that are intended to address the unique characteristics of insurance contract laws described below.

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24. If it is deemed necessary for establishing a sound insurance transaction order and for the protection of policyholders in carrying out affairs, the Governor of the Insurance Supervisory Service may issue to insurers any order necessary for supervision. *Id.* art. 181.

25. If there is any fact violating this Law or an order of direction issued or made under the Laws, or if it is deemed necessary for the public interest or the establishment of a sound insurance transaction order, the Governor of the Insurance Supervisory Service may conduct an investigation of insurers, policyholders, or other relevant persons. *Id.* art. 182-1.

26. *Id.* art. 182.

27. *Id.* art. 45.

28. *Id.* art. 202.

29. *Id.* art. 150.

30. *Id.* arts. 14, 151, 201.

31. Every Korean code is composed of Books which provide regulations about various subject matters. Books are grouped into Chapters which are in turn composed of Articles.

32. Commercial Code, *supra* note 1, art. 638-64 includes provisions about the definitions of an insurance contract, formation of a contract, delivery of an insurance policy, third party insurance contracts, retroactive insurance contracts, payments of premiums and claim amounts, termination of a contract, change of risks, initiation of an insurer's liability, notification of the occurrence of covered risks, excluded risks, etc.

33. *Id.* arts. 665-726 includes provisions about general terms, fire insurance contracts, transportation insurance contracts, marine insurance contracts, and automobile insurance contracts.

34. *Id.* arts. 727-739 includes provisions about general terms, life insurance contracts, and injury insurance contracts.

35. Commercial Code, *supra* note 2, arts. 46, 47.

Under Korean insurance contract laws, the Commercial Code classifies insurance contracts as one type of a commercial transaction..[36] Some scholars argue that an insurance contract does not have the characteristics of a commercial transaction.[37] Insurance is a socioeconomic device through which multiple economic actors come together, taking advantage of the law of large numbers, to maximize the homogeneity of risk by providing reserve funds and thus preparing for fortuitous losses. As a socioeconomic convention, therefore, an insurance contract cannot be concluded by anyone other than a legitimated social actor. Thus, an unlicensed insurer who does not meet the formal qualifications prescribed by law[38] cannot serve society in this capacity. Consequently, the principle of *freedom of contract* has only limited applications to insurance contracts.[39] Insurance contracts are of a special legal nature compared to other commercial contracts. Their characteristics will be explained in three ways, as outlined below.

First, insofar as it is a contract in the standard sense, an insurance contract is an individual liability contract concluded between an insurer and an insured. Insurance satisfies the economic demand of the injured person by giving him access to a reserve fund raised through the joint contributions of multiple parties. The insured is thus comprised of a group of people who have achieved a degree of homogeneity of risk among themselves. In other words, the formation of insurance groups is theoretically stimulated by the socioeconomic demand to diversify risk. Other than the legal implications, private insurance is identical to mutual insurance in this respect. Because insurance is assumed to protect risk-bearing groups (*die Gefahrgemeinschaft*), insurance contract law should likewise be seen as a type of collective law that applies simultaneously to all insurance contracts. It is for this reason that insurance contract law imposes the duty of disclosure on the insured or the policyholder[40] and takes a very conservative approach to the question of change of contractual or covered risk.[41]

Second, insurance companies are generally concerned with finance, and hence, the public welfare. Thus, the purpose of insurance contracts is not only to coordinate private interests among potentially conflicting parties, as other business contracts do, but also to promote public welfare. Therefore, unlike ordinary bank savings, the redemption of jointly reserved funds from an insurance policy is not guaranteed. Since the ultimate goal of an insurance company is to meet the economic demand triggered by accidental casualties, it is very collective in its nature. As a result, an insurance contract is regulated by extensive supervisory laws and regulations, including the Insurance Business Act.

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36. *Id.* arts. 46, 47.
37. *See infra* note 57 and accompanying text.
38. In Korea, the insurer shall be limited to mutual companies or joint stock companies in case of a domestic insurer, and there is no qualification for it in case of a foreign insurer. Insurance Business Act, *supra* note 7, art. 5. The insurer should commence operations after paying its capital or foundation fund not less than US$11.6 million in the case of life insurance and US$34.9 million in the case of non-life insurance. *Id.* art. 6.
39. *See id.* art. 4.
40. Commercial Code, *supra* note 1, art. 651.
41. *Id.* arts. 652, 653.

For example, the Insurance Business Act restricts the qualification of the insurer,[42] regulates the general law of the insurance contracts, and prevents policyholders' interests (secured by law) from being undermined by general insurance clauses while protecting those public interests involved in the insurance.[43]

Third, due to the collective and public nature of insurance, the principle of freedom of contract required in a capitalist society, should be limited in its application to insurance contracts. Rather, legal considerations are needed for the protection of public interests. The Commercial Code specifies what is called "the principle of prohibiting disadvantageous changes to the insured."[44] This qualifies insurance contract law as a somewhat mandatory regulation because it prevents a contract from being changed contrary to the interests of the insured even under a special agreement. The purpose of the principle is to protect the unsophisticated individual who is not knowledgeable about individual insurance; its application should not be extended to business insurance types such as marine insurance or reinsurance.[45]

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42. Insurance Business Act, *supra* note 7, arts. 5, 6. In Korea, the requirement to enter the insurance market has traditionally been very strict. Since 1997, considerably relaxed standards have been applied in terms of entry requirements for the insurance business. For example, an applicant for a new insurance business license is no longer required to meet the stringent Economic Needs Test (ENT), which had been in effect since 1994. The abolishment of the ENT in 1997 was part the Korean government's agreement with the OECD. This means that new life or non-life insurance companies will be granted permission to enter the market, so long as the minimum capital requirement is met.

Entry requirements vary depending on how the applicant is classified. Applicants for a new insurance business license have the option to seek the following classifications for qualification. First, an eligible applicant may be a corporation that is a publicly traded company with capital of more than 100 billion won (US$83 million) or holdings worth more than a 10% stake in any existing life insurance firm. Second, financial companies, banks with capital of more than 700 billion won (US$583 million), securities companies with capital of at least 300 billion won (US$250 million), or insurance companies with total assets of at least 1.5 trillion won (US$1.3 billion) are eligible to establish a new insurance company. Third, individuals who possess more than a 10% stake in any insurance company that existed for the preceding two years may establish a new insurance company. Fourth, a foreign life of non-life insurance company may establish an insurance company in Korea as long as it produces confirmation of sound financial status from its home insurance industry regulators.

Herein, a foreign insurer is an insurance company or an underwriter organized under the laws of a country other than Korea and presently doing insurance business in a country other than Korea. Regardless of whether or not an insurer is a foreign or a domestic entity, the Minister of Finance and Economy has the discretionary power to increase or decrease its capital requirements at any time. Eun Sup Lee & Jeong-Hwa, *supra* note 15, at 38–40.

43. Commercial Code, *supra* note 1, art. 663.

44. *Id.* art. 663.

45. The Provisory clause of Article 663 in the Commercial Code clearly stipulates the range of the applicability of the principle.

III. LEGAL CHARACTERISTICS OF CONTRACTS

A. *Definition of an Insurance Contract*

The fundamental purpose of insurance is to eliminate or reduce the uncertainty of economic risk. Insurance contracts originated from marine insurance and have developed into a variety of fixed-amount types of insurance, including life insurance and non-life insurance. This fact complicates insurance contract theories. Consequently, it is very difficult to explain the concept of insurance contract from a single viewpoint.[46]

Some scholars exclude life insurance from the domain of insurance while others suggest that the theoretical definition of insurance is useless and that only the characteristics of insurance need to be dwelt upon.[47] The latter insist that definitions of insurance are relative and, hence, not given to a single theory.[48] In general, there is an abstract definition of insurance contracts that is distinguishable from other contracts and is based on research into the legal characteristics of insurance contracts.

The Commercial Code[49] stipulates that an insurance contract becomes valid when one of the contracting parties (policyholders) pays the premium and the other party (insurer) agrees to provide the insured with a claim amount or other indemnification in case of a fortuitous loss to the property or life of the insured

46. There are various theories concerning the concept of the insurance contract. Important theories defining insurance contracts in Korea are as follows. These theories come from Germany and other continental countries:

(1) Theory of Loss-Indemnification proposes that the purpose of an insurance contract is to compensate for covered loss occurring to the insured. The theory had been dominant during the period of initial development of private insurance, at which time only non-life insurance had been contracted. However, the theory became obsolete as life insurance came into existence.

(2) Theory of Supply for Economic Demand proposes that the purpose of an insurance contract is to suffice the economic demand arising from covered risks. The theory focuses on the economic goal of an insurance contract.

(3) Techniques Theory proposes that an insurance contract is a contract by which the insurer agrees to pay a specified amount of money to the insured, based on the premium calculated from the probability that the insured will have an expected accident. The theory focuses on the technical aspect of insurance.

(4) Dualistic Theory proposes that an insurance contract is an independent onerous contract by which the insurer agrees to pay an agreed amount of money or compensate for a loss by covered risks. The theory comes from the argument that it is difficult to derive a unified concept of life and non-life insurance.

(5) Theory of Payment of Certain Amount proposes that an insurance contract is a contract by which the insurer agrees to pay a specified amount of money to the insured with the receipt of the premium on the condition that a specified accident happens. The theory is thought to be relatively faultless in that the objectively approved legal effect of an insurance contract is good enough for the discussion of the concept of the insurance contract. Today, for an insurance contract, some scholars propose the theory of property supply, which states that the claim be paid in kind.

47. Seung Kyu Yang and Kil Jun Park, Commercial Laws (in Korean) 양승규, 박길준, 상법요론 396 (1986).

48. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW, A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 3-5 (1988).

49. Commercial Code, *supra* note 1, art 638.

(beneficiary). It can be inferred that life insurance and non-life[50] insurance are applied uniformly in Korean insurance contract law.

B. Legal Characteristics

An insurance contract has the following eight legal characteristics. First, an insurance contract is an onerous and bilateral contract. An insurance contract is by definition onerous because the policyholder pays the premium and the insurer promises to provide a certain amount of money in case the covered events occur. An insurance contract is bilateral[51] in that the policyholder is bound to pay the premium while the insurer must provide an insurance amount in return. Because the liability for the reimbursement of the insurer is activated by the occurrence of covered events, there are two conflicting theories about the nature of the insurer's liability once the insurance period passes without the occurrence of any covered accidents. One theory pertains to risk assumption, which suggests that an insurance contract covers the assumed risks only in the event of their occurrence. The other theory is that of claim amount payment, which suggests that the insurance contract requires the payment of a certain amount, regardless of whether a covered event occurs.

In keeping with the socioeconomic view of insurance, the answer should be sought from the collective nature of the insurance contract because an individual insurance contract is connected to insurance groups consisting of multiple parties faced with homogeneous risks. Thus, the principle of equality does not apply to the payment of the insurance amount in an individual insurance contract, but rather to the overall context. An insurer's liability is thus derived from the theory of claim amount payment. Therefore, an insurance contract should be interpreted from the combined perspectives of both individuality and collectivity.[52] An insurance contract is not conditional because a concluded insurance contract becomes effective immediately upon its conclusion.[53]

Second, an insurance contract is an informal and consensual contract[54] because it is concluded upon the expression of intent by the two involved parties[55]

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50. In Korea, the combined influence of voluntary specialization by insurers and statutory regulations like the Commercial Code and the Insurance Business Law led to the widespread recognition of two types of insurance "fire and marine" and "life" insurance. This recognition is different from the United States, where there are three main classes of insurance, commonly referred to as "fire and marine," "life and accident," and "casualty" insurance. *See* KEETON & WIDISS, *supra* note 48, at 18.

51. In the United States, an insurance contract is regarded as a unilateral contract. WILLIAM R. VANCE, HANDBOOK ON THE LAW OF INSURANCE 94 (3rd ed. 1951).

52. *See* Supreme Court Case 1966.10.21. 66/1458.

53. *See* Civil Code, *supra* note 2, art. 137.

54. With respect to this matter in the United States, there are 30 ways to enforce either the outright restrictions against oral contracts without causing the losses to fall generally on insurance purchasers rather than on insurance companies. In some states, statutory provisions, such as those that require certain standard provisions in specific types of insurance coverage or those that regulate the manner in which a policy is to be executed have, on rare occasions, been interpreted as implicitly forbidding oral agreements for insurance. In a few states, prohibitions against oral contracts, which are imposed only rarely in relation to property insurance, are applied somewhat more frequently in relation to life, health, and accident insurance. KEETON & WIDISS, *supra* note 48, at 50, 51. In the field of property insurance, a marine insurance contract is required to be

and not at the point when payment is rendered. Although it is not a legally required step to validate the agreement, in practice, however, an insurance purchaser fills out a formal insurance application form. The insurance policy is then issued when the parties express the intent to form a contract, at the time when the contract concludes. The Commercial Code stipulates that the liability of the insurer begins after the insured makes the first premium payment.[56] Thus, the moment liability begins is different from the time the insurance contract takes effect.

Third, insurance is one kind of a commercial transaction. The Commercial Code states that insurance is a commercial transaction made in the pursuit of profit. This means that the insurer is engaged in the business of concluding an insurance contract. Some scholars reject this commercial transaction view in theory because of the social and public nature of the insurance contract.[57] Hence, an insurance contract concluded by a mutual insurance company is not a commercial transaction. Nevertheless, the Commercial Code is applied *mutatis mutandis* to mutual insurance if the nature is not contradictory.[58]

Fourth, an insurance contract is a kind of allegorical contract. An insurance contract is allegorical because the insured amount is rendered in the event of a fortuitous loss.[59] The fact that a fortuitous loss occurred does not necessarily have to be substantiated objectively, but may lie within the subjectivity of the contracting parties.[60] An insurance contract is similar to gambling because the property relationship is altered in the event of a fortuitous loss. It is different from gambling because, unlike a gambler, the insured can not make a financial profit as a result of choice of terms. Moreover, an insurance contract is different from gambling in that fortuity must be estimated according to the probability of the occurrence of casualties, which is based on statistics compiled from a large pool of people.

Fifth, an insurance contract is based on good faith or utmost good faith. This notion is based on the legal purpose of preventing its allegorical nature from rendering it a gambling instrument.[61] It is true that the principle of good faith

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embodied in a marine policy. That is, Article 22 of the Marine Insurance Act, 1906 (Marine Insurance Act 1906 of the United Kingdom is also applied in the field of marine insurance in the United States) stipulates that "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act." Marine Insurance Act, 1906, § 22 (Eng.).

55. Commercial Code, *supra* note 1, art. 639.

56. *Id.* art. 656.

57. In the United States, the commercial or mercantile characteristics of an insurance contract was denied in *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (i.e., insurance is not commerce), but was affirmed in *U.S. v. South Eastern Underwriters Association*, 322 U.S. 533 (1944), *rehearing denied* 323 U. S. 811 (1994).

58. Commercial Code, *supra* note 1, art. 664.

59. Seung Kyu Yang, Insurance Law (in Korean), 양승규, 보험법 88 (1998).

60. Commercial Code, *supra* note 1, art. 644.

61. United Kingdom Marine Insurance Act, art. 17 (1906) provides that a contract of marine insurance is a contract based upon the utmost good faith). The Marine Insurance Act codified English law on marine insurance contracts as of Dec. 21, 1906. This Act repealed earlier British statutes relating to marine insurance when it became effective on Jan. 1, 1907. No similar statute applies to disputes relating to non-marine insurance contracts, but, in practice, English courts tend to follow the Marine Insurance Act, 1906, when appropriate to

applies not only to insurance contracts but to all contracts;[62] good faith, however, must be emphasized more in insurance contracts than in other contracts.[63]

Sixth, an insurance contract continues in effect during a specified period of time when the insurer assumes the responsibility of paying a claim during the period of risk. Therefore, a period of risk should be agreed upon between the parties. In practice, the duration of the risk is ordinarily governed by explicit provisions in the insurance policy that limit the risks transferred to an insurer.

Seventh, an insurance contract is independent of other contracts. An insurance contract is not related to any type of contract originating from Roman law. It is not designed to absorb risks through the insertion of supplementary clauses into a dependent contract—as would be the case, for example, in contracts involving construction. Thus, independence denotes that an insurance contract exists for its own sake and is unconnected with other contracts.

Eighth, an insurance contract is an adhesion contract which is concluded by means of general insurance clauses. By its nature, an insurance contract is agreed upon by multiple members. Legal considerations designed to protect the policyholders' interests must be incorporated. The Commercial Code prohibits the insurer from making changes that are disadvantageous to the policyholders.[64] Thus, the Minister of Finance and Economy is required to approve insurance contracts that are prepared by the insurer.[65]

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the circumstances; otherwise, precedents are taken from case laws not embraced by the Marine Insurance Act, 1906. 2 ROBERT H. BROWN, MARINE INSURANCE, CARGO PRACTICE 1-2 (1998).

62. Civil Code, *supra* note 1, art. 2.

63. In the United States, many courts have held that every insurance contract includes an implied covenant of good faith and fair dealing, which requires the parties to conduct themselves so that nothing is done that impairs the right of others to receive the benefit of the agreement. The "good faith" doctrine has not been developed in the same way and to the same extent throughout the nation. KEETON & WIDISS, *supra* note 48, at 624, 625.

64. Commercial Code, *supra* note 1, art. 633.

65. Insurance Business Act, *supra* note 7, arts. 5, 16.

IV. THIRD-PARTY INSURANCE CONTRACTS

A. *Definition and Function*

An insurance contract for the benefit of third parties (third-party insurance contract) refers to one concluded through the policyholder's own name on behalf of another person, the beneficiary.[66] If the policyholder becomes simultaneously the beneficiary in non-life insurance contracts and the beneficiary in life insurance contracts, the contract is called a "contract for oneself." If the beneficiary is not designated, the contract is called an "insurance contract for whom it may concern" (*Versicherung fur Rechnung wen es angeht; assurance pour compete de qu'il appartiendra*).

The third-party insurance contract originated from the practice of agents or brokers who concluded insurance contracts on behalf of the owners of specified goods. Practiced since the earliest days of marine insurance, the third-party insurance contract is now used for most types of insurance contracts. For example, an employer may conclude an accident insurance contract for his employees, or a father may conclude a life insurance contract for his son. The Insurance Business Act also has provisions for the guarantee of insurance contracts,[67] which is one type of third-party insurance contracts.

B. *Legal Characteristics*

There are two main theories about the characteristics of third-party insurance contracts. One theory is that of contracts for third parties. This theory postulates that a policyholder has concluded an insurance contract directly or indirectly on behalf of the beneficiary. The other theory is that of mediation, which proposes that an insurance contract is mediated by a policyholder. The latter, however, is seldom accepted in Korea.[68] Therefore, we will only investigate the former.

The theory of a special contract for third parties suggests that an insurance contract should be understood as a contract for third parties as described in civil law.[69] As an uninterested third party, the beneficiary is not a party to the contract. A contract for third parties based on civil law is different from a third-party

66. Commercial Code, *supra* note 1, art. 639.

67. Insurance Business Act, *supra* note 7, art. 5-1, "The insurance business includes businesses that promise a debtor or other obligors to indemnify a creditor or other obligees for losses that may arise in regard to the performance of obligations under the statutes or for liabilities under contracts of sale, employment or other contracts, and receive rewards therefore from the debtor or other obligors."

68. In Anglo-American insurance law, what is unclear is whether or not the third party has a direct claim against the insurers in the event of the insured being unwilling or unable to claim himself. Conventional analysis, based on the doctrine of privity of contract, would suggest that the third party will be able to do so only if he can show that the insured contracted with the insurer as the third party's trustee or agent. In non-marine insurance, an agency relationship will work, in the absence of express authority, only if it is disclosed and if the principal ratifies the contract before a loss. Outside of trust or an agency, a third party is faced with the doctrine of privity of contract. JOHN BIRDS, MODERN INSURANCE LAW 59 (1993).

69. Civil Code, *supra* note 2, art. 539.

insurance contract based on commercial law. Under the Civil Code, the third-party rights become effective upon the expression of intent to accept agency.[70] Under commercial law, third-party rights become effective without the third-party's expression of intent.[71] Due to this difference, some scholars suggest that a third-party insurance contract is a special kind of contract (eigenartig geordneten Vertrag zugunsten Dritter) that happens to fall within the domain of insurance contract law. It would be more reasonable to consider it as a special case of an insurance contract rather than as a unique type of contract unto itself.

C. Conditions for Conclusion

When an insurance contract is concluded for the benefit of third parties, it must contain a declaration of intent to serve as a third-party insurance contract. The declaration of intent may be expressed or implied. In addition, it is unnecessary to designate who will be the beneficiary. If it is not certain for whom an insurance contract is drawn, it is assumed to be drawn for the policyholder themselves.[72]

For a third-party insurance contract to be valid, the policyholder must be committed to concluding the contract for the benefit of third parties.[73] Thus, an insurer can refuse to honor the insurance contract if it was concluded without the named beneficiary's knowledge, in particular, if the policyholder concluded the contract without third-party commitment and without notifying the insurer.[74]

D. Effects

The beneficiary is naturally given the right of indemnity, or protection from claims for payment because a third-party insurance contract satisfies the economic demands of the third party, not the policyholder. There are some differences between life and non-life insurance with respect to how the related law is applied.

Although the third-party insurance contract does not give the policyholder a claim for payment, it gives him collateral rights, including: claims for delivery of the insurance policy,[75] an insurance premium discount,[76] an insurance premium refund,[77] and insurance contract termination.[78] A claim for the termination of an insurance contract by the policyholder can be exercised only with the third-

70. *Id.* art. 539(2).
71. Commercial Code, *supra* note 1, art. 639-1.
72. Seung Kyu Yang, *supra* note 59, 184.
73. Commercial Code, *supra* note 1, art. 639-1.
74. *Id.* art. 639(1).
75. *Id.* art. 640.
76. *Id.* art. 647.
77. Civil Code, *supra* note 2, art. 547.
78. Commercial Code, *supra* note 1, art. 649.

party's consent.[79] Moreover, the policyholder also has the right to designate or change the beneficiary in the case of life insurance.[80]

Because the policyholder concludes the contract under his own name, he assumes obligations of payment of the insurance premium,[81] representation,[82] notification of changes of risk,[83] and notification of the occurrence of covered losses.[84] In particular, the policyholder is responsible for endeavoring to minimize or avert the loss caused by the covered risks.[85]

On the other hand, the beneficiary is contractually positioned to automatically claim the indemnification amount as he is in a position of enjoying the benefits derived from the insurance contract without the necessity of expressing intent to do so.[86] Nevertheless, the insurer can defend himself against the claim of a beneficiary on the basis of the relationship between the insurer and the policyholder. For example, the insurer can argue for the termination of a contract due to an insurance premium default[87] or due to misrepresentation on the part of the policyholder.[88] Specifically, in a life insurance contract where the policyholder is authorized to designate and change the beneficiary, the beneficiary's rights can be restricted.[89]

In the case of the policyholder's adjudication of bankruptcy or insurance premium default, the beneficiary will be obligated to pay the insurance premium to avoid termination of the insurance policy.[90] This proviso is seen as advantageous to the beneficiary of a continuing contract. As he is now benefitting from the continuation of the insurance contract, the beneficiary will also be obligated to give notice of any occurrence of loss caused by the covered risk.[91]

79. Civil Code, *supra* note 2, art. 541.
80. Commercial Code, *supra* note 1, arts. 733, 734.
81. *Id.* art. 639(2).
82. *Id.* art. 651.
83. *Id.* art. 652.
84. *Id.* art. 657.
85. *Id.* art. 680.
86. *Id.* art. 639(1).
87. *Id.* art. 650.
88. *Id.* art. 651.
89. *Id.* art. 733.
90. *Id.* art. 639(2).
91. *Id.* art. 657.

V. GENERAL INSURANCE CLAUSES

General insurance clauses are formal and prepared by the insurer. With respect to sources of insurance contract law, these clauses play important roles as they bind both contracting parties unless a contrary intention is expressed. Because general insurance clauses are common and standard, a special insurance contract may need more detailed insurance clauses known as specified or added general insurance clauses. A special insurance contract typically consists of general insurance clauses, regardless of their heading, and is consonant with such clauses' formal nature. Special insurance clauses may be established by the contracting parties to address individual situations. Such clauses have occasionally been established for corporate insurance (e.g., marine insurance) and are allowed unless harmful to a particular insurance group.

General insurance clauses satisfy the technical requirement that the contents of an insurance contract must be formalized, which allows processing of insurance contracts in large quantities. The need to remain consistent on the insurance contract's structure arises from the fact that these contracts are based on the concept of the risk group, whose members should be treated equally.

Moreover, general insurance clauses are prepared unilaterally by the insurer. This is partly driven by the fact that in many cases the policyholder lacks technical and legal knowledge about insurance contracts. This may lead to a policyholder to conclude an insurance contract only with references to fortuitous losses and periods of risk and insured amounts, while ignoring many important details appropriate to insurance contract contents. As a consequence, there is a concern that it might allow the insurer's possible insertion into the insurance contract of clauses that are disadvantageous to the policyholder's interests, which is already heightened by the fact that there is a disparity of bargaining power between the individual policyholder and the insurance companies.

Because of the contractual weaknesses that can arise with insurance contracts, the Commercial Code prevents insurance clauses from being amended against the potential profits of the policyholders or the beneficiary even if there is a special agreement between the parties concerned—except in the case of corporate insurance.[92] Furthermore, the Insurance Business Act requires the insurer to obtain a sanction from the Minister of Finance and Economy, either when one wishes to apply for permission to do insurance business with general insurance clauses attached,[93] or to change existing general insurance clauses.[94] Prior to 1992, insurance subscribers were not in a position to fully understand insurance contracts because insurers were not legally required to explain insurance clauses before the conclusion of a contract. Now, insurers must explain general insurance clauses to subscribers before concluding an insurance

92. *Id.* art. 663.
93. Insurance Business Act, *supra* note 7, art. 5-3.
94. *Id.* art. 7-1.

contract.[95] The Law to Regulate Unfair Contract Terms,[96] which checks the usage of unfair contract terms, provides additional protection for the consumers. The Insurance Business Act and the Commercial Code take precedence over the above law regarding general insurance clauses, just as the Unfair Contract Terms Act of 1977 is not automatically applied to insurance clauses in the United Kingdom.

A. Content

The contents of general insurance clauses can be divided into three parts: (1) those that are invoked directly from the provisions of the Commercial Code (invoked clauses); (2) those that modify the provisions of the Commercial Code (modified clauses); and (3) those that supplement the provisions of the Commercial Code (supplemented clauses). The following items should be mentioned in general insurance clauses:[97] (a) causes for payment of claims by the insurer, (b) conditions of contract defiance, (c) causes for exempting the insurer from liabilities, (d) methods of determining the extent of the insurer's obligations and the time of caning them out, (e) the expected amount of loss to be suffered by the policyholder or the insured in case of his obligation not being performed, (f) conditions of complete or partial insurance contract cancellation and the rights and obligation of the parties when a contract is canceled, and (g) eligibility of the right of disbursement of profit or surplus funds.

B. Binding Power

As previously mentioned, general insurance clauses play important roles in providing sources of law in insurance contract law. Commercial laws cover the content of insurance contracts too simply and generally serve as gap-fillers. In practice, special insurance clauses and general insurance clauses are preferentially applied to insurance contracts in order to bind the contracting parties. For items not specified in the clauses, commercial laws are applied. Several foundational theories of the binding power of general insurance clauses have been proposed in Korea.

The theory of intent suggests that contracting parties are mutually bound to each other because they have invoked legal clauses to govern legal performance. This is a matter of interpretation, which seeks a foundation for the appropriateness of the clauses, according to the intent of the parties. This theory

95. Commercial Code, *supra note* 1, art. 638(3)(1). Additionally, Article 156 of the Insurance Business Act requires the insurer to indirectly inform the insured of general insurance clauses in advance by prohibiting the act of misinforming or of not informing the policyholder material facts contained in the general insurance clauses. Also, Article 3 of the Law to Regulate Unfair Contract Terms requires a business to inform the consumer in advance the material facts contained in the clauses of a contract.

96. Law to Regulate Unfair Contract Terms, Law No. 3922 (1986).

97. The Enforcement Decree of the Insurance Business Law, *supra* note 16, art. 7.

does not adequately explain the foundation of binding power because the policyholder may be bound by unknown clauses as well.

·According to the theory of adhesion, even if a policyholder is not completely familiar with the clauses of his contract, the conclusion of an insurance contract can be interpreted as the comprehensive approval of the contract with the effect of mutually binding the contracting parties. The question remains open as to whether or not the policyholder really had the intent to approve every detail of the contract; moreover, it is also unreasonable to argue for the binding power of general insurance clauses based only on a contracts conclusion.

The theory of normative law, the most promising theory in Korea, proposes that binding power is conferred to the contracting parties based on the normative nature of the clauses. From a sociological viewpoint, this theory views general insurance clauses as sources of insurance contract law and stresses the necessity of approval of the clauses by supervising authorities, of the flexibility of revision, and of universal interpretation.

C. Effects

In reference to the general binding power of general insurance clauses, the clauses naturally bind the parties at the time of the conclusion of an insurance contract without inquiring into the parties' intent to comply with the clauses as long as the contents of the clauses are rational. This is very appropriate from the viewpoint of the theory of normative law. According to the principle of equity, the policyholder should be informed of general insurance clauses before the contract is concluded in order for its general binding power to be effective.[98] Thus, the clauses that are against mandatory regulations of insurance contract law are not binding.[99]

With respect to revisions and the retroactive power of general clauses, in principle, once an insurance contract is concluded, the validity of revised clauses does not affect the existing insurance contract. This is true not only in the case disadvantage to one party, but also in the case advantage, unless there is a contrary agreement between the concerned parties.

When a revision of the clauses is authorized, the Financial Supervisory Commission may give retroactive power to the revised insurance clauses to protect the interests of the policyholder and the beneficiary of the insurance contract.[100] In this case, the revised insurance clauses are construed not to be effective until the insurer manifests his intent to give them retrospective power.

98. Commercial Code, *supra* note 1, art. 638-3-1, Insurance Business Act, *supra* note 7, art. 156.

99. *Id.* art. 633.

100. Insurance Business Law, *supra* note 7, art.16. The Article provides that the Financial Supervisory Commission may, when it deems it necessary in connection with the business or property status of a insurer, order the insurer to amend the basic documents on the type and method of business approved by the Minister of the Finance and Economy, and that when granting authorization of amendments of fundamental documents, make it so that such amendments shall be prospectively applicable to any existing insurance contract.

There have been contradicting opinions about the validity of insurance clauses in private laws that lack the approval of the Minister of Finance and Economy.[101] It is more realistic to consider all insurance clauses valid. Of course, an insurer using clauses without a requisite approval should be working under the provisions of the Insurance Business Act;[102] clauses that are against the public interest or for the pursuit of unilateral profit for the insurer should be invalidated.

VI. REPRESENTATION

Disclosure and representation constitute the duty to make a true statement of all material circumstances to the contract by or on behalf of a policyholder or the insured by the time a contract is concluded.[103] This duty should be distinguished from the duty of notification of changes of risk or of the occurrence of the covered losses.[104]

In reviewing the need for and foundation for representation, the insurer needs the policyholder's cooperation to keep the balance between payment and consideration within the insurance group because of the number of contracts that are typically concluded.

Depending on the nature of the insurance contract, the foundation for representation can be traced to several different theories, including theories of the allegorical contract, mutual consent, and risk estimation. The most common theories in Korea are the theories of good faith and risk estimation. Again, insurance, by its nature, benefits the economic demand of the person who meets with an accident through the joint reservation of funds formed through the joint contributions of multiple parties faced with homogeneous risks. The insured themselves form a group. An insurer thus needs to gauge risk rates with some degree of accuracy in order to estimate the insurance premium to be used for claims. Estimating the risk rates are by no means accomplished by the insurer alone. Therefore, the insurer is compelled to ask for cooperation from the policyholder. This is the foundation upon which the law recognizes the duty of disclosure and representation. It is important to note that the meaning of representation has changed from an *active* requirement, in which a representative

101. *See id.* Article 5(3) of the Insurance Business Act stipulates that a person who desires to obtain permission to operate insurance business shall submit to the Minister of Finance and Economy such documents as articles of incorporation, a document showing the method of business, conditions of insurance policy, a document showing the methods for calculating the premiums and mandatory technical reserve, and other documents as prescribed by the Ordinance of the Prime Minister.

102. Commercial Code, *supra* note 1, art. 226-1-6.

103. *Id.* art. 651.

104. *Id.* arts. 652, 657.

must report all of the material facts concerned, to a *passive* requirement, in which a representative must simply answer the insurer's questions. The passive requirement approach has become more feasible as insurance technology has progressed.

With respect to the legal characteristics of representation, an insurer can neither force a representative to make representation nor claim damages for the default of representation. An insurer can only terminate the insurance contract[105] if a policyholder misrepresents the facts on purpose or by gross negligence. Therefore, a representation is a prerequisite for an insurance contract to be completely valid. It is not a direct obligation, but rather, an implied duty which is not imposed under the effect of the contract.

VII. CONTENT

In an insurance contract, the representative is the insured, which is either the policyholder or the third party beneficiary.[106] Although there are arguments that the insured in a non-life insurance contract is not required to make a representation, the insured is considered as the representative in a non-life insurance contract as well as in a life insurance policy because the Commercial Code uniformly regulates both types of insurance.[107] Moreover, in a non-life insurance contract, the insured has concerns as the owner of an insurable interest. Still, there may be many cases for which the insured cannot carry out the representation. For example, in the case of a non-life third-party insurance contract, the interests between the insured and the policyholder conflict. In such a case, it is desirable for the insurer to opt to accept the insurance application on the basis of representation made by the insured. Moreover, the agent of the policyholder also assumes the duty of representation in the case of an insurance contract concluded by the agent.[108]

The receiver of the representation includes the insurer and his agent. The agent who is authorized to conclude a contract or the medical examiner for the life insurance contract, is entitled to receive representation. An intermediate agent who has no authority to conclude a contract, or an insurance salesperson, is not necessarily so entitled.[109]

105. To terminate a contract means to avoid further the contract, since the breach of the duty of disclosure or representation.

106. Commercial Code, *supra* note 1, art. 651.

107. *Id.*

108. *Id.* art. 646; Civil Code, *supra* note 2, art. 116.

109. Supreme Court Case 대법원판례: 10/30/79; 79; 1234.

With respect to the time of representation, representation should be made before the time an insurance contract is concluded. The exception to this is the time may be extended by the use of special clauses until the initiation of the risk period. Therefore, when representation is not completed at the time of application, a policyholder can correct or supplement the representation and must represent facts that have newly transpired or changed until the conclusion of the insurance contract.

Either a written or an oral representation is valid because the method of representation is not restricted by law. The content of the representation should be material facts: facts that affect the final decision to conclude an insurance contract, such as the amount of the insurance premium and those considerations that would have kept the insurer from concluding the contract or at least concluding it under the given conditions had the facts been known.[110] The materiality of a fact is determined differently with each type of insurance. For example, material facts in a fire insurance policy include the physical nature, structure, and use of a building. In life insurance, the health condition of the insured at the time of a contract's conclusion is material.[111] In practice, facts described in a written inquiry in an insurance application (the questionnaire) are presumed to be material.[112]

A. *Required Condition and Effects of Misrepresentation or Non-Disclosure*

In Korean insurance contract law, both subjective and objective conditions must be satisfied in order to have a claim of misrepresentation or non-disclosure. The subjective conditions of misrepresentation or non-disclosure are deliberation and gross negligence by the insured.[113] Deliberation occurs when the insured knows the facts but there is no implication of bad faith, such as fraudulent intent.[114] In terms of gross negligence, there are two conflicting opinions in Korea regarding its legal range. One is that gross negligence includes not only the case of misrepresentation but also ignorance of material facts. The other opinion excludes ignorance of material facts from the range of gross negligence, unless the representative is ignorant of facts that he should clearly have known during the ordinary course of business.[115] Thus, the key objective condition of misrepresentation or non-disclosure is material facts.

Legal remedies for misrepresentation are justified by the materiality of certain facts to the orderly conclusion of insurance contracts. If a fact is thought

110. United Kingdom Marine Insurance Act, *supra* note 61, art. 18(2). With respect to the materiality of representation, Article 3105 of the New York State Insurance Law stipulates "No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." N.Y. INS. LAW § 3105(b).

111. Seoul Distric Court Case 서울지방법원판례 73 ga hap 3701, Nov. 22, 1973.

112. Commercial Code, *supra* note 1, art. 651(2).

113. *Id.* art. 651; *see also infra* notes 160-81 and accompanying text.

114. If the insured does not make representation on his clinical history solely because he does not want to disclose his past history to others, this constitutes misrepresentation.

115. *See* United Kingdom Marine Insurance Act, *supra* note 61, art. 18(1).

to be subjectively important but is not represented, the objective condition of material facts cannot be satisfied. The Commercial Code does not specify the validity of questionnaires, but if actual questionnaire items are represented, the requirements of representation are assumed to have been met, barring willful concealment.[116] With respect to the onus of proof, the insurer bears the burden of proof for the policyholder's alleged misrepresentation.

When material facts are misrepresented or not disclosed, the contract is not automatically invalid, rather, it gives the insurer the right to terminate the insurance contract.[117] The right of termination can be exercised unilaterally by the insurer with proof of misrepresentation. The insurer can terminate the contract or waive the right to terminate irrespective of whether or not there was an actual occurrence of covered losses. When an insurer terminates an insurance contract due to misrepresentation, the contract becomes invalidated thereafter.[118]

In comparison, when an insurer terminates an insurance contract after the occurrence of covered losses, the insurer does not assume the responsibility for paying the claim, but can claim redemption of any amount already paid.[119] In a life insurance policy, the insurer should pay to the policyholder the accumulated fund for the third-party beneficiary.[120]

Moreover, the right of termination is restricted in certain cases. That is, the insurer cannot exercise the right of termination under the following conditions:

(a) The insurer has not exercised the right of termination within one month after becoming aware of misrepresentation, or five years have passed since the conclusion of the insurance contract.[121] This period is not for prescription, but refers to a statute of limitations.
(b) The insurer was aware of the misrepresentation at the time of conclusion, or not aware due to his own gross negligence.[122]
(c) The occurrence of covered losses is proved not to be due to misrepresentation.[123] In this case, the insurer assumes responsibility for paying the claim amount and may not claim redemption of the claim amount already paid. Although this provision is for the protection of the policyholder or the beneficiary in case there is no causation between the covered losses and the misrepresentation, it is somewhat unreasonable from the point of view of the foundation for disclosure and representation. That is, it is contradictory to consider the cause of the covered losses after the fact in order to determine that there is misrepresentation, given that the duty of disclosure and

116. Supreme Court Case 대법원판례 68 da 2028 2/18/69.
117. Commercial Code, *supra* note 1, art. 651.
118. Civil Code, *supra* note 2, art. 550.
119. Commercial Code, *supra* note 1, art. 651.
120. *Id.* art. 736(1).
121. *Id.* art. 651.
122. *Id.*
123. *Id.* art. 655.

representation is intended as a means by which to estimate risk in advance and to distinguish unacceptable risks from acceptable ones. Also, no balance is achieved in the case where if it were represented properly by the time of conclusion, such knowledge would keep the insurer from concluding the contract, or at least from doing so under the same conditions. This provision should either be removed from the legislation or at least be very strictly construed, similar to the viewpoint of construction in the case of clause of exception, or in the case in which the insurer terminates the contract after the occurrence of covered losses. The policyholder should bear the burden of proof that there is no causation between the occurred losses and the misrepresentation.[124] When it is doubtful whether or not there is causation, this clause of exception should be construed favorably to the insurer.

(d) There is a special agreement between the concerned parties. However, a special agreement with the intent of placing the policyholder in a disadvantageous position is invalid.[125]

B. Misrepresentation or Non-Disclosure Versus Mistake or Fraud According to the Civil Code

Because legal action based on a mistake or fraud can be nullified[126] under the Civil Code,[127] it is questionable whether or not the Civil Code should be applied to misrepresentation caused by mistake or fraud. Some scholars suggest that the Civil Code should not be applied to misrepresentation in an insurance contract because misrepresentation involves the unique features of good faith, collectivity, and risk estimation in insurance contracts. In the case of fraud, an insurance contract should be terminated by the application of commercial law. The insurance contract should also be rescinded or nullified by application of the Civil Code after the statute of limitations stipulated in the Commercial Code expires, five years after the conclusion of an insurance contract.[128] Also, the Civil Code naturally does not apply in the case of mistake except to cases lying outside the misrepresentation regulations in the Commercial Code, such as mistakes about the insured subject matter.

124. Supreme Court Case 대법원판례 68 da 2028 2/18/69.

125. Civil Code, *supra* note 2, art. 103.

126. To nullify the legal action means to avoid the legal action *ab initio* Civil Code, *supra* note 2, art. 141.

127. Civil Code, *supra* note 2, arts. 109, 110.

128. Commercial Code 상법, *supra* note 1, art. 651. Supreme Court Case 대법원판례 (1991, 12.12.91da 1165) ruled that, in the case of misrepresentation or non-disclosure made by fraud, an insurance contract could be terminated by the application of the Commercial Code, and such a contract could also be nullified by the application of the general principles of civil law.

VIII. INSURANCE POLICIES

The insurer should issue an insurance policy as evidence of a contract and to prove the formation of the contract after its conclusion.[129] Because an insurance contract is informal and consensual,[130] the issuance of an insurance policy is not required to render the contract effective, it is only for convenience. Also, the policy is not to be considered a contract document just because the insurer signs and seals the policy.

The insurer is obligated to make and deliver an insurance policy when the insurance contract is concluded.[131] In practice, an insurance policy is naturally made and delivered when an insurance contract is concluded. The insurance policy is considered as the most important evidence of content of an insurance contract because it contains printed contractual clauses, including special clauses. The view that the insurance policy is evidence of an insurance contract is consistent with the fact that insurance contracts are becoming more formalized in the insurance business.

A. Legal Characteristics

With respect to the policy of formality, the insurer should sign and seal an insurance policy after including the following facts:[132] (1) subject of insurance; (2) nature and scope of covered risks; (3) insured amount; (4) insurance premium and method of payment; (5) time of initiation and termination when the period of risk is designated; (6) reasons for invalidation and forfeiture of rights; (7) name or firm name and address of the policy holder; (8) year, month, and date of the insurance contract; and (9) place and date of the contract's issuance.

In addition to the basic above-mentioned items, the laws have designated certain special items that need to be mentioned, depending on the type of insurance.[133] Thus, although an insurance policy is formal, the degree of formality is not as strict as that of a bill or a check. An omission of an item that must legally be mentioned or the addition of unrelated items does not affect the validity of an insurance policy.

An insurance policy is a certificate policy in evidence from which to infer the content of a contract. It is one of the important pieces of evidence pertaining to an insurance contract. An insurance policy does not establish any rights because

129. *See* Commercial Code, *supra* note 1, art. 640-1.
130. *Id.* art. 638.
131. *Id.* art. 640-1.
132. *Id.* art. 660.
133. *Id.* arts. 685, 695, 728, 738.

the preparation of an insurance policy is not a legal indication of activation of the rights and obligations introduced by the insurance contract.

With regard to the policy of negotiability, there have been arguments over whether or not insurance policies are negotiable. In principle, generally, an insurance policy is a policy in evidence and is neither negotiable nor transferable. Notwithstanding, both registered and non-registered (ordered) policies may be issued and are being used in practice in transportation and marine insurance contracts. In legislation governing the issuance of ordered policies, negotiability is not always approved.[134] As described below, there are three principal theories in Korea concerning the negotiability of ordered insurance policies.

Pro theories completely affirm the negotiability of insurance policies on grounds of security and safety in transactions for the reason that it is necessary to physically possess an insurance policy in order to exercise the right to claims. It would be better to deny negotiability for the following reasons. First, the right to claims in life insurance cannot be transferred without the consent of the insured.[135] Furthermore, the insured cannot be transferable because of the nature of a life insurance contract. Second, the object of insurance in some types of non-life insurance, such as fire insurance, is not typically transferable. In addition, claims for indemnification for damages cannot be transferred without the object of insurance. Therefore, the negotiability of unregistered insurance policies should not be uniformly affirmed. Such a pro approach would result in more disadvantageous cases than advantageous ones.

Partial pro theories affirm the negotiability of insurance policies, especially when they involve transportation or marine cargo insurance. For marine cargo insurance, there is a strong demand for the transferability of insurance policies accompanied by the transfer of bills of lading (e.g., endorsement or policy delivery). The fact that a defense based on an insurance contract is not blocked by the endorsement or delivery of the policy does not prevent the transferability of the policy from being affirmed. Recently, these partial pro theories have been gaining greater acceptance and consensus in Korea. Because an insurance policy is not an abstract document, an insurer can defend himself against the bearer of a policy based on an insurance contract. Thus, an insurance policy can be considered, in an incomplete sense, as a negotiable document because the initiation of the right on the insurance policy depends on fortuitous losses.

Finally, according to the con theories, the effectiveness of claims for insured amounts depend on conditions that lie beyond a policy's purview, such as payment of the premium and performance of obligations. In non-life insurance, claims cannot be transferred simply by assigning the policy; the subject of the insurance should also be transferred in order for the assignment to be fully

134. According to the German Insurance Code, art. 4, an insurance policy is only a policy with immunity, French Insurance Code: L.112-5 approves the negotiability of an insurance policy. Cited by Seung Kyu Yang 양승규, *supra* note 57, at 135.

135. Commercial Code, *supra* note 1, art. 731(2).

effective.[136] Therefore, the negotiability of an insurance policy is denied. This is the prevailing opinion in Japan.

B. Demurrers and Reissuance

Because an insurance policy is, as shown above, a certificate policy in evidence containing incomplete sets of facts, the concerned parties should demand possible modifications to the policy when mentioned items on the policy do not match the contract to prevent needless conflicts from occurring. The Commercial Code stipulates that the concerned parties in an insurance contract can introduce a clause permitting a demurrer with the aim of correcting the policy within one month after its issuance.[137]

Moreover, because an insurance policy is not tradable, an insured amount can be claimed even in the case of loss or damage to the policy. An insurance policy puts the policyholder in a better position to prove the facts in a contract because the policy is issued as evidence of the contract. The Commercial Code stipulates that when a policy is lost or severely damaged, the policyholder may claim reissuance at his own expense.[138] Despite this stipulation, the non-registered or order policy with admitted negotiability should be reissued through the process of public peremptory notice under the Code of Civil Procedure.[139]

IX. EXCLUSION RISKS

In the case of accidents or casualties designated in the insurance policy, the insurer assumes responsibility for paying the claim amount or indemnifying the insured.[140] Insurance contract law specifies the designated risks under which insurers are not responsible for payment in "exclusion risks" clauses.

To reiterate, an insurance contract imposes the responsibility of indemnity for fortuitous losses on the insurer through a joint reserve fund formed through the contributions of multiple parties faced with homogeneous risks, in exploitation of the law of large numbers. An insurance contract is thus an allegorical contract. Although a covered risk is fortuitous to an individual, the probability of its occurrence can be predicted fairly accurately within the whole insurance group according to the law of large numbers. Therefore, the insurer can operate a business based on statistical principles by maintaining a balance between receipts from premiums and payouts. To eliminate moral hazard and see to the efficient operation of the insurance business, insurance law protects the insurer and exempts them from the obligation of payouts when covered losses are willfully induced by the insured or are caused by war. Therein is the rationale for exclusion risks.

136. *Id.* art. 679.
137. *Id.* art. 641.
138. *Id.* art. 642.
139. Civil Code, *supra* note 2, art. 496.
140. *Id.* art. 638.

Exclusion risks can be classified into two categories according to their characteristics: (1) general exclusion risks, common to all insurance contracts and (2) special exclusion risks, specific to the characteristics of a particular insurance contract. Exclusion risks are specified individually in all types of general insurance clauses.

A. General Exclusion Risks

One type of exclusion risk includes both deliberate acts and gross negligence. In general insurance, the insurer is exempt from responsibility when the policyholder, the insured, or the beneficiary induces covered losses deliberately or through gross negligence.[141] It is reasonable that the insurer should be protected from covered risks caused by the insured's deliberate acts or gross negligence because such losses are not fortuitous, and the deliberate occurrence of covered risks rails against the principles of good faith and social justice.

In cases of death and injury insurance, the insurer is not exempt from responsibility, even if the covered losses were induced by gross negligence on the part of the policyholder, the insured, or the beneficiary, unless the loss comes in the form of execution in accordance with the death penalty.[142] Limiting the insurer's exemption from responsibility caused by gross negligence in death and injury insurance protects the beneficiary from a humanitarian point of view. Extensive protection for the beneficiary should be legislatively reconsidered, not only because the human body and human life should be more carefully protected, but because death and injury due to gross negligence are immoral and against the principle of good faith.

Prior to 1991, the insurer was exempt from responsibility in the case of death due to a willful act or gross negligence on the part of the insured party.[143] Abnormal deaths such as suicide by an insane person were excluded from the exclusion risks based on judicial precedents.[144] Depending on the policy, the insurer's responsibility is also generally maintained, even in the case of the insured's suicide, after a certain period, (usually two years after the initiation of the insurer's responsibility).[145] Considering the above, it would be legislatively desirable to make the insurer liable for death and injury caused by the gross negligence of the policyholder, the insured or the beneficiary for a certain period of time after the initiation of the insurer's responsibility.

Today in liability insurance, the insurer generally assumes responsibility for paying an insured amount for the occurrence of covered losses due to the insurer's gross negligence.[146] When covered losses occur due to deliberate or gross negligence on the part of the person for whom the policyholder or the

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141. *Id.* art. 659(1).
142. *Id.* art. 659(2).
143. Former Commercial Code 상법, Law No. 1000 (1962), art. 680.
144. *See* Korean Standard Life Insurance Clauses 한국생명보험표준약관, art 8-1-1.
145. *Id.*
146. *See* Korean Indemnity Liability Insurance Clauses, art 3(1).

insured takes civil responsibility (e.g., family or employees), a problem arises in determining whether or not the insurer is responsible for the covered losses. In Germany, representative liability theory is invoked to protect the insurer. In Korea, however, the insurer's exemption from responsibility is not necessarily conferred unless otherwise specified.

The other type of exclusion risks is war risks. When covered accidents take place due to war or social disturbance, the insurer assumes no responsibility unless otherwise agreed upon.[147] This is because war is neither a basis for risk estimation nor absorbed by the usual premium.

B. Special Exclusion Risks

The special exclusion risks approved in the Commercial Code only apply to non-life insurance, which includes the general provisions in non-life insurance[148] and the particular provisions in transportation insurance and marine insurance.[149]

In non-life insurance, the insurer is not responsible for indemnity in the case of damage or loss arising from ordinary wear and tear, or the inherent vice or nature of the subject matter insured.[150] To be effective, covered risks should be fortuitous. Damage or loss arising from the inherent vice or nature of the subject matter insured, such as evaporation of alcohol, decay of fruit and meat, or breakage of cargo due to careless packing, is not considered fortuitous. These exclusion risks are not applicable to property insurance although they are approved in the general provisions of non-life insurance as outlined in the Commercial Code.

In transportation insurance, when covered losses in transport occur due to a deliberate act or gross negligence on the part of either the consignor or the consignee, the insurer is not responsible to indemnify the damage or loss.[151] Although the consignor and the consignee are not the policyholder or the insured, exclusion risks are conferred to them by the same consideration of deliberation and gross negligence as to the policyholder.[152]

In marine insurance, the insurer is responsible to indemnify for loss, damage, or expenses caused by accidents or casualties from or incidental to the navigation.[153] Due to its peculiarity, covered risks in marine insurance take place more frequently than in other non-life insurance, thus making the insurer's scope of responsibility usually more extensive. Accordingly, the Commercial Code and insurance clauses serve to broaden the range of exclusion risks in marine insurance.

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147. Commercial Code, *supra* note 1, art. 660.
148. *Id.* art. 678.
149. *Id.* arts. 692, 706.
150. *Id.* art. 678.
151. *Id.* art. 692.
152. *Id.* art. 659(1).
153. *Id.* art. 693.

Exclusion risks under the Commercial Code are as follows:

(a) Damage or loss arising from a vessel's unseaworthiness or unfitness, in the case of hull or freight insurance;[154]
(b) Damage or loss arising from willful misconduct or gross negligence on the part of the charterer, the shipper, or the consignee in the case of cargo insurance or expected profit insurance;[155]
(c) Ordinary expenses charged to ferriage, beacon fee, or quarantine fee.[156] These are also called "average accustomed" and are ordinary expenses involved in navigation;
(d) Exclusion risks are recognized when substantial change of risk, such as deviation from the proper route, change of voyage, or change of vessel, occurs due to the fault or negligence of the insured or the policyholder. The insurer shall be discharged from further liability in the case of substantial change or increase of risk,[157] but he cannot claim exemption if there is no causation between the covered loss and the change of risk.[158]

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154. *Id.* art. 706(1).
155. *Id.* art. 706(2).
156. *Id.* art. 706(3).
157. *Id.* art. 702. Under Commercial Law, objective change of increase of risk is distinguished from subjective change or increase of risk, from the fact that the latter comes from the deliberation or gross negligence of the insured or policyholder, while the former does not. Also the effect of each change or increase is somewhat different from each other.
158. Commercial Code, *supra* note 1, arts. 655, 701, 703. The provision (art. 702) was made in consideration of the fact that it is difficult to prove the change of risks in marine insurance as a special provision to the general provision (art. 653) about the change of risks due to the insured's deliberation or gross negligence, which is construed to be affected by the United Kingdom Marine Insurance Act 1906 (arts. 42–49). The fact that causation is required between a change of risk and a loss to discharge the insurer from further liability is different from the provisions of Marine Insurance Act 1906. To provide that the insurer shall be discharged from further liability and concurrently that the causation is required between a loss and a change of risks is not reasonable, considering the concept of the change of risks. It would be legislatively desirable to be modified not to require the causation.

C. Exclusion Risks in General Insurance Clauses

All general insurance clauses designate their own exclusion risks for the insurer. These are known as exclusion clauses. The exclusion risks contained in the clauses are effective as long as they do not conflict with the Commercial Code.[159] Also, when a covered risk pertains to exclusion risks indicated in the clauses, the insurer is not responsible for payment of the claim amount.

X. LEGAL SITUATION OF THE INSURED

The usage of the term "the insured" varies with the type of insurance (life insurance or non-life insurance) in Korea's Commercial Code. In the case of non-life insurance, the insured, as the subject of insurable interests, refers to the person who has the right to be indemnified for loss or damage from the covered risks.

In the case of life insurance, the insured refers to the person whose life or body is insured, i.e., the object of the insurance. To avoid conceptual confusion, it would be better if the insured in non-life insurance were made to represent the beneficiary in non-life insurance.

With respect to the relationship between the insured and the policyholder, in the case of non-life insurance, the insured and the policyholder are the same when the insurance contract is for oneself. In the case of third-party insurance, the insured is not a party to the contract, but rather a third party. In the case of non-life third-party insurance, the policyholder concludes the contract on behalf of a third party under his own name and so makes claims and assumes obligations. The benefit of the contract (i.e., claims for the payment of the insured amount) is received by the insured.

159. Commercial Code, *supra* note 1, art. 663.

In the case of insurance on one's own life and body, the insured is the policyholder. On the other hand, insurance on another person's life and body means that the policyholder can choose others as the insured. In addition, in the case of a death insurance or a mixed insurance, the insurer's written consent is required to transfer the claims to others and to conclude the insurance contract.[160] In this case, the insured, of course, is not a party to the insurance contract.

In the case of non-life insurance, both the natural person and the legal person can be insured only if they are the subject of insurable interests. In the case of life insurance, it is self-evident that only a natural person can be the insured. A person under the age of eighteen or a mentally deficient person cannot be the insured.[161]

A. *Non-Life Insurance Contracts*

The insured in a non-life insurance contract obtains claims for payment of a claim amount and is different from the policyholder, who is the contracting party. The law clarifies rights and obligations of the insured, as follows.

The insured obtains claims for indemnity for loss or damage caused by covered risks because the insured naturally receives the benefits of the contract, even in the case of third-party insurance, regardless of his familiarity with the beneficiary of the insurance contract and without questioning whether or not the policyholder is mandated.[162]

In principle, the insured does not assume a disadvantageous obligation of paying the premium in the third-party insurance context because the insured is the one who receives the benefits provided under the contract. The initial obligation of payment of the insurance premium is imposed on the policyholder.[163] Only when the policyholder is bankrupt or in default of payment of the insurance premium is the insured responsible for such payments, as long as he does not relinquish his rights.[164]

The insured also assumes the duty of disclosure and representation at the time of conclusion of the insurance contract[165] and the obligation of notification afterwards.[166] The insured is obligated to notify the insurer of a substantial change or increase in risks as soon as he becomes aware of such change or increase.[167] In the event of a default of the obligation, the insurer can terminate the contract within one month after becoming aware of the fact.[168] Because the obligation of notification is initiated after the conclusion of an insurance contract, there have been conflicting opinions in Korea over the question of whether or not the legal

160. *Id.* art. 731.
161. *Id.* art. 732.
162. *Id.* art. 639-1.
163. *Id.* art. 639-2.
164. *Id.* art. 639-2, *provison.*
165. *Id.* art. 651.
166. *Id.* arts. 652, 657.
167. *Id.* art. 652.
168. *Id.*

nature of obligation is a direct liability or a kind of indirect liability. The latter is thought to be more reasonable.

The insured, therefore, should notify the insurer of an occurrence of covered losses as soon as he is aware of it.[169] This is because the insured is in a good position to grasp the details of the object of his insurance, even though he is not a contracting party. The obligation is not only a prerequisite for claims for payment of the insured amount but is also the insured's direct duty to the insurer.

In addition, the insured assumes responsibility for the so-called "obligation of risk maintenance" (Gefahrstandspflicht). For example, the insured should maintain a level of acceptable risks without change or increase of the risks. Thus, when risks that are initially deemed acceptable by the insurer are changed or increased significantly due to the insured's deliberation or gross negligence, the insurer is given the right to terminate the contract at anytime.[170] The right to terminate the contract may not be exercised when the change in risks is restored to the original conditions or it is proved that there exists no causation between covered losses and the changes in risks.[171]

With respect to the duty to avert or minimize losses, the insured, as the subject of insurable interests, should take all reasonable steps to prevent damage from spreading or increasing when covered losses occur,[172] consistent with the public interest and the principles of good faith. The insurer is, thus, not responsible for the increase in damage due to default of the obligation and can claim redemption of the claim amount already paid.

B. Life Insurance Contracts

The insured in a non-life insurance contract is the beneficiary of the insurance. The insured in a life insurance contract is the object of covered risks but may not necessarily be the beneficiary. Therefore, the person who has the right of claims for payment of the insured amount is the beneficiary, while the insured may be the policyholder himself, the beneficiary, or a third party.

In an insurance contract on another life and body, the insured's written consent is required to conclude an insurance contract whose covered risk is death.[173] When claims obtained by an insurance contract are assigned to person other than the insured, the insured's consent is also required.[174] In addition, the insured's consent is required when the policyholder designates or changes the beneficiary after the conclusion of a death insurance contract, where a third party is designated as the policyholder or the beneficiary.[175] The purpose of this requirement is to prevent various abuses from occurring caused by the possibility

169. *Id.* art. 657.
170. *Id.* art. 653.
171. *Id.*
172. *Id.* art. 650.
173. *Id.* art. 731(1).
174. *Id.* art. 731(2).
175. *Id.* art. 734(2).

of unlimited approval of another person's life insurance contract.

In the case of third-party life insurance, the policyholder has the right to designate and change the beneficiary.[176] When the policyholder dies without exercising the right of designation, the insured takes the position of the beneficiary[177] and obtains the right, unless it is agreed by them that the policyholder's successor can exercise the right.

The insured in a life insurance assumes the duty of disclosure and representation[178] and the obligation of notification.[179] Covered risks should not, of course, occur due to the insured's deliberation or gross negligence.[180] In death and injury insurance, the insurer is responsible for payment of the claim amount, even when covered losses occur due to the insured's gross negligence.[181]

XI. SOME GENERAL DIFFERENCES BETWEEN KOREAN AND U.S. INSURANCE LAWS

A. *Misrepresentation*

In the matter of misrepresentation, Korean insurance contract laws require bad faith and gross negligence by the insured as subjective conditions and nondisclosure and misrepresentation as objective conditions. Korean laws also require causation between misrepresentation and loss in order for the insurer to exercise the right to terminate a contract after covered losses occur. When an insurance contract is terminated due to misrepresentation, under Korean insurance contract law, the insured has no claim for the restoration of the premium already paid. This is reasonable because innocent misrepresentation is always excused in Korean law. On the other hand, an insurer in the United States may rescind a contract without questioning whether or not there exists causation between the loss and the non-disclosure or misrepresentation, since issues of non-

176. *Id.* art. 733(1).
177. *Id.* art. 733(2).
178. *Id.* art. 651.
179. *Id.* art. 652.
180. *Id.*
181. *Id.* art. 659(2).

disclosure and misrepresentation do not depend on reasons or motives. Thus, in such cases, the insured can claim restoration of the paid premium only if the said misrepresentation is not fraudulent.

B. Change or Increase in Risk

1. Due to the Insured's Deliberate Act or Gross Negligence

In Korea, change or increase of risk can be divided into two broad types, according to whether or not a change or increase arises from the deliberate act or gross negligence by the insured. Here, an objective change or increase of risk is different from a subjective change or increase of risk. In the former, the policyholder is obligated to notify the change to the insurer. The failure to notify allows the insurer to terminate the contract or to request an additional premium. For example, in the case of marine insurance contract, a change or increase of risk can discharge the insurer from further liability from the time of deviation or a change in the voyage,[182] similar to the provisions of the United Kingdom Marine Insurance Act 1906.[183] In addition, subjective change or increase of risk also violates the policyholder's obligation to maintain the risks as contractually accepted, and again, such change or increase give the insurer the right to terminate a contract or to claim an additional premium. The right to terminate a contract may be exercised whether or not covered losses occur. Termination may not be exercised when risks are restored to the original conditions or when it is proved that there exists no causation between covered losses and a change or increase of risk. Thus, Korean insurance contract laws have provisions to impose the obligation of notification on the insured in the case of objective changes in risk. These provisions can certainly protect the innocent insured from objective changes in risk. Also, in the case of subjective changes in risk, Korean insurance contract laws somewhat restrictively give the insurer the right to terminate a contract.

In comparison, U.S. insurance laws stipulate that "the insurer shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured" in a fire insurance contract.[184] In a marine insurance policy, the insurer is discharged from any liability from the time of deviation if a vessel, without lawful excuse, deviates from the voyage described in the policy.[185] In both of the these cases, the insurer is discharged from any liability to the insured irrespective of whether or not there exists a causation between the change of risk and losses.

182. *Id.* arts. 701(1), 701(2), 702.
183. United Kingdom Marine Insurance Act, 1906, *supra* note 59, arts. 45-46.
184. KEETON & WIDDISS, *supra* note 48, at 680.
185. LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES, 39 (1981).

2. *Due to Breach of Warranty*

Korean insurance contract law has no concept of warranty[186] such as that used in the United States. For example, although unseaworthiness is cited as one of the exclusion risks in hull or freight insurance, this would not be considered breach of the insured's implied warranty in Korea—as it would be in the United States. The insurer cannot discharge its liability merely because there was a breach of the warranty, rather, only when there is a causation between covered losses and unseaworthiness would the insurer be discharged from liability. Thus, the Korean approach of requiring causation is more favorable to the insured. This difference between the two legal systems disappears when legal efforts, which make the effect of the breach of warranty relaxed,[187] provide satisfactory results in the United States.[188]

C. *Insured and Policyholder Status*

Finally, in Korean insurance contract law, the insured and the policyholder are strictly distinguished. Their respective legal status are different, one result of which is the fact that this permits arguments over whether or not the insured, especially in the case of third-party insurance, has the duty of disclosure and representation, and whether or not the policy holder has a direct claim against the insurer. It is easier for them to understand their legal rights and obligations in the case where they are distinguished from each other than in the case where the policyholder is regarded as the agent of the insured, as in the Anglo-American insurance law.

XII. CONCLUSION

Although there are no substantial differences between Korean insurance contract laws and U.S. laws, it may be argued that Korean insurance contract laws protect the insured and the policyholders to a greater degree than U.S. laws do. Korean insurance contract laws lay greater emphasis on protecting the

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186. The early development of the concept of warranty in the Anglo-American insurance law has been attributed to Lord Monsfield. *See* KEETON & WIDDISS, *supra* note 46, at 563-64.

187. *Id.* at 565.

188. Traditionally, a warranty has been constructed very strictly and literally in the United Kingdom, especially in a marine insurance contract, as illustrated by the provisions of Article 33(3) of the Marine Insurance Act 1906. It stipulates that "A warranty as above defined is a condition which must be exactly complied with, whether or not it is material to the risk or not. If it is not so complied with, then subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty . . . ." The doctrine of warranty has been eased in the United States, as illustrated in the provisions of Article 3106(b) of the New York State Consolidated Laws. It stipulates

A breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such a breach materially increases the risk of loss, damage, or injury within the coverage of the contract. If the insurance contract specified two or more distinct kinds of loss, damage, or injury which are within its coverage, a breach of warranty shall not avoid such a contract or defeat the recovery thereunder with respect to any kind or kinds of loss, damage, or injury other than the kind or kinds to which such warranty relates and the risk of which is materially increased by the breach of such warranty.

insured, basing the protection more on the weakness of the insured's bargaining power than on the principle of equity or commercial convenience. This difference may, however, be mitigated to the extent that U.S. legislative efforts to protect insurance consumers, from the viewpoint of consumerism, are effective.