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The insurer's duty of disclosure under Cambodian insurance law: A comparative perspective

Chou Meng^{1*}

Abstract: The aim of this paper is to explore the current state of insurance law in Cambodia, the legal framework of the insurer's duty of good faith (duty to inform), and the regulation enacted in the Cambodian Insurance Law in recent years. The amendment made to Cambodian insurance law in 2014 took a worthy step forward by regulating an insurer's duty to inform. However, some rules were still left unaddressed, such as the scope of the insurer's duty, which is too broad and as of yet, there is no legal remedy for the insured when duty is breached by the insurer. In the face of these incomplete regulations, this article offers a comprehensive comparison of different legal approaches prescribed by several countries with more advanced insurance laws. Adopting similar approaches will be a key step toward a more functional insurance law in Cambodia's future.

Subjects: Contract Law & Tort; Asian Law; Commercial Law

Keywords: insurance law; duty of good faith; duty of non-disclosure; duty to explain

1. Introduction

The insurance industry has played a significant role in Cambodia's economic development and has had important functions in the realm of social welfare. Insurance offers a choice of prudence to an individual when planning and conducting their affairs. This choice allows one to transfer away risk of losses by paying an insurance premium to the insurance company. In short, insurance is an effective risk transfer mechanism which can provide the insured with peace of mind.¹ The mutual agreement

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PUBLIC INTEREST STATEMENT

The aim of this paper is to explore the current insurance law in Cambodia as well as the legal framework of the insurer's duty of good faith (duty to inform) and regulation enacted in the Cambodian Insurance Law in recent years. It is a worthy step forward in the new amendment law in 2014 of Cambodian insurance law which insurer's duty to inform has regulated. However, some insufficient rules still remained unsolved, such as the scopes of the duty are too broad, and particularly there is no legal remedy when duty breached by the insurer appears in the current amendment law. In the face of these incomplete regulations, this article offers a comprehensive comparison of the different legal approaches from some countries which their insurance law is in a mature condition as a key step toward for Cambodia to harmonized its future legal reform.

between the insured and insurer is a precious function which enables both parties to plan their personal affairs (insured) and/or their business operations (insurance company) with prudence. The insured in the consumer in an insurance agreement and should obtain effective legal protection. This shields their legal interests and reduces aggression on the part of the insurance company which may come in the form of voiding an insurance policy or decreasing the amount of compensation.

Consequently, in order to promote fairness in insurance affairs, an appropriate legal system for the protection of the insured's legitimate right is the only effective mechanism. Currently, the insurer requires the insured to provide them with all the information concerning the insured subject matters in order to fix the risk. To further ensure fair representation, the insurer is required to inform the insured about important matters pertaining to the corresponding policy, specifically changes in coverage. Thus, in the designation of a policy, the disclosures and advisements as described by the insurer—to the insured—appear to be effective tools to both inform and address policy coverages. However, current insurance law in Cambodia does not contain any provision concerning this significant mechanism. A reform of industrial corporate law and consumer protection law should play a central role in the current goal of the Cambodian Government to modernize its market economy and attract foreign capital investment.

2. The origin of insurer's duty

2.1. *The duty of utmost good faith in marine insurance law 1906 (English)*

When Mediterranean and North Sea merchants were introduced into English insurance affairs—and the English court, thereafter—they soon adopted English insurance laws and customs. However, in the past few centuries, disputes have arisen and have been settled by the merchant tribunals, not by common law. During this period there has been competition between the merchant tribunals and the Admiralty court. The Commissioners' court, however, was under the assumed jurisdiction of the common law court until the 18th century.² The principle of insurance matters, especially the principle of duty of Utmost Good Faith was established in common law by *Carter v. Boehm* and was adopted by the English court at that time.³ The principle of Uberrima Fides or "Duty of Utmost Good Faith" could be ensured and performed fairly, openly and honestly.⁴ In the English legislature, after the review of thousands of cases, the relevant principles of Utmost Good Faith were codified in Marine Insurance Act (MIA) in 1906.

This principle is recognized as one of legislation or an implied rule which would be applied in the insurance contract; a number of rules and principles which settle the duty of Utmost Good Faith were described in sections 17–20 in the 1906 Marine Insurance Act. Sections 17 of the Marine Insurance Act 1906 stipulated that: "*A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.*" In this section, the law identified that this duty is reciprocal wherein it is owed by both the insured and insurer. The other three sections (sections 18–20) specified more particulars of the pre-contractual duty of disclosure which was put on the insured; it provided further details about the insured's duty of providing comprehensive and precise disclosure. At the same time, these four sections declared both to govern the marine and non-marine insurance law.⁵ The insurance contract, as confirmed by the English expert in merchant law, Lord Mansfield CJ, 250 years ago in *Carter v. Boehm*, is based on the Utmost Good Faith principle, which will be further referred to as "Good Faith".⁶ There are many rules that support said principle and provide the guidance and structure to implement it, especially for a rule regarding the insurer's duty.

As a point to bear in mind, it is similar to other contracts. Good Faith denotes that the duty is not simply one of honesty, but also of fraud prevention⁷ or deceit within an insurance contract. The function of the Good Faith Principle is to impede fraudulent intentions on the parts of both the insured and insurer who should not withhold or misrepresent any material facts of the insured subject matter in effort to obtain or prescribe insurance coverage. Both parties are encouraged to act in good faith and should not conceal any facts which may affect the scope of the policy. The

contract should be founded on an equal exchange of information wherein neither party is able to take advantage of the other. Consequently, good faith is meant not only just for the insured's duty of disclosure, but also for the insurer.

2.2. The insurer's duty of disclosure

In the case of *Carter v Boehm*,⁸ Lord Mansfield's judgment established the principle of utmost good faith; this principle was also applicable to "all contracts and dealing." Meanwhile, Lord Justice pointed out that not only was the insurer owed the duty of disclosure from the insured, but the converse was also true: the insurer also owed the same duty to the insured. The Good Faith Principle forbids both parties from concealing or ignoring pertinent information about the proposed policy or agreement.⁹ This mutual obligation is a cornerstone of the duty of good faith in common law, which applies to all insurance contracts.¹⁰ This reciprocal good faith requires the insurer to disclose the material facts which are presumed to be commonly known by him. The Mansfield LJ pointed out that the insurer: "*must at least extend to disclosing all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.*"¹¹

In English common law, the only case which described in detail an insurer's duty to disclose was the *Horry v Tate & Lyle Refineries Ltd* case.¹² Justice Pain proposed that the insurer had to point out: "(1) that the sum offered was on the low side; (2) that they should have supplied the victim with a copy of the medical report supplied by his (the plaintiff's) doctor; (3) they should have made sure the plaintiff understood that if he accepted the money, that would be an end of the matter and (4) the plaintiff should have an opportunity of testing himself back at work and have a proper opportunity of thinking over the offer."¹³ Furthermore, the insurer's duty of disclosure appeared in the case of *Banque Financière de la Cité v Westgate Insurance Co Ltd*,¹⁴ where the insurer knew about a broker's fraudulence but did not inform the bank. The decisions in both the trial and appellate levels of this case relied on the insurer's breach of the duty of Good Faith (non-disclosure duty), where he is expected to disclose certain facts and circumstances to the insured in the stage of pre-contractual obligation.

Bear in mind that within common law, the insurer also owes the duty to act in good faith. The insurer is obligated to disclose material facts to the insured both before and while entering into an agreement. In the history of insurance contract development, the principle of good faith is clearly understood to be reciprocal in nature. In the *Westgate* case,¹⁵ for example, the trial judge, the court of appeals, and the House of Lords all recognized the reciprocal nature of the duty of disclosure. Thus, there is no doubt about the original nature of reciprocity of the duty of disclosure in insurance contracts.

Furthermore, in *Bank of Nova Scotia v Hellenic Mutual War Risks Association*,¹⁶ the court reiterated the reciprocity of disclosure duty but also affirmed that it was not necessary to do so.¹⁷ Following this, it has been rare that the duty of disclosure by the insurer emerged in English insurance precedent. It is common knowledge that the jurisprudence developed by the courts in recent years almost principally stressed on the position of insured duty of disclosure. The Marine Insurance Act 1906, in fact, stipulated that it was the duty of the insured to disclose rather than the insurer's duty.¹⁸ The position of the insurer's duty of good faith still remained somewhat vague in English common law. While the rule was implied in the insurance cases, the insurer position was still in its infancy, communication systems were weak, and consequently, the one who stands in a better position (e.g., judge) emphasizes the knowledge of the insured rather than that of the insurer. This is because the insured has a better knowledge of the potential risks to be posed to the insurer.¹⁹ The situation has developed drastically with the progression of technology, communication tools, and human resources. Insurance companies can now, with the latest technology, control and collect data on their own, enabling them to gain more information within the scope their practice at a more rapid pace and therefore, provide more accurate risk management. Thus, the duty of disclosure by the insurer seems to have greater significance in the arrangement of good faith and fair dealing within insurance affairs.

The English Insurance Act 2015—enforced on 12 August 2016—has had some impact on the pre-contractual duty of the insurer as defined in the Marine Insurance Act 1906. As stated in the Insurance Act 2015, avoidance, as the remedy for breach the duty of utmost good faith is abolished by section 14 (1) of the new Act. Section 14 (1) of the new Insurance Act provides that: *“Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.”* However, the Act also clearly establishes the duty of fair presentation of the risk by insured, but does not do so for the part of the insurer. Thus, the rule in section 17 of Marine Insurance Act 1906, which affirmed that insurance contract is based on utmost good faith still remains²⁰; and the insurer still retains the duty of disclosure in good faith and fair dealing with insured in the contractual relationship.²¹ Additionally, the Explanatory Notes attached to the new Act establishes that *“The intention of section 14 is that good faith will remain an interpretative principle, with section 17 of the 1906 Act and the common law continuing to provide that insurance contracts are contracts of good faith.”*²² The law persistently provides room for judicial officiants to interpret this duty in a flexible manner. Noteworthy, the Law Commission also mentioned that the duty of good faith is mutually and could also apply to the insurer.²³

In Germany, the insurance contract law is stipulated by the Insurance Contract Act (VVG). The German Insurance Contract Act, which abolished the old Insurance Contract Act (1908) was enacted in 2007 and entered into force in 2008. Except for the marine and reinsurance, this codification of insurance contract law governs all types of insurance contracts.²⁴ The aim of this Act is to improve the insured’s protection levels by providing more transparency in the exchange of information and duty to advise the insurance company.²⁵ The duty to advise is laid down in section 6 (1) of the German Insurance Act,²⁶ which stipulates that:

If the difficulty in assessing the insurance being offered or the policyholder himself and his situation gives occasion thereto, the insurer must ask him about his wishes and needs and, also bearing in mind an appropriate relation between the time and effort spent in providing this advice and the insurance premiums to be paid by the policyholder, the insurer shall advise the policyholder and state reasons for each of the pieces of advice in respect of a particular insurance. He shall document this, taking into account the complexity of the contract of insurance being offered.²⁷

As the matter of this article, in Germany, the law imposed upon the insurer the duty to advise and provide all necessary material information to the insured. Furthermore, on the basis of German Insurance Contract Act, “before the contract is concluded, the insurer shall provide the policyholder with the advice in writing, clearly and comprehensibly stating reasons.”²⁸ Therefore, the insurer is also required to inform the insured about the term of the contract, including the general terms and conditions of the policy.²⁹

The duty to advise has had a deep influence on European Insurance Law. The EU legislature has had to provide a model of the rule of insurance contract law (Principles of European Insurance Contract Law—which was influenced by the German Insurance Contract Act) in order to overcome the trade barriers existing in the current EU market. The duty of insurer in a pre-contractual stage is stipulated in section 2 of the Principles of European Insurance Contract Law (PEICL). The pre-contractual duty of the insurer was adopted in article 2:201 of the PEICL. This article is modeled on the Third Insurance Directives, which reveal the duty under EU law.³⁰ However, this rule is still vague as it only deals with the transmission of information to the insured. Although article 2:201 (2) and (3) provide some suggestion of duty of insurer where it was not provided by article 2:201 (1), the significant features of the covered policy which would include in the insurer’s duty to advise are still ambiguous.³¹ Therefore, the article 2:202 of PEICL is of some help to elucidate the article 2:201, wherein it is established that:

When concluding the contract, the insurer shall warn the applicant of any inconsistencies between the cover offered and the applicant's requirements of which the insurer is or ought to be aware, taking into consideration the circumstances and mode of contracting and, in particular, whether the applicant was assisted by an independent intermediary.³²

In this article, the law requires of the insurer a duty to warn the insured about factual inconsistencies between his needs and the reality of coverage offered. On the one hand, as we can see in article 2:202, in order to warn the insured, the insurer "ought to be aware" about such inconsistencies. When made aware, the insurer is obligated to establish or re-characterize the insured's needs and wishes from the coverage offered. The insurer's duty to explore the insured's needs is claimed as labeled a duty to warn in which it actually provides for a duty to advise.³³

2.3. The Scope to Disclose: the English and German law aspects

It has been 250 years since the Duty of Utmost Good Faith was confirmed by Lord Mansfield in his judgment in *Carter v Boehm*; it is reciprocal between both insured and insurer. As a consequence, the English have imposed a similar obligation on the insurer to disclose and represent to the insured all facts and circumstances concerning the risk and covered policy which are to be underwritten. Here, two questions will be raised concerning the scopes of duty to disclose by the insurer. First, what does the insurer need to disclose? And second, how can material facts and circumstances be tested?

The duty of disclosure by the insurer remains unclear in the practical scope. There is an obligation that the insurer must to disclose to insured any material information which is known by him prior to and within the duration of the contract. The insurer is only obligated to disclose the material facts which are known or presumed to be known by him, but not to the insured.³⁴ Is this enough for the insurer to disclose? Cicero, a legal jurist said "not". He stated that, in the corn market, where the prices are high and the supplies are low, the seller should tell the buyer about the next arrival of corn supplies when the price would be lower.³⁵ However, in English Marine Insurance Act 1906, the definition of the scope of the insurer's duty to disclose seems very narrow. In the history of English case law, Lord Mansfield seems to develop a narrow view on insurer's duty. Lord Mansfield extended the obligation of the insurer to refrain from misrepresenting the facts material to the risk insured.³⁶ In this case, there is a fact which diminishes the risk insured against. The source of the insurer's duty was affirmed in section 17 of the Marine Insurance Act; however, wherein the law did not apply certain scopes to such duty. Hence, it is necessary to analyze the scope of the duty of disclosure by the insurer at the pre-contractual stage. Once again in *Banque Financière de la Cité v Westgate Insurance Co Ltd* case, the view of the Court of Appeal had provided a clear guidance on this matter. The Appeal Court thought that, in this case, the judgment made by the trial court by Steyn J wherein he defined the materiality of disclosure as: "calculated to influence the decision of the insured to conclude the contract of insurance."³⁷ was too broad. It seems to oblige the insurer to disclose all the facts known by him of the cheaper offered premium that may be offered by other insurance companies.³⁸ Later, the appellate court adopted the definition of materiality as: "the duty falling on the insurer must at least extend to disclosing all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer."³⁹ This test then was approved by the House of Lords by Lord Bridge.

The "good faith and fair dealing" test, applied in the trial court by Steyn J, caused a great deal of disputes because it implied that the insurer not only has to disclose circumstances concerning the risk but also has to advise the insured about the terms and conditions at the pre-contractual stage. The court of appeals, in reference to the insurer's duty to disclose, has developed a more precise test; its view: the expectation of disclosure on the part of the insurer is all material information known by him which related to "the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer."⁴⁰ It is a more clear parameter if

compared to Steyn J's test. However, the court of appeal's test of materiality is still limited as it leaves the door open for future cases to redefine the scope of this duty.⁴¹

Furthermore, pursuant to the doctrine of insurer's duty in German Insurance Contract Act, the insurer is obligated to advise the insured of all matters relating to their insurance policy, specifically the policy that best aligns with the insured's interests. The insurer should explain to the insured about the complexities of the insurance contract and policy, the kinds of insurance products, the amount of premium that the insured should pay, and the risk covered. Additionally, the insurer should make specific recommendations to insured regarding the insured's needs and wishes to purchase.⁴² The aim of legislators in favor of adopting this duty, is that the insured has sufficient information about all available insurance products in order to make an independent evaluation and a reasonable choice as to whether to buy insurance or not. By providing the advice from the insurer, the insured could classify the proposal provided and would not have to trust the insurer blindly. Therefore, when an insurer's products could not meet the need of an insured, the insurer would be obligated to advise the (would-be) insured not to choose his insurance products.⁴³

2.4. The Insured Relief in the Breach of Duty by Insurer

The relief—expected to be entitled by law for the insurer's breach the duty of disclosure or misrepresentation⁴⁴—is to avoid the insurance contract and return the premium.⁴⁵ This position has been persistent since the judgment by Lord Mansfield in *Carter v Boehm*⁴⁶ and *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)*.⁴⁷ The principle of an insurer's duty of disclosure as established by Lord Mansfield is aimed at protecting the insurance consumer's legitimate right from being misled to buy an insufficient insurance product. The most typical implication of this remedy is illustrated in the case stated above (*Carter v Boehm*): where an insurer has known, the vessel has arrived, but concealed this information and accepted to insured the risk of the vessel, by doing so, the insurer is in breach of good faith. In this case, the sole remedy of avoidance is adequate for the insured to protect his legitimate right. On the basis of codified law, this remedy has been held by the courts to apply to all forms of insurance, particularly consumer insurance.⁴⁸ The avoidance remedy seems a useful tool for the insured, where he has been misled during the information stage prior to entering into an agreement, due to the information which was either not disclosed or was misrepresented by the insurer. Additionally, the insured's right to avoid the contract for the breached duty of insurer was entitled by the old law (MIA 1906) and still remains in the new law (Insurance Act 2015).

Avoidance was the only remedy, and it was a difficult choice for the insured whilst in most circumstances, it was unlikely that he wanted to avoid.⁴⁹ This remedy which is sometimes meaningless for an insured whilst he had a claim under the contract unless the insured event occurred after the avoidance of insurance. This proportionally harsh remedy was recently discussed as well as in *Banque Financière de la Cité S.A. v. Westgate Insurance Co. Ltd*,⁵⁰ which the House of Lords denied the remedy of damages. According to this circumstance and/or a very few other reported cases that dealt with this matter, then the only remedy entitled to the insured is avoidance the insurance contract (insurance policy). Thus, without forceful or significant involvement of authorities, the insured's remedy seems unlikely to change, unless by intervention of legislators.⁵¹

Undoubtedly, the reality of duty/obligation imposed by insurance law is indicated by the powers exercisable by both parties when a violation has occurred. Very similar to common law, in Germany the law intends to provide the insured with a mechanism of protection by means of putting the insurer under the duty of advice. As a matter of insurer's breach of duty, the law grants the right to the insured to void the contract and get indemnification for any losses or damages from the breached insurer.⁵² As far as a breach is concerned, the insured has to prove that the advice is necessary and the insurer was aware but failed to communicate. In contrast, the insurer is presumed to avoid liability, if, however, he could prove that there was no advice has been provided by his fault.⁵³

Once the failure of the insurer to perform the duty of advice has been founded, many forms of sanction are granted to the insured. The insured is granted the right to terminate⁵⁴ the insurance contract or can adjust the terms of the contract.⁵⁵ In the event that the insured chooses to terminate the contract, it can have a retroactive effect. On the other hand, if the breach of the insurer's duty has caused the insured great loss, the insured is entitled to sue the insurer for damages under the general contract law.⁵⁶

While the requirement of the pre-contractual duty to advise (inform/warn) is described and solidified in the European legislation in Principles of European Insurance Contract Law (PEICL), the legal remedies for breaching the duty have also been dealt with in more applicable approaches. Following article 2:202(2) of the PEICL, there are two rules of remedies for the insured where the duty to advise is breached by the insurer. In the first remedy, the insured is granted the right to terminate the contract.⁵⁷ The law provided the insured a period of 2 months to terminate the contract by informing the insurer with a written letter when he became aware of a breach. The second remedy is the right to damages.⁵⁸ The insurer is obligated to indemnify the insured against any losses caused by the breach of his duty, unless the insurer can prove that the acts are of no fault. This rule which grants the insured the right to claim damages under the PEICL is very similar to the German law.⁵⁹

3. Good Faith Under Cambodian Law and Insurer' Duty of Disclosure

3.1. Good Faith Under Cambodian General Contract Law

In Cambodia, insurance is not regulated by the Civil Code or Commercial Code. As there is no existence of Commercial Code, the insurance is regulated by Insurance Law. However, the principle of good faith is mentioned explicitly in the Civil Code⁶⁰ (The 2007 Cambodian Civil Code). Like other civil law systems, Cambodian contract and obligation laws are distinctly recognized and enforced by the principle of good faith.⁶¹ The article 5 of Civil Code establishes that: "*Rights shall be exercised and duties performed in good faith.*" Meanwhile, as the obligation is concerned, the performance of both parties is under the principle of good faith and fair dealing.⁶² There is little definition of good faith in the judicial decision. Thus, in practice, it is difficult to determine this principle; sometimes the ethical standard as well as fair dealing may be applied by the court. Of note, there is no guidance provided on how this principle applies in Civil Code; therefore, it leaves litigators unclear and uncertain of the scope and limitation of this principle.⁶³

3.2. The context of Cambodian insurance law and duty of good faith

The first Cambodian insurance regulation⁶⁴ was enacted in 1992; however, this law is heavily abbreviated; it contained only 4 articles which aimed to promote social security, economic development, particularly to boost the insurance market industry. Following this lack of insurance legislation, in 2000 the Cambodian National Assembly adopted the new Insurance Law. The 2000 Law on Insurance was promulgated on 20 June 2000 and put into effect on 22 October 2001 by another supplementary Royal Decree (PREAH REAH KRAM) No. NS/RKM/0700/02 which was issued by the King. This successfully works on insurance legislation is the first step forward for Cambodia to provide a significant legal framework for understanding its insurance regulations. This legislation contained 56 articles in 8 chapters.⁶⁵

The Cambodian law on insurance (2000) explicitly established the principle of good faith, as stated in article 10: "In making insurance contract, the insured and insurer shall respect the principle of good faith, mutual benefit, and unanimity through negotiation and shall not harm the public interests." However, there was no regulation on the duty of the insurer to disclose any information concerning the risks included or the policy covered to the insured. The legitimate right to protection between insured and insurer is simply imbalanced.

Henceforth, as the lack of legal theory and unfitted concept in the 2000 insurance law, particularly the unbalancing of insured's and insurer's right is concerned, the National Assembly of

Cambodia enacted the long-awaited amendments to the Law on Insurance (Vásquez-Vega, 2014) on 4 August 2014.⁶⁶ The articles and chapters in the newly amended law are double that of the old one; it covers the whole form of insurance business activities, including life and non-life insurance, reinsurance, micro-insurance, and foreign representative businesses. Besides promoting the transparency of the insurance business affairs, the law also developed other three main important frameworks, e.g., the management system in insurance business industry, classify and define the operation of businesses, and to boost fair competition in the market industry.⁶⁷

It is worth mentioning that the changes resulting from the 2014 amendment law affected issues related to the duty of good faith, such as the insurer's duty of disclosure (to inform).⁶⁸ However, since the Cambodian insurance law was still in its infancy, some insufficient rules still remained unclear and further reform could be considered by approaches referenced from other countries where the law is well-developed.

3.3. The duty to inform: Why there is a need to reform

Article 10 of the 2014 Cambodian insurance law governs the insurer's duty to inform, filling in the gap of the old law. As mentioned in article 10 of the new law: "the insurance company have a duty to clearly explain the insured about the conditions of the insurance contract and the meaning of the attached insurance application and insurance certificate or/and other related documents (informal translated)." In regards to the scope of insurer's duty to inform, the law states a broad definition of the scope: "conditions of the insurance contract and the meaning of the attached insurance application and insurance certificate or/and other related documents."⁶⁹ There would be a rise in uncertainty on what the insurer should have to disclose, and how to assume the extent of the information and facts disclosed. As far as the issues relevant to the context of insurance policy, it is worthy to note that, according to article 10 of the 2014 law on insurance, the insurance company (insurer) is obligated to explain the conditions of the insurance contract and other related documents to the insured. It still remains imprecise in the practical scope of what the insurer should explain; does he have to explain what he knew, ought to know, or what was known before issuing the policy to the insured? Or, whether the information concerning the risk insured should be explained or not?

Even the law put the duty on the insurer to explain to the insured the issues related to the conditions stated in their insurance contract. However, unlike in German law, the Cambodian insurance law does not provide the prospective insured a way to either to get any information about specific products provided by the insurer or facts relevant to the insured's interest in their insurance policy. Without the duty enshrined in law, however, it is likely that the insurer would not provide the insured a clear explanation about the complexities of the insurance policy, including the detailed information of insurance products, the more preferential average of the insurance premium, the risk covered in the policy, and particularly the exclusion of the exemption of the risk's liability. The amended insurance law of 2014 only imposes the duty to explain the condition of the insurance contract, but there remains a large gap within the scope of information to the determination of risk covered and the insurability in the policy slip. In addition, if the insurer, in accordance with the law, conducted the duty to explain, but failed to draw attention to the insured, then the cause of this fact the clauses of the contract whether rendered ineffective or unenforceable? No rules governing this issue appear in the Cambodian insurance law. And there is also no requirement by law whether the contractual clauses should be written in plain language, there are no rules of interpretation against the one who stands in the advantage in drafting the clause (*contra profentem*) appear in the current law.

As mentioned in the preceding sections, the duty of disclosure, both in common and civil law tradition, is a mutual duty.⁷⁰ Besides the insured, the insurer is also obligated by the statutory law to disclose all material facts in respect to the insurance of the insured prior to or during the pre-contractual stage.⁷¹ But, in the context of Cambodian insurance law, as for a long time, unlike the insured's duty, the insurer's duty was simply regarded as unimportant and often ignored.⁷² If, however,

compared with the duty of the insured, in practice, it is very difficult for the insurer to put more effort to explain to the insured with more detail about the insurance contract. The insurer then seemingly cannot pay more attention or time in explaining the conditions and terms proposed in the contract.

Some improvement in the new insurance law has been noted, such as the 2014 insurance law appears to be in a step forward upon by requiring the insurer a duty to explain.⁷³ Nevertheless, unlike in English common law and German law in which the law imposes a duty of disclosure (“inform” in German law) on the insurer, and explicitly requires that the duty should be implemented in the information stage or before the contract is concluded. Regrettably, in Cambodia, although the law requires of the insurer a duty to explain the insured, the law does not clearly express the timeframe of the duty required as the law did in England and Germany. As demonstrated by the brief comparative outline above, there are several issues as-of-yet unsolved in the Cambodian insurance law, and it is probably whether the Cambodian legislator is also well aware of most of them or not. Hopefully, these issues will be motivating reasons for future reform.

3.4. Remedies for breach: the emptiness of the law and the requires to reform imminently

According to the English common law, as has been described above, where the insurer fails to perform the duty of disclosure to the insured, the insured has the right to void the contract and the insurer has to refund the premium to the insured.⁷⁴ In Germany, in a case where the duty to inform is failed on the part of the insurer, besides the right to void the contract, the insured is granted the right to sue the insurer to indemnify the losses and damages.⁷⁵

In Cambodian context, the insurance law clearly imposes the duty to explain to the insurer. However, whilst the insurer failed to explain the meaning of terms and conditions in the contract, for example, there is no remedy provided by the law in Cambodian insurance law. Furthermore, in case the insurer performs the duty to explain, but the explanation of the clauses or detailed information is in an improper manner, as well as by giving an overly broad explanation of the insurance’s scope of liability or untrue advertisement of insurance in which make the insured profoundly believe that some risk is covered—when in fact—it is not covered. As a matter of fact, there are no legal remedies set out by the law for this type of conduct of the part of the insurer. Nonetheless, the Cambodian Civil Code provides a principle in general terms of contract law that one party of the contract is banned from any impropriety towards the other parties to reach the agreement.⁷⁶ In the following cases, a person who declares the intention may rescind the contract as the declaration of intention is defective pursuant to provisions set forth in Section II (Defective Declaration of Intention and Validity of contract) and section III (Invalidity and Rescission) of Civil Code:

- (a) where the declaration of intention is made as the result of mistake;
- (b) where the declaration of intention is made as the result of the other party’s fraud, duress or misrepresentation; or
- (c) where the declaration of intention is made as the result of the other party’s act that aims to obtain excessive profits and exploits the surrounding situation.

This provision of the Civil Code can be applied to all kinds of contracts unless otherwise, provided by other regulations in a special law. Thus, under these circumstances and without any rules provided by insurance law, the insured has the right to request the court to void the contract in accordance with the general rule provided by Civil Code.

At English common law, voiding the contract would be the only remedy for the insured; meanwhile, they could have their premium returned. This remedy has been criticized as being too harsh for the insured while having sustained losses or damages because of the insurer breaches the duty of disclosure. The remedy set out by the English common law is not satisfactory and seems unsuitable from which to draw a lesson for future Cambodian legal reform. In contrast, in

German law, the law not only grants the insured the right to claim avoidance of the contract and refund the premiums paid but is also entitles the insured the right of claiming damages and get indemnification of the losses occurred before the voided contract.⁷⁷ Unlike the English common law, the German law provides a great significant policyholder protection means for the insured. Consequently, the remedies provided by German law seem more suitable for Cambodia to use as a reference for its reform.

4. Conclusion

Since the transition from a planned economy to a free-market economy, legal reform has played a great significance in boosting economic development. In the process of its economic development, the fair competition in industrial sectors is increasingly important. Thus, the Cambodian Government has to coordinate its economic evolution with appropriate legal framework. As the insurance industry is concerned, the importance of the law of insurance will be strengthened. This essay has described the current legal framework of insurance law of Cambodia as well as the legal principles and regulations govern the insurer's duty of good faith in general, and the duty of disclosure (inform) in particular, the scope of disclosed and its legal remedy.

A brief overview of the legal approaches of the English common law, German law, and European law has been offered in order to provide a better understanding of the rules on insurer's duty of good faith in Cambodia. In this comparative analysis, the result shows that the perspective of the insured's legitimate right to protection in English common law is quite different from the Civil Law Tradition, particularly in German Law. The rules govern the insurer's duty of utmost good faith, the duty of disclosure and the legal remedies when duty is breached is much less favorable to the insured. In English common law, the insurer's duty of disclosure and its remedies remained somewhat vague as the court still had room to interpret the duty implied by the old Act (MIA 1906). Unlike the English approaches, the German law seems more developed than the English law.

The duty to explain in Cambodian insurance law, however, is actually a mutual one, but no clear remedy has been provided. If, however, the insurer breaches their duty, then the law will lose its efficacy. In addition, the scope and measurement of the material information to be explained by the insurer is still ambiguous and vague. Improvement of Cambodian insurance regulation related to the duty of the insurer and its remedy should take place soon. Reform is highly necessary for the insurance industry's development and heightened levels of insurance consumer right protection. To exemplify one law, the German approach is more than appropriate from which Cambodia can draw for its next steps in reform.

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Notes

1. Kevin X. Li, Yulan Wang, Owen Tang, Jie Min, "Disclosure in Insurance Law: A Comparative Analysis" 41 *European Journal of Law & Economics* (2016) 350.

2. Daniel Vásquez—Vega, "A Comparative Analysis of Utmost Good Faith in Colombian and English Insurance Law" (2014) 5 *EAFIT Journal of International Law* 81.
3. Malcolm Clarke, Baris Soyer, *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (1st edn informa law 2017) 13.
4. Peter Macdonald Eggers, Simon Picken, *Good Faith and Insurance Contracts* (4th edn informa law 2018) 41.
5. Baris Soyer (n 7) 14.
6. David Kendall and Harry Wright, *A Practical Guide to The Insurance Act 2015* (1st edn informa law 2018) 22.
7. Simon Picken (n 8) 57.
8. (1766) 3 Burr. 1905. See, Reuben Hasson, "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance" 47 *The Modern Law Review* (1984) 510, supra note 40.

9. Özlem Gürses, *Marine Insurance Law* (2nd edn Cavendish Publishing Limited 2017) 101.
10. Simon Picken (n 8) 373.
11. *Carter v Boehm* (1766) 3 Burr. 1905, per Lord Mansfield, at 1909, see Prof. D. Rhidian Thomas, *The Modern Law of Marine Insurance* (1st edn Informa Law, 2016) 110.
12. [1982] 2 Lloyd's Rep. 416.
13. Reuben Hasson (n 12) 510, *supra* note 40.
14. Ballesteros approached the assured bank for a loan of 80 million Swiss francs to develop a luxury hotel in Spain. The bank wanted the risk of repayment to be insured and Ballesteros appointed Mr. Lee to place the insurance. The insurance would be assigned to the bank so the beneficiary of the policy would be the bank against default in repayment of the loan. In the process of placing the insurance, the broker was fraudulent in that he certified that the banks were insured when in fact the insurance had not been placed at that stage. The banks released the loan despite this fraud, and in the end the insurance was placed but with a fraud exception clause. The bank also wanted to be secured by valuable stones and gems which again, without the knowledge of the bank, were fraudulently overvalued as they were worthless. Ballesteros and the broker Mr. Lee disappeared after they had obtained 80 million Swiss francs from the bank. Having found out that the valuable stones in fact were worth nothing, the bank made a claim under the insurance policy but which was bound to be rejected due to the fraud exception clause, see [1990] 2 Lloyd's Rep. 377 in Özlem Gürses (n 13) 101. And see, Baris Soyer (n 7) 40–41.
15. [1990] 2 Lloyd's Rep. 377 (H.L.); affirming [1988] 2 Lloyd's Rep. 513 (C.A.); reversing [1987] 1 Lloyd's Rep. 69 (Com. Ct.).
16. [1991] 2 Lloyd's Rep. 191 (H.L.); reversing [1989] 2 Lloyd's Rep. 238 (C.A.); reversing [1992] 2 Lloyd's Rep. 540 (Note) (Comm. Ct.).
17. The House of Lords held that the plaintiff assignee was entitled to the damages from the defendant insurance company but not on the ground of utmost good faith. ([1991] 2 Lloyd's Rep. 191 at 203–205) The Court of Appeal held that the insurer owes a duty to disclose to the insured but not to the assignee. ([1989] 2 Lloyd's Rep. 238 at 261–264).
18. The Marine Insurance Act 1906, the insured's duty of disclosure defined in through via four sections, and only indicated the insurer's (reciprocity) duty of disclosure via one section.
19. Simon Picken (n 8) 373.
20. Simon Picken (n 8) 373.
21. Özlem Gürses (n 13) 103.
22. Explanatory Notes to the Insurance Act 2015, para. [116]. See, Tarr, Julie-Anne, "Transforming Insurance Law: A Comparative Review of Recent Insurance Law Reform in the United Kingdom and Australia" 28 (1) Insurance Law Journal (2016) 7.
23. Simon Picken (n 8) 374.
24. German Insurance Act (VVG), section 209.
25. Piotr Tereszkiewicz, "The Europeanisation of Insurance Contract Law: The Insurer's Duty to Advise and Its Regulation in German and European Law", in *The Transformation of European Private Law: Harmonization, Consolidation, Codification or Chaos?* Edited by James Devenney and Mel Kenny, (Cambridge University Press, 2013) 242.
26. *ibid* 243.
27. The English translation of this provision comes (slightly adjusted) from the English translation of the entire German Insurance Contract Act, available at the German Insurance Association (GDV), www.gdv.de/Downloads/English/German_Insurance_Contract_Act_2008.pdf. *Ibid* 243.
28. German Insurance Act (VVG), section 6(2).
29. German Insurance Act (VVG), section 7(1).
30. Piotr Tereszkiewicz (n 30) 250.
31. *ibid* 250.
32. Principles of European Insurance Contract Law (PEICL), section 2:202.
33. Piotr Tereszkiewicz (n 30) 251.
34. Prof. D. Rhidian Thomas (n 15) 110.
35. Malcolm Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* (Oxford University Press, 2005) 99.
36. In *Carter v Boehm* case, the Lord Chief Justice proffered an example of an underwriter accepting the insurance of a vessel for a voyage, which the underwriter, but not the assured, knew to have arrived; in such a case, the insurance could be avoided and the premium recovered if the insurer failed to disclose the arrival of the vessel to the assured. This perhaps was not the best instance of the insurer's duty, given that risk would never have attached and the premium would have been returnable in any event.
37. [1987] 1 Lloyd's Rep 69, 94.
38. Simon Picken (n 8) 377.
39. [1989] 2 All ER 952. *ibid* 377.
40. [1990] 1 QB 665, at 772. See, Baris Soyer (n 7) 42.
41. Simon Picken (n 8) 378.
42. Piotr Tereszkiewicz (n 30) 245.
43. *ibid* 245.
44. Marine Insurance Act 1906, section 17.
45. Marine Insurance Act 1906, section 84 (1).
46. Lord Mansfield's formulation was "void" See, Özlem Gürses (n 13) 1007.
47. [2003] 1 AC 469.
48. Tarr, Julie-Anne (n 27) 4.
49. Harry Wright (n 10) 156.
50. [1991] 2 A.C. 249.
51. Prof. D. Rhidian Thomas (n 15) 113.
52. German Insurance Act (VVG), section 6(1).
53. Piotr Tereszkiewicz (n 30) 248.
54. German Insurance Act (VVG), section 8.
55. Piotr Tereszkiewicz (n 30) 248.
56. Robert Koch, "German Reform of Insurance Contract Law" *European Journal of Commercial Contract Law* (2010) 168.
57. Angelo Borseeli, "Cognate Emptor: on the Insurer's Duty to Inform the Prospective Policyholder in Europe" *Social Science Electronic Publishing* (2012) 63.
58. Piotr Tereszkiewicz (n 30) 252.
59. *ibid* 252.
60. Even though the Civil Code was promulgated in 2007, it has not yet started its application because there is a necessity to draft some ancillary laws for appropriate implementation of the Civil Code. More time is also required to disseminate the code all over the country, since the code is composed of more than a thousand articles and contains a number of new legal terms and concepts for the Cambodian people to understand. Thus, Article 1305 of the Civil Code provides that this code shall be applicable from the date to be

designated by another law. Such “another law” is called “the Law on Application of the Civil Code” which the joint drafting team between MOJ and JICA successfully drafted in early 2011. The National Assembly and the Senate have already passed the draft law. Therefore, the Civil Code is supposed to start its application around the end of 2011. See, Hor Peng, Kong Phallack, Jorg Menzel (Eds.) (2012), p. 100.

61. Ly Tayseng (2018)
 62. Article 440 of Cambodian Civil Code (2007); Hor Peng, Kong Phallack, Jorg Menzel (Eds.), *Introduction to Cambodian Law* (Korad Adenauer Stiftung-Cambodia Peng et al., 2012) 110.
 63. Ly Tayseng, “Formation of Contract and Third Parties in Cambodia”, edited by Mindy Chen-Wishart, Alexander Loke, and Stefan Vogenauer, *Formation and Third Party Beneficiaries* (Oxford University Press, 2018) 349.
 64. Law on Insurance Business was adopted on 30 January 1992.
 65. The Law on Insurance of Cambodia (2000).
 66. The 2014 Law on Insurance entered into force in February 2015 after the issue of Royal Decree No. NS/RKM/0814/021 by the King Norodom Sihamoni.
 67. Cambodian Insurance Law (2014), art. 2.
 68. Cambodian Insurance Law (2014), art. 10 (informal translated).
 69. Cambodian Insurance Law (2014), art. 10.
 70. Simon Picken (n 8), p. 124.
 71. Simon Picken (n 8), p. 376 and 377.
 72. Until the amendment of insurance law in 2014, the legal protection of policyholders, at least in theory, probably is clearly as a central concern of the modern insurance legislation in Cambodia. Thus, the new law (2014) had proposed the duty to explain on the insurer. However, the rule in respect of this duty is still in ambiguity condition.
 73. Cambodian Insurance Law (2014), art. 10.
 74. Marine Insurance Act 1906, section 84 (1).
 75. If the insurer failed to give an explanation of the exclusion clauses to the insured, these clauses will not be binding on him/her, then the insurer will not be allowed to avoid liabilities by relying on these such clauses. German Insurance Act (VVG), section 6 (1).
 76. As mentioned in the article 345 of the Civil Code (2007).
 77. Piotr Tereszkiewicz (n 30) 248.
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