

LEGAL PROBLEMS ON DUTY OF DISCLOSURE UNDER MARINE INSURANCE CONTRACT*

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ABSTRACT

The duty of disclosure is important duty under utmost good faith doctrine that assists the party to marine insurance contracts have an equal status prior execution of the contracts. The party to the contracts shall entitle to obtain material circumstances from another for their own of risk assessment. This duty causes controversial problems in practice, for example, the assured's duty is too onerous, extension of compliance scope for the post-contractual period and unfair remedy.

Those problems affect to the development of marine insurance law in several jurisdictions. It is significant to highlight a change from 'duty of disclosure' to 'duty of fair presentation' in the United Kingdom where originated the ancient of marine insurance law. The new duty imposes the insurer to have more active part at the pre-contractual period and include imposing a fair remedy. Noticeably, the new duty attempts to close the loophole in accordance with the duty of disclosure.

In Thailand, there is no direct provision governing the duty of disclosure under the marine insurance contracts. The previous judgments ruled the applicable law to the marine insurance cases in two ways; one, the application of Marine Insurance Act 1906 and another, the application of insurance law under the Civil and Commercial Code. The application of both laws led to significant questions and legal problems respectively. With a purpose to resolve these problems and build a trust to players, the marine insurance law provision regarding to duty of disclosure should be enacted with the

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provisions to state equitable duty between the assured and insurer, limitation of the duty's scope at the pre-contractual period and imposing a fair remedy.

Keywords: duty of disclosure, marine insurance, utmost good faith, duty of fair presentation

บทคัดย่อ

หน้าที่เปิดเผยข้อเท็จจริงเป็นหน้าที่ที่สำคัญภายใต้หลักสุจริตอย่างยิ่ง ซึ่งช่วยให้คู่สัญญาในสัญญาประกันภัยทางทะเลมีสถานะเท่าเทียมกันก่อนที่จะเข้าทำสัญญา คู่สัญญาแต่ละฝ่ายย่อมมีสิทธิได้รับข้อเท็จจริงที่เป็นสาระสำคัญจากคู่สัญญาอีกฝ่าย เพื่อประเมินความเสี่ยงของตนก่อนที่จะคู่สัญญาแต่ละฝ่ายจะเข้าทำสัญญาประกันภัย ในทางปฏิบัติ หน้าที่เปิดเผยข้อเท็จจริงได้ก่อให้เกิดข้อถกเถียงในปัญหาต่าง ๆ อย่างแพร่หลาย อาทิ เช่น ผู้เอาประกันภัยรับภาระหน้าที่เปิดเผยข้อเท็จจริงเกินควร, การขยายขอบเขตการปฏิบัติตามหน้าที่ภายหลังที่คู่สัญญาได้ทำขึ้นแล้ว และความไม่เป็นธรรมอันเกี่ยวกับวิธีการแก้ไขเยียวยาสำหรับการปฏิบัติหน้าที่เปิดเผยข้อเท็จจริง

จากปัญหาที่เกิดขึ้นดังกล่าว ได้ส่งผลให้เกิดการพัฒนาการของกฎหมายประกันภัยทางทะเลในหลาย ๆ ประเทศ โดยเฉพาะอย่างยิ่ง ประเทศสหราชอาณาจักรซึ่งเป็นต้นกำเนิดของกฎหมายประกันภัยทางทะเลที่เก่าแก่ ได้แก้ไขเพิ่มเติม ‘หน้าที่เปิดเผยข้อเท็จจริง’ และเรียกหน้าที่ดังกล่าวขึ้นใหม่ว่า ‘หน้าที่เปิดเผยข้อเท็จจริงอย่างซื่อสัตย์’ ทั้งนี้ หน้าที่เปิดเผยข้อเท็จจริงอย่างซื่อสัตย์ได้กำหนดให้ผู้รับประกันภัยให้มีบทบาทมากขึ้นสำหรับระยะเวลาก่อนเข้าทำสัญญา และรวมถึงการแก้ไขบทบัญญัติที่ไม่เป็นธรรมอันเกี่ยวกับวิธีการแก้ไขเยียวยา อย่างไรก็ตาม เป็นที่น่าสังเกตว่า หน้าที่เปิดเผยข้อเท็จจริงอย่างซื่อสัตย์ได้พยายามที่จะแก้ไขปัญหาดังกล่าว ที่เกิดขึ้นอันเกี่ยวกับหน้าที่เปิดเผยข้อเท็จจริงอีกด้วย

สำหรับประเทศไทย ปัจจุบันยังไม่มีกฎหมายที่จะบังคับใช้กับหน้าที่เปิดเผยข้อเท็จจริงภายใต้สัญญาประกันภัยทางทะเลแต่อย่างใด คำพิพากษาที่ผ่านมาได้วางหลักอันเกี่ยวกับ กฎหมายที่จะปรับใช้แก่สัญญาประกันภัยทางทะเลไว้สองลักษณะ ลักษณะแรก คือ การนำ Marine Insurance Act 1906 ของประเทศสหราชอาณาจักร มาปรับใช้ และ ลักษณะที่สอง คือ การนำกฎหมายประกันภัยภายใต้ประมวลกฎหมายแพ่งและพาณิชย์ของประเทศไทยมาปรับใช้ การปรับใช้กฎหมายทั้งสองลักษณะดังกล่าวได้ก่อให้เกิดคำถามและปัญหาทางกฎหมายที่สำคัญอย่างยิ่ง ดังนั้น เพื่อที่จะแก้ปัญหาดังกล่าวและสร้างความเชื่อมั่นแก่ผู้ที่ต้องปฏิบัติตามหน้าที่นี้ ประเทศไทยควรออกกฎหมายประกันภัยทางทะเล ว่าด้วยเรื่อง หน้าที่เปิดเผยข้อเท็จจริงเพื่อบังคับใช้กับสัญญาประกันภัยทางทะเล โดยกำหนดให้การเปิดเผยข้อเท็จจริงเป็นหน้าที่ของคู่สัญญาทั้งสองฝ่าย, จำกัดขอบเขตการปฏิบัติหน้าที่ไว้เฉพาะช่วงเวลาก่อนที่จะ

เข้าทำสัญญา ตลอดจนกำหนดบทบัญญัติที่เป็นธรรมเกี่ยวกับวิธีการแก้ไขเยียวยาสำหรับการปฏิบัติ
หน้าที่เปิดเผยข้อเท็จจริงด้วย

คำสำคัญ: หน้าที่เปิดเผยข้อเท็จจริง, ประกันภัยทางทะเล, หลักสุจริตอย่างยิ่ง, หน้าที่เปิดเผยข้อเท็จจริง
อย่างยุติธรรม

Introduction

Since a contract of marine insurance is considered to be unequal contract, the utmost good faith doctrine would therefore require the duty of disclosure applying to both assured and insurer before a conclusion of contract. In practice, the duty of disclosure is mainly imposed to the assured. The insurer's duty is likely to be less important than it should be. It could explain that the assured is strictly obliged for disclosing all material facts before the execution of contract as those facts would effect to the insurer for entering into the contract and identifying premium rate. However, this duty causes controversial issues for the marine insurance business as follows:

First, the assured's duty is too onerous as the insurer has more bargaining power than the assured. And, if the assured fails to disclose his facts because of his unknown, the insurer may also take this benefit for acting in bad faith in order to disclaim their liabilities.

Second, the compliance scope of this duty is extended to the post contractual period. This extension scope is contradicted to the law stating that this duty is to perform before a conclusion of contract.

Third, the broker involves to the marine insurance business by acting on behalf of the assured for the contract execution. As observed, there is no provision of law identifying the broker's liability if he ignores to disclose the assured's facts to the insurer.

Forth, the avoidance of insurance contract is unfair remedy to be imposed against the assured's breach. It should consider whether this remedy is fair to the assured if such breach is arisen from his unknown.

Fifth, Thailand has no direct provision governing the duty of disclosure under the marine insurance contracts. The application of Marine Insurance Act 1906 and insurance provision under the Civil and Commercial Code may not be appropriate for applying to Thai's marine insurance business.

Overview Duty of Disclosure

The duty of disclosure has been developed from a case named *Carter v. Boehm*¹. It was a landmark case regarding to the historic ocean marine insurance case.² The court ruled that the insurer's knowledge should not only rely on the assured's knowledge but also including the knowledge deriving from others. Lord Mansfield also opined that the facts disclosed to the insurer should not be limited to the assured's knowledge only. The insurer should ask further queries to the assured or others prior to execute the insurance contracts and the assured obliges to disclose every material circumstance regardless of whether such disclosure circumstance will be considered as a material circumstance.³ This duty has been subsequently codified and given statutory authority in Section 17, 18 and 19 of the Marine Insurance Act 1906.⁴

(1) Objective

The objective of this duty is therefore to ensure that a party would honestly disclose material facts to another for the risk assessment.

(2) Is it a legal duty?

The duty of disclosure has been stated in the marine insurance law. Under a case named *Bell v. Lever Brothers Ltd.*⁵, it

¹ *Cater v. Boehm* (1766) 3 Burr. 1905 cited in Professor Alexander von Ziegler, *The "Utmost Good Faith" in Marine Insurance Law on the Continent, Marine Insurance at the Turn of the Millennium* Volume 2, **ANTWERP** 22 (2000).

² Francis Achampong, *Uberrima Fides in English and American Insurance Law: A Comparative Analysis*, 36 **International and Comparative Law Quarterly** 329 (1987).

³ *Lindenau v. Desborough* (1828), 8 Barn & Cr. 586.

⁴ John Birds, Ben Lynch and Simon Milnes. **MacGillivray on Insurance Law**. 12th ed. London, Sweet and Maxwell Limited, 476 (2012).

⁵ *Bell v Lever bros* [1932] AC 161.

clearly concluded that the duty of disclosure cannot be derived from the contract if this duty were existed before the actual formation of the contract. Therefore, the duty to disclose is a legal duty not a contractual duty.

(3) The person who require to comply the duty of disclosure

The parties to marine insurance contracts are generally required for compliance with the duty of disclosure. The assured is required for disclosing all facts that those are in his knowledge. Also, the insurer is required for disclosing the facts i.e. insurer's name and premises, details of insurance policy throughout premium, termination and others.⁶ Additionally, the duty of disclosure is considered to be extended to the broker as the course of business may demand one party shall affect insurance on property on behalf of another.⁷

(4) Types of disclosed facts

The assured has to disclose facts which are generally classified in two groups;⁸ one is facts that the assured know, ought to know and presumed to be known in the ordinary course of business and another is material circumstances which should be the circumstances that have influenced to the prudent insurer for making a decision either indicate the insurance premium or accept the marine perils.⁹ While, the insurer has to disclose facts which are the insurer's facts, insurance policy, and insurance contract.¹⁰

(5) Compliance issues

The applicable period is significant issue on the duty of disclosure. As observed the practice of marine insurance, the duty disclosure is requested both pre-contractual and post-contractual period. In the application form of marine insurance policy, the

⁶ นิตินาสตร์ สายสุนทร, *หลักสุจริตอย่างยิ่งในสัญญาประกันภัยทางทะเล*, วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 6 (2552). (Nitisat Saisoonthorn, *Utmost Good Faith under Marine Insurance Contract*, Master of Law's Thesis. Thammasat University, 6 (2009)).

⁷ John Birds, *supra* note 4, at 1245.

⁸ สายสุนทร (Saisoonthorn), *supra* note 6, at 27-35.

⁹ สายสุนทร (Saisoonthorn), *supra* note 6, at 30

¹⁰ *Id.*, at 21.

prospective assured will be requested to declare his disclosure to the insurer in the application form at the pre-contractual period. While, at the post-contractual period, the duty of disclosure will be also required to be performed by the assured even the marine insurance policy has been issued.

(6) Non-compliance issues

In case the duty of disclosure has failed to be performed by the assured, the insurance contract shall be voidable as remedy against the insurer. Subsequently, both parties shall be restituted to the condition that they were previously. However, this remedy seems to be unfair because there is disregard to the degree and reason of such failure.

Foreign Laws regarding to the Duty of Disclosure

(1) United Kingdom

The Insurance Act 2015 is introduced new duty named “duty of fair presentation” for applying to commercial insurance¹¹ in lieu of the duty of disclosure. The duty of fair presentation merges disclosure and misrepresentation rules into a holistic duty where the overall information presented to the insurer will be assessed on how fair a representation was made,¹² however, the new duty still retains the concept of the disclosure of information.¹³ The assured’s obligation is to make a fair presentation of the risk to the insurer and the aforesaid obligations shall exclude any circumstance that the insurer knows, ought to know or is presumed to know it. It could further clarify that an intention of duty of fair presentation is to force insurers to involve information gathering process by removing some of assured’s burden.¹⁴ Interestingly, this Act has been reformed the

¹¹ Laura Reeves, “*The Duty of Pre-Contractual Disclosure in English Insurance Law: Past and Future –Does the Law Need to be Changed?*”, **Southampton Student Law Review** Vol.5, 8 (2015).

¹² *Id.*, at 2.

¹³ *Id.*, at 10.

¹⁴ Michael Axe, ‘*Insurance Disputes: ‘full disclosure’ or ‘fair presentation’ – what’s the difference?*’ in “Commercial Disputes, Disputes, Insurance Disputes”, <http://www.rawlisonbutler.com/news/insurance-disputes-full-disclosure-or-fair-presentation-whats-the-difference/>.

remedies based on the insurer's point of view.¹⁵ The remedies could separate cause to be either deliberate, reckless or others. It should note that this reform is a significant change to the United Kingdom's marine insurance law and possibly reflect to the global of marine insurance industry inevitably.

(2) Norway

The Nordic Marine Insurance Plan of 2013, Version 2016 is the latest version of the Norwegian Marine Insurance Plan. It is not the marine insurance law but it is an agreed document in accordance with the standard marine insurance contractual terms as well as the Institute Clauses used in the London Market.¹⁶ The person effecting the insurance is obliged to comply with the duty of disclosure.¹⁷ Besides, the insurer is still required to comply with the duty of give notice without undue delay and clarify that the insurer has intend to invoke in case the insurer become aware that incorrect or incomplete facts has been given.¹⁸ This Norwegian Marine Insurance Plan is required the duty of disclosure to perform at the conclusion of contract. The remedies arising from non-compliance with the duty of disclosure have been provide in several scenarios i.e. the contract shall not bind the insurer if the person effecting insurance fraudulently fails to perform this duty and etc.

(3) The People's Republic of China

Under the Maritime Code of the People's Republic of China, the assured has obliged to inform a truthful of material circumstances to the insurer before the conclusion of contracts.¹⁹ The said disclosure should be material circumstanced effecting to the insurer's making decision to enter marine insurance contracts. In the

¹⁵ Laura Reeves, *supra* note 11, at 10.

¹⁶ Poomintr Sooksripaisarnkit, *Reform of 'non-disclosure' in UK Marine Insurance Law: Exotic Approach or Original Understanding*, Doctor of Philosophy's Thesis. University of Leicester, 34 (2006).

¹⁷ § 3-1 Para 1 of Chapter 3 under Norwegian Marine Insurance Plan of 1996, Version 2010

¹⁸ § 3-6 of Chapter 3 under Norwegian Marine Insurance Plan of 1996, Version 2010

¹⁹ Article 222 of Maritime Law of the People's Republic of China

event the assured does not comply with the duty to disclose, the remedies are separated cause between intentional act and no intentional act. For intentional act, the remedy for breach is that the insurer could terminate marine insurance contracts without any refund of premium throughout he shall not be liable for any loss that those are caused by the perils assured against prior the termination of contracts.²⁰ For unintentional act, the remedy for breach is that the insurer could either terminate marine insurance contracts or demand a corresponding for increasing the premium.²¹

Duty of Disclosure in Thailand

There is no direct provision of law governing a contract of marine insurance for Thailand. Section 868 under Civil and Commercial Code is only the reference provision not a provision to resolve the issue of marine insurance contracts. The insurance law under this Civil and Commercial Code could not be applied to the marine insurance contracts because the intention of drafter is to exclude the marine insurance contracts from the insurance contracts or those called as non-marine insurance.²² And, the marine insurance has the difference characteristics from non-marine insurance, for example, perils, insurable interest and etc. Besides, the general provisions of insurance law could not be applied because the marine insurance contracts should be governed by the specific provisions even the general provisions of insurance law are rooted from the law of marine insurance.

For the duty of disclosure terms under the marine insurance contracts, the Unfair Contract Terms Act B.E. 2540 may be relevance. To extent that, if the unfair terms, i.e the assured is requested to comply with the duty of disclosure after the contract execution, are imposed as a standard terms and the party who has not imposed this unfair term agrees to accept due to less of bargaining power, whether this unfair term could be enforced. It could explain

²⁰ Article 223 Para 1 of Maritime law of the People's Republic of China

²¹ *Id.*

²² จิตติ ดิงศักดิ์, กฎหมายแพ่งและพาณิชย์ว่าด้วย ประกันภัย 4 (พิมพ์ครั้งที่ 12 2543) (Jitti Tingsapat, Textbook on Insurance 4 (12nd ed. 2000)).

that there is generally considered to be unfair terms because one, the duty of disclosure is generally required to perform before the contract execution and another, such terms would let the assured to accept more burden than it should be. Therefore, the acceptance of the aforesaid party could not let the unfair terms to be enforced.

Apart from the above, in the absence of the specific provision for governing marine insurance in Thailand, the local custom, the provision most nearly applicable and the general principles of law as stated in Section 4 under the Civil and Commercial Code must be taken into consideration respectively. It should note that this section has been applied to the marine insurance cases and it also leads to problems in the previous judgments. To extent that, the Court ruled the judgments in accordance with the applicable law to marine insurance cases in two ways. One,²³ the application of Marine Insurance Act 1960 that is the internal law of the United Kingdom which has widely accepted for the marine insurance industry in a global. It was applied to the marine insurance case as the general principle of law. It leads to further legal problems because this is a foreign law and the Court could not apply this internal law of foreign country for applying to Thai marine insurance cases without being requested and proved this law by the parties to the dispute. Although the parties to the dispute agree to bring this foreign law into the case, the Conflict of Laws B.E. 2481 needs to be involved in this issue. Second,²⁴ the application of insurance provisions under the Civil and Commercial Code into Thai's marine insurance cases, it was applied to the marine insurance case as analogy to provision most nearly applicable. It also leads to further legal problems because a difference of characteristics between marine insurance and insurance against loss.

Recommendations

In order to find out solutions for the problems to be addressed in above, the proposals of recommendation are provided as follows:

²³ Supreme Court Judgment No. 7530/2537

²⁴ Supreme Court Judgment No. 6649/2537

First, the duty of disclosure needs to balance between the assured and insurer. The insurer's duty needs to be added and clarified that what kind of facts that the insurer need to be disclosed.

Second, the duty to disclose should be limited to perform at the time before the execution of marine insurance contract only in order to reduce the uncertainty in practices.

Third, the duty of disclosure provision should be clearly extended to the broker who performed the duty on behalf of the assured. In addition, the reasonable penalty against the broker's breach of duty should be imposed.

Fourth, the remedy should be provided in several degrees, for example, the non-compliance arising from either intention or non-intention should have difference remedies. The concept of remedy should be provided to the assured and insurer.

Fifth, Thailand should have its own marine insurance law. The benefit of having its own marine insurance law may reduce the problems arising from a judgment and build a trust to players. Therefore, the marine insurance law should compose of specific provisions regarding to the duty of disclosure stating the details as follows:

(a) The duty of disclosure should be applied to both assured and insurer. The broker who acts on behalf of the assured is also included as the responsible person to this duty.

(b) It should clearly state the material circumstances by giving example throughout clarify the difference of facts that will be disclosed by the assured and insurer.

(c) Exceptions of material circumstances should clearly provide in order to avoid data dumping and further dispute.

(d) This duty should be limited at the period before execution of marine insurance contracts. After the execution of marine insurance contracts, the legal consequence arising from non-compliance with the duty should not be considered.

(e) The remedy should grant to the assured and insurer. The avoidance of marine insurance contracts may be remained as the highest degree of remedy and it should be imposed

by the court's discretion only. Besides, the assured should entitle a remedy against the broker's breach.

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