LEGAL PROBLEMS ON DUTY OF DISCLOSURE UNDER MARINE INSURANCE CONTRACT

BY

MR. PANUWAT FOONGWANICH

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAW (ENGLISH PROGRAM)
FACULTY OF LAW
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THESIS

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ENTITLED

LEGAL PROBLEMS ON DUTY OF DISCLOSURE
UNDER MARINE INSURANCE CONTRACT

has been approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Law (English Program)

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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 contract. Both assured and insurer are required to perform its duty by disclosing material circumstances to each other as equitable duty. Once this duty is applicable in practice, the assured's duty is too onerous on the ground that the insurer has more bargaining power than the assured. The scope of this duty is extended for the post contractual period. Avoidance of marine insurance contract is considered to be unfair remedy. These problems on this duty arise from the unfair provisions that were stated in the marine insurance law. It therefore reflects to the duties' application and the Court's interpretation respectively.

This thesis aims to study a correlation between a nature of marine insurance contracts and the duty of disclosure. The party under marine insurance contracts shall entitle to obtain material circumstances from another party for their own of risk assessment. It also studies a development of marine insurance law in several jurisdictions evidencing to attempt closing the loophole of the duty of disclosure provisions. The provisions of marine insurance under the United Kingdom, Norway and the People's Republic of China have been slightly difference in particular law development.

For the United Kingdom, the duty of fair presentation has been introduced under the Insurance Act 2015 in lieu of the duty of disclosure. The concept of new duty is generally similar to the duty of disclosure but the new duty contains clearer provisions for resolving problems i.e. insurer's notice to make further enquiries and imposing several degrees of remedy. For Norway, the duty of disclosure is existed under the Nordic Marine Insurance Plan of 2013, Version 2016, as agreed document governing a contract of marine insurance. The person effecting the insurance obliges to perform this duty. The insurer obliges to give notice once the incorrect or incomplete of information are provided by the assured. The remedies are also provided based on several scenarios which impose to both assured and insurer. For the People's Republic of China, the provisions of this duty are out of dated. This duty imposes to the assured while there is silence on the insurer's duty. The remedies impose to the assured based on the act that is either intention or non-intention.

For Thailand, Section 868 under the Civil and Commercial Code is insufficient to consider the duty of disclosure under the marine insurance contracts. There were two ways for the resolution on this problem. One, the application of the Marine Insurance Act 1906. It leads to significant question stating that whether the marine insurance law could be applied via a gap-filling provision under Section 4 of the Civil and Commercial Code. Another, the application of insurance law under the Civil and Commercial Code. It also leads to a problem on the ground that characteristics between insurance against loss and marine insurance are difference. In order to resolve these problems and build a trust to players, the marine insurance law provision regarding to the duty of disclosure should be enacted with the provisions of 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

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Mr. Panuwat Foongwanich
Thammasat University
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CHAPTER 1
INTRODUCTION

1.1 Background and Problems

A marine insurance plays an importance role with a purpose to minimize risks for any events involving the sea. The marine insurance will protect the subject matter insured against such loss or damage from the marine perils that are considered to be high risks.[1] For the insurance markets, marine insurance have significance amount of market share. In London, the premium income over the past 12 months has shown the best performance of market that accounting for 19% of the total company market in 2014 that was increased from 18% of the overall market in 2013.[2] In Thailand, marine insurance is significant part of insurance market shares[3] that growth at 0.84% in 2015.[4] It concludes that the marine insurance involves the significant part for the insurance industry both international and domestic level.

Under marine insurance contracts, the duty of disclosure is an importance duty under utmost good faith doctrine. In principle, this doctrine is required both assured and insurer to comply with because the insurance contract is '*uberrimae fidei'*.[5] But, in practice, the obligation under the duty of disclosure is imposed to the assured. The insurer's duty is likely to be less important than it should be. While, the assured is strictly obliged for disclosing all material facts before the execution of the marine insurance contracts as those facts would effect to the insurer for entering into the contract and identifying premium rate respectively.

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[1] สิทธิโชค ศรีเจริญ, *"การประกันภัยทางทะเล"*, **วารสารนิติศาสตร์** ปีที่ 17 ฉบับที่ 4, 118. (Sitthichoke Siricharoen, *"Marine Insurance Law"*, **Nitisart J.** 17th Volume 4, 118).

[2] International Underwriting Association, **London Company Market Statistics Report**, October 2015, 10.

[3] สำนักอัตราเบี้ยประกันวินาศภัย สมาคมประกันวินาศภัยไทย, สืบค้นเมื่อวันที่ 20 สิงหาคม 2558, จาก http://www.tgia.org/iprb/download-TH_8.

[4] *คปภ. คาดธุรกิจประกันภัยปี 59 โต 8.02%*, สืบค้นเมื่อวันที่ 24 กุมภาพันธ์ 2559, http://www.manager.co.th/iBizchannel/ViewNews.aspx?NewsID=9590000019940.

[5] Section 17 of the Marine Insurance Act 1906.

The application of the duty of disclosure is one of controversial issue for the marine insurance as the following:

First, the assured's obligation on the duty of disclosure is too onerous due to less of the bargaining power. The insurer may subsequently take this benefit for acting in bad faith by application of the assured's unknown to disclaim their liabilities. However, it should carefully consider whether the duty of disclosure should be obligation for both insurer and assured. If not, it needs to further consider that whether the duty of disclosure fair to the assured who discloses all of material facts to the insurer.

Second, as the duty of disclosure is required the assured to comply prior the execution of marine insurance contracts, this duty is extended the applicable scope for a period after the contract execution by the Court's judgment. It also notices that some marine insurance policy have contained text demonstrating that if the assured fails to disclose fully and faithfully all facts, the benefits of the policy may be validated. However, the extension of applicable scope has created some uncertainty to the assured for compliance with this duty under the marine insurance contracts.

Third, whether the duty of disclosure should extend to include a broker who acting on behalf of the assured. If the preceding paragraph is to include the broker, there is a subsequent question that which material facts have to be disclosed by the broker. If the broker ignores to disclose the material facts due to his negligence, is it fair to conclude that the assured is in a non-compliance status.

Forth, the avoidance of insurance contract is unfair remedy. The subsequent questions may be raised whether it is fair to the assured if such breach is arisen from his unknown.

Fifth, as Thailand has only one provision of marine insurance that does refer to a specific law of marine insurance and the duty of disclosure is an importance duty under the marine insurance contract, there is questioned that whether the Thai's assured need to comply this duty. If the Thai's assured is required for compliance with, what the applicable law is and what remedy arising from non-compliance with is.

There are importance questions to Thailand for consideration the above issues. From the Supreme Court Judgment No. 7350/2537 and 6649/2537, the Supreme Court have ruled the applicable law for the marine insurance cases in two ways – the prior one was the application of the Marine Insurance Act 1906 and the latter one was the application of the insurance provision under the Civil and Commercial Code. Both applications have caused some drawback for the marine insurance business in Thailand.

In particular, it could further address the problem in accordance with the difference remedies arise from non-compliance with the duty of disclosure between the Civil and Commercial Code and the Marine Insurance Act 1906. Under the Civil and Commercial Code, the insurance provision are regarding to the life insurance and insurance against loss. Although the marine insurance shall be considered as one type of insurance against loss, the characteristics between the marine insurance and insurance against loss are totally difference. The remedy arising from breaching the duty of disclosure for non-marine insurance under the Civil and Commercial Code identifies that in case the insured does not comply to disclose all material facts, the insurance contract may be voidable and the parties of insurance contract shall be restituted to the position prior executing of the insurance contract. While, the United Kingdom where the marine insurance laws has widely accepted as a model law of marine insurance, there is a tendency to reform a remedy arising from breaching the duty of disclosure under marine insurance contract to be fairness. The insurer may refuse all claims and not return the premium if the assured breaches this duty because of either deliberate or reckless. The assured may entitle on monetary of claims that will be calculated on pro rata basis in case there is arising from others which are neither deliberate nor reckless. The aforesaid remedy between the Civil and Commercial Code and the Marine Insurance Act 1906 are rather difference.

As aforesaid, there are difference characteristics between the marine insurance and insurance against loss as follows:

1. Perils (การเสี่ยงภัย): the marine insurance does involve the perils of the seas arising from the extraordinary action of the wind and sea or from extraordinary cause external to the ship, originating on navigable waters.[6] Those are considered to be unexpected events and more severe than non-marine insurance i.e. abnormally bad weather, violent storm, turbulent sea and etc.[7]

2. Formats (รูปแบบประกันภัย): the marine insurance has various formats that are "commercial insurance" and "mutual insurance". One, commercial insurance is undertaken by a sole of individuals grouped together in various underwriting syndicates.[8] Another, mutual insurance is formed for mutual benefit that "involves a group of persons or corporations agreeing in advance to contribute to offset each other's losses"[9]. It is commonly known as Protection and Indemnity (P&I Club) and other Hull clubs.[10] The difference between two of insurance forms are involved profit that mutual insurance have intent to offset only actual losses excluding accumulate of profit.[11]

3. Others: the following are comparisons in particular matters between marine insurance and non-marine insurance. The latter shall be considered based on insurance against loss that is non-marine insurance provisions under the Civil and Commercial Code:

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[6] Robert M. Hughes, **Handbook of Admiralty Law**, 2nd Edition, 75 (1920).
[7] Susan Hodge, **Law of Marine Insurance**, Cavendish Publishing Limited, 175 (1996).
[8] United Nations Conference on Trade and Development, "*Legal and documentary aspects of the marine insurance contract"*, 10 (Oct 20,2015) http://unctad.org/en/PublicationsLibrary/c4isl27rev1_en.pdf.
[9] *Id*. at 9.
[10] *Id.* at 10.
[11] *Id*. at 9.

3.1 Insurable interest (ส่วนได้เสียที่เอาประกันภัย)

Under marine insurance, insurable interest must be proved at the time of loss.[12] The assured does require having insurable interest at the time of loss or damage incurred to the insured property.[13] Due to the insured property under marine insurance contracts is freely transferred to third parties at any time. While, subject to non-marine insurance, the assured is required to have insurable interest at the executing time of insurance contract that is a general provision apply to non-marine insurance.[14]

3.2 Utmost good faith (หลักสุจริตอย่างยิ่ง)

Although the utmost good faith doctrine was initially developed for maritime trade into fair business by English judges and thereafter codified in form of specific provisions into the Marine Insurance Act 1906[15], this doctrine is also applied to non-marine insurance.[16] From a general view, it is reaffirmed that the authorities on marine insurance are applicable to general insurance.[17] Since it is difficult to prove the correctness and completeness of facts which are disclosed by a party to another, the parties to the insurance contract are required to act with utmost good faith otherwise the insurance contract may be void.[18]

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[12] John Birds, Ben Lynch and Simon Milnes. **MacGillivray on Insurance Law.** 12th ed. London , Sweet and Maxwell Limited, 23 (2012).

[13] Section 6(1) of the Marine Insurance Act 1906.

[14] Section 863 of the Civil and Commercial Code

[15] 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 2000, 22.

[16] อรรถนิติ ดิษฐอำนาจ, **คู่มือการศึกษาวิชากฎหมายระหว่างประเทศว่าด้วยการรับขนของทางทะเลและการประกันภัยทางทะเล**. 256 (พิมพ์ครั้งที่ 7 2554). (Atthaniti Dissatha-Amnarj, **Textbook on International Trade Law in respect of Carriage of Goods by Sea and Marine Insurance**. 256 (7th ed. 2011.).

[17] W.I.B. Enright, **Professional indemnity Insurance Law**. London , Sweet and Maxwell Limited, 149 (1996).

[18] ดิษฐอำนาจ (Dissatha-Amnarj), *supra* note 16, at 256.

3.3 Indemnity (การชดใช้ค่าสินไหมทดแทน)

For non-marine insurance, the insurer has to indemnify any loss or damage equal to actual loss. This concept seems to be contrary with the marine insurance identifying that the insurer shall indemnify any loss or damage as agreed in the marine insurance contracts.

3.4 Double insurance (ประกันภัยซ้ำซ้อน)

In case two or more insurance contracts are made in excessive, the consequence arising from both marine insurance and non-marine insurance are difference. Under non-marine insurance provision, it is prescribed that the first insurer is responsible for actual loss or damage. If there is insufficient, the respective insurer shall be also responsible for such insufficiency.[19] While, under the marine insurance provision, it is prescribed that if there is double insurance, all insurers shall be mutually responsible and to indemnify any loss or damage to the assured upon its own proportion as agreed in the marine insurance contracts. [20]

1.2 Hypothesis

As Thailand does not have the marine insurance law, it may arise of uncertainty to both assured and insurer regarding to the applicable law and, subsequently, Supreme Court Judgment are doubted that whether those judgments are in line with the international standard or not. Therefore, it is necessity for Thailand to reconsider and enact a draft of marine insurance law in order to eliminate the uncertainty and problems on marine insurance contracts.

1.3 Scope of study

This thesis aims to study and focus on the legal problems of the duty of disclosure arising from compliance, non-compliance and remedy but excluding the duty not to misrepresent. To extend, the study shall cover the development of the duty

[19] Section 870 of the Civil and Commercial Code.
[20] Section 32(2)(a) and 80(1) of the Marine Insurance Act 1906.

of disclosure in three selected jurisdictions which are the United Kingdom, Norway and the People's Republic of China.

1.4 Objectives

1. To study the utmost good faith doctrine and correlation between the doctrine and the duty of disclosure.

2. To study the importance of the duty of disclosure throughout its legal problems arising from compliance and non-compliance with the duty.

3. To study foreign laws in order to understand the duty of disclosure under the contract of marine insurance in each jurisdiction.

4. To study the related law and applicable law for Thailand regarding to the duty of disclosure under the marine insurance contracts.

5. To propose legal measures for Thailand in order to deal with problems on the duty of disclosure under the marine insurance contracts.

1.5 Methodology

The thesis applies the method for study and analysis based on library research of textbooks, articles, journals, judgment, scholar's opinion and information on the internet, domestic and foreign laws.

1.6 Expected Result

1. To understand the utmost good faith doctrine and correlation between the doctrine and the duty of disclosure.

2. To understand the importance of the duty of disclosure throughout its legal problems arising from compliance and non-compliance with the duty.

3. To understand the law of the United Kingdom, Norway and the People's Republic of China regarding to the duty of disclosure under the marine insurance contracts.

4. To understand the legal problems for Thailand regarding to the duty of disclosure under the marine insurance contracts.

5. To propose legal measures for Thailand in order to deal with problems on the duty of disclosure under the marine insurance contracts.

CHAPTER 2
OVERVIEW OF DUTY DISCLOSURE

This chapter is to study an overall of marine insurance business, marine insurance contracts throughout types of marine insurance as a background for understanding characteristics of utmost good faith doctrine and the duty of disclosure respectively.

2.1 Marine Insurance Business

2.1.1 Importance of marine insurance business

The marine insurance business is importance to the international trade since it would facilitate to reduce the risk of loss at the sea during the transport of goods.[21] This part would clarify the importance of marine insurance business to the relevant person as follows:

2.1.1.1 For individual: the marine insurance would assist individual, who operates a business in accordance with the transport by sea, for avoiding economic loss that may have a high value of loss. It is clearly explain that goods that are transported by sea may easily get damaged due to the sinking of ship. If such goods are insured, the marine insurance will provide compensation to the assured whenever any loss or damage incurs to the goods.[22]

2.1.1.2 For shipowner: the value of ship is rather expensive and high value and such ship may be easily to get destroy because of the different types of risk on the marine venture. Therefore, if there has a destruction of ship, the marine insurance will provide the loss compensation to the shipowner.[23]

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[21] *Significance of Marine Insurance* (Oct 20, 2015), http://marketinglord.blogspot.com/2012/08/significance-of-marine-insurance.html.
[22] *Importance of Marine Insurance* (Oct 20, 2015), http://insuranceon-line.blogspot.com/2012/07/importance-of-marine-insurance.html.
[23] *Id.*

2.1.1.3 For freight: the businessman is required to pay some money to the shipowner for the transport of goods from one place to another place. It could explain that freight insurance is included under the marine insurance. Therefore, the marine insurance would indemnify the shipowner against any incurrence of loss arising from freight have not been paid by the businessman.[24]

2.1.1.4 For cargo owner: the goods during transport by sea need to be secured in order to avoid all liabilities when the incurrence of loss. The aforesaid liabilities to the goods shall be transferred from the cargo owner to the insurance company. It clearly clarifies that if any loss incurs, the compensation shall be provided to the cargo owner under the marine insurance policy.[25]

2.1.1.5 For government: the marine insurance is a tool for businessman to reduce the risks during the transport of goods by sea and this tool is involved to the increasing of international trade. It could explain that the government could receive the economic profit from the increasing of international trade.[26]

2.1.2 Market share of marine insurance business

Apart from the aforesaid, it may need to reaffirm the significant market share of marine insurance by identifying certain amounts from a credible of insurance market as follows:

2.1.2.1 London insurance market

London insurance market is the world's leading center for marine insurance.[27] This insurance market currently has the largest share of insurance market that composed of Lloyd's of London and Company Market.[28] The class of marine insurance is still significant part once compared to other classes of insurance as identified below:

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *The UK's Maritime Insurance services continue to dominate the international shipping sector* (May 28, 2016), http://www.maritimelondon.com/service/insurance.
[28] *Id.*

Gross written premium 2014, £billion

Main Business Class	Lloyd's of London[1]	Company Market[2]
Property	8.497	4.117
Marine	2.142	2.945
Aviation	0.582	0.948
Motor	1.213	1.155

Figures do not add up due to rounding
1. Source: Lloyd's Annual Report 2014
2. Source: IUA, London Company Market Statistics Report October 2015

Table 2.1: London Market gross written premium by business class

In addition, Lloyd's is a society of members that composed of both corporate and individual who underwrite in syndicates on whose behalf professional underwriters accept risk.[29] This insurance market providing main classes of marine liability, cargo, hull, war and political risks,[30] was declared in accordance with the gross written premium for marine insurance in the past five years as follows:

	Gross Written Premium	
	£m	
Marine Insurance	2010	1,671
	2011	1,968
	2012	2,090
	2013	2,195
	2014	2,142

Table 2.2: Lloyd's gross written premium for marine insurance[31]

[29] *Id.*
[30] *Lloyd's Annual Report 2014*, 51 (Oct 20, 2015), http://www.lloyds.com/AnnualReport2014/pdfs/Lloyds%20Annual%20Report%202014.pdf.
[31] *Id.*, at 30.

2.1.2.2 Thailand insurance market

The Insurance Premium Rating Bureau (สำนักอัตราเบี้ยประกันวินาศภัย) under Thai General Insurance Association (สมาคมประกันวินาศภัยไทย) published the statistics presenting both direct premiums for marine insurance policy during 2012 – 2015 as below:

Year	Direct Premiums		Total
	Hull Insurance	Cargo Insurance	
2012	422,396	4,767,367	5,189,763
2013	387,756	4,911,540	5,299,296
2014	435,720	4,868,254	5,303,973
2015	438,185	4,904,788	5,342,974

Unit: 1,000 THB

Table 2.3: Comparative Direct Premiums of Marine Insurance Business in Thailand[32]

It could explain that the direct premiums for marine insurance have been increased. Noticeably, as there was a political and economic matter in 2014 year but the direct premiums still increased until 2015 year. These statistics conclude that the growth of marine insurance business may depend on the Thailand's economic.

[32] สำนักอัตราเบี้ยประกันวินาศภัย สมาคมประกันวินาศภัยไทย, สืบค้นเมื่อวันที่ 4 มิถุนายน 2559, จาก http://www.tgia.org/iprb/download-TH_8.

2.1.3 Types of Marine Insurance

The marine insurance could classify into several types as follows:[33]

2.1.3.1 Hull and Machinery Insurance (การประกันภัยตัวเรือและเครื่องจักร)

Hull and machinery insurance is to insure both hull and ship's machinery which are owned by the shipowner against any loss or damage caused by marine perils, for example, storm, grounding, collision between ships and etc.

2.1.3.2 Cargo Insurance (การประกันภัยสินค้า)

Cargo insurance is to insure its cargoes which are owned by either seller or buyer as the case may be against any loss or damage caused by the marine transportation. It could explain that either buyer or seller can be the assured under the cargo insurance depending on obligations as agreed in the incoterms. The buyer has obliged to provide the insurance for CFR term and FOB term. Also, the seller has obliged to provide the insurance for CIF term.

2.1.3.3 Liability Insurance (การประกันภัยความรับผิด)

Liability insurance is to insure the shipowner's liability to the third party who has suffered from any wrongful act, fault or error. For example, collision claim, cargo claim, pollution claim and etc. This liability insurance has been known as the P&I Club.

2.1.3.4 Freight Insurance (การประกันภัยค่าระวาง)

Freight insurance is to insure freight to be collected for each cargo or each voyage. In practice, carrier entitles a right to collect freight provided that goods should have delivered at the agreed destination. Otherwise, the carrier has not entitled a right to collect freight.

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[33] ไผทชิต เอกจริยกร, **กฎหมายพาณิชยนาวี ตอน 3,** 182-188 (พิมพ์ครั้งที่ 5 2557). (Pathaichit Eagjariyakorn, **Maritime Law – Book 3** 182-188 (5th ed. 2014)).

2.1.3.5 Reinsurance (การประกันภัยต่อ)

Reinsurance is an insurance contract between a reinsurer and an insurer. The reinsurer agrees to indemnify the insurer for any loss or damage under the marine insurance contracts between the insurer and assured. If any loss or damage incur, the assured will be compensated such loss or damage by the reinsurer on behalf of the insurer for the purpose of risk management.

2.2 Marine Insurance Contract

2.2.1 Definition of Marine Insurance Contract

The definitions have been provided by several scholars as follows:

Prof. Atthaniti Dissatha-Amnarj defines that: [34]

"A marine insurance contract is a contract of indemnity that the insurer agrees to indemnify the assured based on the incident of marine adventure and the assured agrees to pay the insurance premium in return."

Prof. Dr. Pathaichit Eagjariyakorn defines that: [35]

"A contract of marine insurance is a contract that one party called an "an insurer" agrees to pay compensation to another party called "an assured" or "a beneficiary" for loss or damage to the subject matter insured for example vessel, cargo and liability which the assured has from employing vessels under terms and conditions specified by the policy, in exchange for premiums payable by the assured."

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[34] ดิษฐอำนาจ (Dissatha-Amnarj), *supra* note 16, at 243.

[35] เอกจริยกร (Eagjariyakorn), *supra* note 33, at 182 - 188.

It addition to those definitions, Article 1 of the Marine Insurance Act 1906 has defined as follows:

"A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

From the aforesaid definition, it is widely accepted that a contract of marine insurance is a contract of indemnity against any incurrence of loss arising from the marine adventure. The contract of indemnity shall be indemnified basing on the agreed scope and method between parties to the insurance contract and marine adventure may be involved both inland and sea.[36]

The significant elements of marine insurance contracts could be concluded as follows:[37]

2.2.1.1 Parties to the contract (คู่สัญญาตามสัญญาประกันภัยทางทะเล)

The parties to the marine insurance contracts have referred to the assured, insurer and beneficiary.

First, the assured is a person who insures its own property against any liabilities of loss or damage caused by marine perils. For the execution of marine insurance contracts, the assured has to pay the premium for exchanging with the insurer's acceptance to compensate when any loss or damage incur to the insured property. In addition, the assured has been required for compliance with the duty to disclosure and duty to avert or minimize loss respectively.

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[36] ประมวล จันทร์ชีวะ, **การประกันภัยทางทะเล.** พิมพ์ครั้งที่ 2. โครงการตำราวิทยาลัยการขนส่งและโลจิสติกส์ มหาวิทยาลัยบูรพา, 2 (2548). (Pramual Chanchiwa, **Marine Insurance.** 2nded. Faculty of Logistic Burapha University, 2 (2005)).

[37] เอกจริยกร (Eagjariyakorn), *supra* note 33, at 173 - 176.

Second, the insurer is a person who agrees to pay compensation to the assured once any incurrence of loss or damage meet the terms and conditions as stated in the marine insurance policy. The insurer has classified in two types that are one, the company that seeking a profit from premium and compensation and another, the association namely P&I club.

Third, the beneficiary could be either the assured or third parties who could be insured or compensated when any incurrence of loss or damage meet the terms and conditions as stated in the marine insurance policy.

2.2.1.2 Subject-matter insured (วัตถุที่เอาประกันภัย)

Under the marine insurance contract, subject-matter insured could classify in three types as follows:

First, *"any ship goods or other moveable are exposed to marine perils. Such property is referred to as 'insurable property'".*[38]

Second, *"the earning or acquisition of any freight, passage, money, commission profit, or other pecuniary benefit, or the security for any advances, loan or disbursements, is endangered by the exposure of insurable property to maritime perils."*[39]

Third, *"any liability to third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils."*[40]

[38] Article 3(2)(a) of the Marine Insurance Act 1906.
[39] Article 3(2)(b) of the Marine Insurance Act 1906.
[40] Article 3(2)(c) of the Marine Insurance Act 1906.

2.2.1.3 Objective (วัตถุประสงค์ของสัญญาประกันภัยทางทะเล)

The objective of marine insurance contracts is to insure any loss or damage to the insured property caused by the perils of the sea. The aforesaid perils composed of two elements that are one, it should be not only perils of the sea but also any loss or damage has the fortuitous and another, being caused by special occurrence, for example, storm or strong wind.[41]

2.2.1.4 Premium (เบี้ยประกันภัย)

For the execution of marine insurance contracts, the assured shall pay the premium for exchanging with the insurer agrees to insure the assured's property.

2.2.2 Documents regarding to the Marine Insurance Contract

In practice of marine insurance business, there are various documents as follows:[42]

- **Application Form (แบบคำขอเอาประกันภัย):** the prospective assured will fill the information into the form so as to present his intention to be insured of subject-matter. It could consider as an offer that may subsequently arise of the insurance contract.

- **Marine Insurance Policy (กรมธรรม์ประกันภัยทางทะเล):** after obtaining material information, if the subject matter is agreed to be insured by the insurer, the marine insurance policy will be issued with the certain information as declared in the application form. It could be treated as an acceptance from the insurer's side.

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[41] Thomas J.Schoenbaum, **Admiralty and Maritime law**. (Minnesota: Weat Publishing Company), 580 (1989). *cited in* เอกจริยกร (Eagjariyakorn), *supra* note 33, at 176.

[42] สมาคมประกันวินาศภัยไทย, **ความรู้พื้นฐานด้านการประกันภัยและการประกันภัยเบื้องต้น: โครงการอบรมหลักสูตรการตรวจสอบอุบัติเหตุให้กับเจ้าหน้าที่สำรวจอุบัติเหตุรถยนต์ของบริษัทประกันภัย รุ่นที่ 6**, 33-41.

- **Cover Note (หนังสือคุ้มครองชั่วคราว):** during the policy issuance, the insurer may issue a cover note to the assured for confirming that the subject-matter will be insured by the insurer. It is also an evidence of premium which is paid by the assured, in consideration of which the insurers agree to insure him for the period stated in the cover note.[43] Therefore, the valid of cover note is considered as temporary until the policy will be issued.

- **Open Policy (กรมธรรม์ประกันภัยแบบเปิด):** it is a type of marine insurance policy that has the terms and conditions to be valid until the policy is terminated by either party.

- **Certificate of Insurance (ใบรับรองการรับประกันภัย):** the insurer will issue this document to the assured for certifying that subject-matter is insured under the policy.

2.3 Utmost Good Faith

The duty of disclosure is a part of the utmost good faith doctrine. Before becoming the utmost good faith, a good faith doctrine (or latin terminology called "bona fide") was firstly introduced and originated by ancient Roman law. The good faith doctrine was assisted judge to interpret and supplement the contracts.[44] It clarifies that the good faith doctrine is become to be a basis doctrine for a contract execution.

In common law[45], there is a doctrine of "caveat emptor" or "let buyer beware" that require a buyer inspects a purchasing goods with their careful. If the

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[43] John Birds, *supra* note 12, at 136.

[44] Yu Zheng, "The Pre-Contractual Utmost Good Faith in the Insurance Law – A Comparative Study of the Chinese Law and the Common Law", National University of Singapore, 11 (2004).

[45] กิจจา ตรีอนุรักษ์, *การไม่เปิดเผยข้อความจริงในสัญญาประกันภัย*, วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 5 (2533). (Kijja Trianurak, *Undisclosed of Material Circumstance under Insurance Contract*, Master of Law's Thesis. Thammasat University, 5 (1990)).

buyer knows a defect of goods at the time of purchasing and buys the aforesaid goods, the seller shall be released from their fault. The basic concept is that each party has freely right to inspect goods as it is subject matter in the contract. It is belief that generally there is no party will mislead another party for a contract execution. The caveat emptor doctrine does not only apply to purchase contract but also including general contract.

Both the doctrine of good faith and caveat emptor, however, are considered to create the fairness and avoid the unequal knowledge of the parties before the execution of contract.

The good faith doctrine was developed by English judges in a famous case named Carter v. Boehm[46] It was a landmark case regarding to the historic ocean marine insurance case.[47] Briefly, the fact was that Mr. Carter as the governor assured the Fort Marlborough to Mr. Boehm as the insurer against the fort being taken by a foreign enemy. [48] He did not inform to Mr. Boehm in accordance with the possibility of the fort would be attacked by French. After the fort was ruined, Mr. Boehm refused to compensate with the reason that Mr. Carter did not disclose the facts in accordance with the fort's situation and such facts were considered as a material for the insurer. In this case, Mr. Carter won due to Mr. Boehm knew the possibility of fort to be attacked by the enemy but, unfortunately, there was no further evidence to prove Mr. Boehm would act as an prudent insurer by investigating the possibility of attack before the execution of insurance contract. The court ruled that, in this case, the insurer's knowledge should not only rely on the assured's knowledge but also including the knowledge deriving from others.

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[46] 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).

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

[48] Carter v. Boehm (1766) 3 Burr. 1905 (Jul 17, 2015), https://en.wikipedia.org/wiki/Carter_v_Boehm.

Lord Mansfield gave his some interesting opinion in this case as follows:

"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trust to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not exist. The keeping back of such circumstance is a fraud and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention; yet still the underwriter is deceived, and the policy is void because the risque run is really different from the risqué understood and intended to be run at the time of agreement" [49]

He also viewed that in case the facts are in the insurer's knowledge, the assured still obliges to disclose all of such facts regardless of whether there is a material facts. Furthermore, the facts disclosed to the insurer should not be limited to the assured's knowledge only. The insurer entitles to ask further queries to the assured or others prior to execute the insurance contract and the assured shall have obliged to disclose every material circumstance regardless of whether such disclosure circumstance will be considered as a material circumstance.[50] It could explain that even the insurer shall have the method to seek the fact but the duty of disclosure should still be an assured's duty.[51] It concludes that the burden of disclosure is shifted to the insurer if the facts can be generally known or investigated by the insurer.

The duty of disclosure developed from the above case have been codified and given statutory authority in Section 17, 18 and 19 of the Marine Insurance Act 1906.[52] It could affirm that the utmost good faith doctrine was developed and become as an important doctrine to the insurance contract while the good faith doctrine will

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[49] 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).
[50] Lindenau v. Desborough (1828), 8 Barn & Cr. 586.
[51] Case Bates v. Hewitt (1867) LR 2 QB 595.
[52] John Birds, *supra* note 12, at 476.

apply for the general contract. The utmost good faith doctrine is required the compliance of parties to the insurance contract more than the good faith doctrine. While, the doctrine of good faith does only require the party to contract disclosing any circumstances which are not fraud to another party.

Under the utmost good faith doctrine, the party to insurance contract must disclose material circumstances to another party with a purpose to make an accurate assessment of the risk before entering to the insurance contract.[53] This doctrine is not only relied on the insured but also on the insurer.[54] To extent that the issue of equitable duty was discussed in Banque Keyser Ullmann SA v. Skandia (U.K) Insurance Co. and first instance Steyn J, rejected an implied term as the duty's source accepting the view in March Cabaret Club & Casino v. London Assurance and rejecting the views of Hirst J. in Black King Shipping Corp v. Massie; The Litsion Pride:[55]

"In my respectful view the actual decision in that case is concerned with the scope of the duty of utmost good faith on special facts, and not with the question of whether it is a rule of positive law, or an implied term in the sense of a term derivable from the terms of the particular contract, read in the light of the subject matter and contextual scene. In my respectful view the body of rules, which are described as the uberrimae fides principle, are rule of law developed by judges. The relevant duties applied before the contract comes into existence, and they apply to every contract of insurance. In my judgment it is incorrect to categorise them as implied terms, in the sense in which the plaintiffs seek to do so."

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[53] W.I.B. Enright, *supra* note 17, at 72.
[54] *Id.*
[55] Banque Keyser Ullmann SA v. Skandia (U.K) Insurance Co. [1990] 1 Q.B. 665 at 715, 723 and at 773-781, C.A.; March Cabaret Club & Casino v. London Assurance [1975] 1 Lloyd's Rep. 169 at 175; Hirst J. in Black King Shipping Corp v. Massie ; The Litsion Pride [1985] 1 Lloyd's Rep. 437 *cited in* : W.I.B. Enright, *supra* note 17, at 147-148.

From the above, the utmost good faith is an equitable duty not an implied term of the insurance contracts that consider to consistent with the utmost good faith ceasing when a conclusion of insurance contract.[56]

For the application of utmost good faith doctrine to the insurance contract, further questions state that which period that the utmost good faith doctrine will be applied. In case named Duffel v. Willson (1808)[57], it concluded that this duty under utmost good faith should be made in particular either during the negotiation until the time executing insurance contract or renewal of insurance contract.[58] Mariella also explained that this doctrine applies for the pre-contractual while the obligations between the insurer and assured for the post contractual seems to be a growing understanding that utmost good faith is irrelevant.[59] On the other hands, the case named Litsion Pride[60] overruled the above case stated that this duty under utmost good faith should be continued after the execution of contract and including the insurance period. This case attempted to explain that the utmost of good faith doctrine should apply in the event that the assured claim the insurer for paying compensation under the insurance policy. However, the latter judgment for extending the application of utmost good faith doctrine to the post-contractual period seems to contradict to the objective of doctrine and create the uncertainty to the assured who is required to comply with this duty. [61]

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[56] W.I.B. Enright, *supra* note 17, at 149.
[57] Duffel v. Wilson (1808) 1 Campb. 401.
[58] นิติศาสตร์ สายสุนทร, *หลักสุจริตอย่างยิ่งในสัญญาประกันภัยทางทะเล*, วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 10 (2552). (Nitisat Saisoonthorn, *Utmost Good Faith under Marine Insurance Contract*, Master of Law's Thesis. Thammasat University, 16-17 (2009)).
[59] *Id.* at 1.
[60] Black King Shipping Corporation v Massie, ("The Litsion Pride") [1985]1 Lloyd's Rep 437].
[61] สายสุนทร (Saisoonthorn), *supra note* 58, at 18.

2.4 Insurance is uberrimae fidei.

The utmost good faith doctrine is important doctrine for applying to the marine insurance contracts. In principle, as a contract of marine insurance is considered to be unequal contract between the assured and insurer, this doctrine is therefore required for application to both parties. The assured is considered to have more knowledgeable for the execution of marine insurance contracts than the insurer as those are considered to be the assured's knowledge. While, the insurer would like to obtain such assured's knowledge for making a decision to execute of marine insurance contracts and indication of the insurance's premium rate. Further, the doctrine of utmost good faith is requested the assured to honestly disclose every of the assured's material facts and the insurer is also requested to honestly disclose some facts, making a decision for execution of marine insurance contracts, assessing the prospective risks based on the assured's material facts and indicating the insurance premium rate. In case either party to the marine insurance contracts does act in bad faith, it seems to be disadvantages for both parties inevitably. Therefore, the application of this doctrine is to assist the parties to the marine insurance contracts for having the equal status.

Apart from the above rationale of such application, the characteristics of marine insurance contracts are importance for application of the utmost good faith doctrine. The characteristics of marine insurance contracts could classify as follows:[62]

1. Marine insurance contracts compose of a nature in accordance with gambling or wagering contract. The reason is that the insurable interest or expectation for acquiring such an interest would not be required for the assured. Another policies are involved the proof of interest as commonly referred to as 'honour' or 'ppi' policies.[63]

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[62] ตรีอนุรักษ์ (Trianurak), *supra note* 45, at 15-16.

[63] Susan Hodge, *supra note* 7, at 2.

2. Marine insurance contracts relate to a marine adventure which incurs once any ship, goods or other movable are exposed to perils of the seas.[64] The perils of the seas have to be something extraordinary connected with and it could not be expected either event or time. It clearly understands that the perils of the seas do neither cover ordinary wear and tear nor rough weather nor cross seas. [65]

3. Compensation in the marine insurance contracts may be varies even there is a same type of marine insurance policy. When any loss or damage incur to goods or vessels that are subject matter insured under the marine insurance contracts, the money compensated by the insurer to the assured may not be the same amount in every times because it depend on each incident and including the terms and conditions of marine insurance policy. Further, compensation under the marine insurance policy may be greater amount than the insurance premium.

4. Deductible is requested to be paid by the assured prior to obtain the compensation from the insurer. It could explain that the deductible is not only a nature of marine insurance contract but also including non-marine insurance contract.

It should further consider that in case the party to the marine insurance contracts fails to perform to each other based on utmost good faith doctrine, what the remedy should be. As observed the marine insurance law in various jurisdictions, the remedy is mostly indicated that the marine insurance contracts shall be 'avoidance' that may be used in the sense of 'voidable'.[66] The clearer picture could give that the insurer must return the premium already paid to the assured and, the assured must also return any payment that those payments are made for loss previously claimed under the same marine insurance contracts. The above reciprocal performance shall be made provided that there is not related to fraudulent.[67] Some comment was given to the remedy stating that it is not fair and 'unnecessarily severe'[68] due to it should also

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[64] *Id.* at 173.
[65] Robert M. Hughes, *supra note* 6, at 75.
[66] Poomintr Sooksripaisarnkit, *Reform of 'non-disclosure' in UK Marine Insurance Law: Exotic Approach or Original Understanding*, Doctor of Philosophy's Thesis. University of Leicester, 111 (2006).
[67] *Id.* at 112.
[68] *Id.* at 110.

consider the degree of failure. Subsequently, this issue leads to significance changes of remedy in other countries in particular the United Kingdom in the next times.

2.5 Duty of Disclosure

This part will study the general concept of the duty of disclosure that is under the utmost good faith doctrine as follows:

2.5.1 Objective

The objective of the duty of disclosure is to ensure the party would honestly disclose material facts to another party for the risk assessment. For the duty of disclosure in practice, the assured is requested for disclosing material facts that those facts are in his knowledge and such disclosed facts are also essential to the risk assessment by the insurer. Because, a contract of marine insurance is subjected to the negotiation power between the assured and insurer. A relationship between assured and insurer are unequal due to the assured's facts is importance to the insurer for evaluate risks and calculate premiums respectively. Therefore, all of material facts are requested the assured disclosing to the insurer before executing to the marine insurance contract. This duty attempts to assist the parties to the marine insurance contracts to have an equal position. In fact, however, the application of utmost good faith doctrine to this duty is likely to be onerous to the assured more than the insurer even this duty is under the utmost good faith doctrine that require both the assured and the insurer for complying with.

2.5.2 Is it a legal duty?

To explain broadly, most various jurisdictions identify that this duty is required to perform prior to the execution of marine insurance contracts and, importantly, such requirement have been further stated into the marine insurance law. In a case named Bell v. Lever Brothers Ltd.[69], it clearly concluded that the duty of disclosure cannot be initiated by the contract if this duty were existing before the

[69] Bell v Lever bros [1932] AC 161.

actual formation of the contract. [70] Therefore, it could explain that the duty to disclose is a legal duty not a contractual duty.

2.5.3 Person who require to comply the duty of disclosure

Based on the utmost good faith doctrine, the parties to marine insurance contracts are generally required for compliance with the duty of disclosure. It clarify that both assured and insurer are responsible to disclose facts with each other. 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.[71]

In practice, it could not refuse that the main responsible person for the duty of disclosure is the assured because the assured's fact in connection with the subject matter are considered to be essential to the marine insurance contracts rather than the insurer's facts.

Apart from the above, 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.[72] Broker is considered to act as agent of the assured due to he is recognized to be empowered by the assured for placing the marine insurance contracts with the insurer.[73]. Also, the duty of disclosure is limited to brokers who legally act as the agent of the assured only.

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[70] Maja Robertson, *Moral hazard and the duty of disclosure under the doctrine uberrimae fidei*, Master of Law's Thesis. Lund University, 11 (2012).

[71] สายสุนทร (Saisoonthorn), *supra* note 58, at 6.

[72] John Birds, *supra* note 12, at 1245.

[73] Sooksripaisarnkit, *supra* note 66, at. 6.

2.5.4 Types of disclosed facts

Both assured and insurer are requested to comply with the duty to disclose, it could explain the types of disclosed facts as follows:

The assured has to disclose facts which are generally classified in two groups as follows:[74]

1. Facts that the assured know, ought to know and presumed to be known in the ordinary course of business

Facts that the assured know, it is an assured's duty to disclose all circumstances which are in his knowledge due to the nature of circumstance is in the assured's knowledge only. On the other hands, the insurer could not know this type of circumstance if the assured have not disclosed. In case this circumstance is lacked to be disclosed, it considers being disadvantages to the insurer. However, a requirement for disclosing the circumstance seems to be protected the insurer for having the essential of assured's circumstance and let the insurer to have the equivalence status as well as the assured prior to execute the marine insurance contracts.

Facts that the assured ought to know, there is a suggestion for disclosing this type of fact based on the reasonable insurer. The reasonable insurer is the assumed person on the insurer's side with the assumption that in case the reasonable insurer face with the same situation as well as the insurer, what the reasonable insurer's performance will be. It could explain that in case the reasonable insurer should know this fact, the assured is requested for disclosing such facts to the insurer.

Facts that the assured is presumed to be known in the ordinary course of business, there is commented that the assured could not escape or even ignore to disclose these facts due to its facts are connected with the ordinary course of the assured's business. For these facts, the assured have not known or presumed to be known, the assured does not oblige to disclose this fact i.e. the fact that need the expertise to seek and the facts is then to be known to the assured.

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[74] สายสุนทร (Saisoonthorn), *supra* note 58, at 27-35.

2. Material circumstances

A material circumstance means the facts or circumstances that prudent insurer, who is a hypothetical reasonably experienced insurer, wishes to know for considering and assessing the risk. It could explain that materiality has been defined in a wide meaning and the assured is difficult to determine what a prudent insurer would like to know. It would lead to the problems for considering what should be disclosed to a prudent insurer.[75] There is suggested that the material circumstances 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.[76]

In case named Container Transport International Ltd. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. (1984)[77], there is a rule from the judgment of appeal court identifying that the material circumstance should consider whether the prudent insurer should interest such circumstance. It could notice that there is no consideration on the insurer's side.[78]

Apart from the above of facts, there is exception in case the facts could be known, ought to know or presumed to know by the insurer. It could explain that the assured does not need to disclose the facts which are considered to be the exception.

The insurer has to disclose facts which are generally classified as follows:[79]

1. Facts of the insurer, i.e. insurer's name and premise.

2. Facts of the insurance policy, i.e. definitions, insurance coverages, exclusions throughout other terms and conditions in the policy, endorsement and insurance premium rate.

3. Facts of the insurance contract, i.e. payment of insurance premium, termination and other terms and conditions in the contract.

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[75] Sooksripaisarnkit, *supra* note 66, at 5.

[76] สายสุนทร (Saisoonthorn), *supra* note 58, at 30.

[77] Container Transport International Inc -v- Oceanus Mutual Underwriting Association (Bermuda); CA 1984.

[78] สายสุนทร (Saisoonthorn), *supra* note 58, at 31.

[79] *Id*., at 21.

2.5.5 Compliance issues

There is outstanding issue for considering the applicable period on the duty of disclosure. It widely accepts that the duty of disclosure needs to perform during pre-contractual period while post-contractual period is still a controversy. It generally understands that when the marine insurance contracts have been executed, there is no duty to the assured. The rationale is that even the disclosure of facts has been made after the execution of marine insurance contracts; such disclosure will not influence to the marine insurance contracts. It should further consider that in case the material circumstances incur after the execution of marine insurance contracts, the assured is still no the duty of disclosure to the insurer with the reasons as follows: [80]

1. In case the incurrence of new circumstances before the insurer's response in accordance with the execution of marine insurance contracts, the assured has still obliged to disclose such circumstances due to the marine insurance contract has not been executed yet.

2. In case the incurrence of new circumstances after the execution of marine insurance contracts, the assured has not a duty to disclose of such circumstances. But, there is some exception in situation that the insurance policy shall be effective once either the insurance premium has been made or the insurance policy has been assured. It could explain that in case the circumstances have been changed in such period, the assured still has a duty to disclose of such circumstances to the insurer.

It concludes that the duty of disclosure does not require for the post-contractual period due to it should be the insurer's risk. On the other hands, there were some judgment to overrule such conclusion and it leads to the further controversy in marine insurance law. In a case named The Liston Pride[81], the judgment identified that the utmost good faith should be extended to cover post-

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[80] สุดา วัชรวัฒนากุล, *ความสุจริตอย่างยิ่งของคู่สัญญาในสัญญาประกันภัย*, วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 56 (2525). (Suda Watcharawattanakul, *The Utmost Good Faith of the Party under the Insurance Contract*, Master of Law's Thesis., Thammasat University, 56 (1982)).

[81] Black King Shipping Corporation v Massie, ("The Litsion Pride") [1985]1 Lloyd's Rep 437.].

contractual period and including the insurance policy period. The latter means the application of utmost good faith doctrine shall extend in the event that the assured claims the insurance to the insurer. It leads to controversy when a period of compliance shall end. It seems to be uncertainty to the assured for complying with. For the extension of duty to disclose in the post-contractual period, it is likely to be contrast with the original concept in accordance with the duty to disclose under the doctrine of utmost good faith.

As observed the practice of marine insurance, compliance of duty disclosure is also requested both pre-contractual and post-contractual.

For pre-contractual, the application for marine insurance policy will be requested for the prospective assured to fill in with the purpose to let the insurer further proposing the insurance proposal. The assured will be also requested to declare his disclosure with statement as follows:

"I/We declare that the above answers and particulars are correct and complete in every respect and that I/We have not withheld any information which might influence the decision of the company with regard to the risk proposed. I/We agree that this proposal and declaration shall form the basis of the contract of insurance between Me/Us and the company if a policy is issued.

I/We agree to accept a policy on the standard form issued by the company and to be bound by the terms and conditions thereof.

Furthermore, I/We agree that if any answer has been given by any other person, such person for that purpose shall be regarded as My/Our agent and not the agent of the company."[82]

"The undersigned authorised officer of the Principal Organisation declares that to the best of his or her knowledge and belief the statements set forth herein are true, and immediate notice will be given should any of the above information alter between the date of this proposal and the proposed date of inception of this insurance. Although the signing of the Proposal Form does not bind the undersigned

[82] *Proposal Form Skippers' Liability*, Fastnet Marine Insurance Services Ltd. (Oct27, 2015), http://www.fastnet-marine.co.uk/Proposal_Skipper.pdf.

on behalf of the Principal Organisation, or its directors, officers or Insured Persons to effect insurance, the undersigned agrees that this form and the said statements herein shall be on the basis of and will be incorporated in the Policy should one be issued."[83]

For post-contractual, it is interesting to find that the duty of disclosure will require to be performed by the assured even the marine insurance policy has been issued. In the Marine Hull Insurance Policy issuing by Thai Insurance Leading Company, there has statement as follow:

"This insurance is understood and agreed to be subject to English law and practice. It is agreed that the Schedule all clauses endorsements special conditions warranties and anything attached to the schedule are incorporated herein as part of this policy and the Assured is obliged to disclose fully and faithfully all facts to the Underwriters, otherwise the benefits of the policy may be invalidated."[84]

Another, the certificate of insurance issuing by the Shipowner's Mutual Protection and Indemnity Association (Luxembourg), the assured to this Protection and Indemnity Insurance is the Thai's company. At the bottom of insurance certificate, there is important statement as follows:

"MATERIAL FACTS. You have duty to disclose all Material Facts to us. This is a continuing obligation that applies both before and during the period that you are insured with us. Material Facts are those facts, matters or circumstances that may influence whether or not we wish to insure you and upon what terms. If you have any doubt whether or not a fact, matter or circumstances is material it should be disclosed. Your failure to disclose such facts may result in our refusal to pay your claim."[85]

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[83] Excerpt from Insurance Application Form deriving from the International Insurance Broker in Thailand.

[84] Excerpt from Marine Hull Insurance Policy issued by Thai Insurance Leading Company on February 2015.

[85] Certificate of P&I Insurance issued by Shipowner's Mutual Protection and Indemnity Association (Luxembourg) on March 2015.

2.5.6 Non-compliance issues

As observed in various jurisdictions, there is no doubt if the duty of disclosure is failed to perform by the assured, the insurance contracts shall be voidable as remedy against the insurer. Consequently, both parties shall be restituted to the condition that they were previously. The assured has to return any payment to the insurer that those payments are made for loss previously claim. The insurer has to return insurance premium already paid to the assured. These remedy are unfair because there is disregard to the degree and reason of such failure. The insurer is likely to have more protection than the assured. It is convenience the insurer for claiming such failure to the assured without any requirement of proof.

It leads to significant question stated that whether a remedy arising from the insurer's failure should be available to the assured. Based on the duty to disclose of material circumstances is a mutual duty, there was a confirmed case as follows:[86]

"The policy would equally be void, as against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would rely to cover the premium."

In a case named Banque Keyser Ullman SA v. Skandia (U.K.) Insurance Co.,[87] the court decided that since the assured entitled to claim damages for loss suffered under circumstances in which return of the premium would be an entirely ineffective remedy. Consequently, the banks were awarded damages in respect of losses arising on the loans made or advanced after the date of the insurers' non-disclosure.[88] While Lord Mansfield opined that, in relation to a breach of the insurer's duty, that an "action would rely on to recover the premium".[89]

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[86] W.I.B. Enright, *supra* note 17, at 202.
[87] Banque Keyser Ullman SA v. Skandia (U.K.) Insurance Co. [1990] 1 Q.B. 665 at 723, and at 773-781, C.A *cited in* W.I.B. Enright, *supra* note 17, at 206.
[88] *Id.*
[89] W.I.B. Enright, *supra* note 17, at 206.

In a conclusion, the remedy arising from a non-disclosure by the insurer is almost always commercially ineffective because the insured's real loss is an inability to recover under the policy.

CHAPTER 3
FOREIGN LAWS
REGARDING TO THE DUTY OF DISCLOSURE

This chapter is to study foreign laws and its development regarding to the duty of disclosure. The foreign law will begin with the background that it should be importance for understanding characteristics of law enactment. To be followed by the application of duty, it will study details including exception of the duty of disclosure. The remedy arising from breaching of duty to disclose will be also followed according to the non-compliance with the duty. The duty of disclosure and duty of fair presentation will be compared. Also, foreign laws regarding to the duty of disclosure will be followed respectively.

3.1 United Kingdom

3.1.1 Marine Insurance Act 1906

The Marine Insurance Act 1906 is the ancient laws on marine insurance businesses. It is described as 'An Act to codify the Law relating to Marine Insurance'.[90] The provisions of law were drafted by the judgment that adopted the rule throughout applied in the practice of marine insurance businesses.

3.1.1.1 The application of the duty of disclosure

(1) Responsible person

It is clearly stated that the assured and agent have to comply with the duty before the execution of marine insurance contracts.

The assured obliges to disclose every material circumstances to the insurer[91] on the ground that the assured plays a vital role for placing the marine insurance while the insurer as the professional in marine insurance

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[90] Peter MacDonald Eggers QC, *"The Past and Future of English Insurance Law: Good Faith and Warranties"*, **UCL Journal of Law and Jurisprudence** Volume 1 No. 2, 216 (2012).

[91] Section 18 of the Marine Insurance Act 1906.

businesses knows the general facts that available in public not the facts that are belonged to the assured. Once the assured wishes to insure the subject matter, the assured knows circumstances of the subject matter which are belonged to or known by him and the assured is therefore requested for disclosing such circumstances to the insurer for assessing risks of marine insurance. However, the marine insurance have not been made if there is lacking the disclosed circumstances by the assured who will be a policyholder when the marine insurance contracts are concluded.

The agent who represents on behalf of the assured has to disclose the circumstances to the insurer.[92] It could understand that the agent needs to disclose the circumstance due to he is the agent who closely communicates and works with the assured. The disclosed circumstances by the agent shall be treated as if the disclosure has been made by the assured. Therefore, his disclosure shall influence to the insurer for the execution of marine insurance contracts. There is no definition to identify the agent under this Act. However, the disclosed circumstances by the agent are not the agent's circumstances but it should be the assured's circumstances which know, deemed to be known, ought to be known or even the communication from the assured has been communicated to him.

(2) Circumstances

Both assured and agent have to disclose the circumstances which are every material of its circumstances. There is a scope defining that *"every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*[93] There is further controversy stating that how the assured or agent knows which a material circumstance is and which a material circumstance will influence to the judgment of prudent insurer. In the author's view, it is hardly to define a specific of material circumstances because it should depend on the assured's circumstances on case by case basis.

There is a presumed provision of every material circumstances in accordance with deem to be known or ought to be known in the

[92] Section 19 of the Marine Insurance Act 1906.
[93] Section 18(2) of the Marine Insurance Act 1906.

ordinary course of business. It could explain that either assured or agent is presumed to be known all material circumstances by a provision of law. This presumption will be a benefit to the insurer because the insurer may take benefit from this provision for releasing their liabilities and refusing the claim respectively.

On part of the agent, the disclosed circumstances are included every material circumstances have been communicated to him[94] and those circumstances are bound the assured to disclose[95]. It could explain that the disclosed circumstances by the agent should be depended on the circumstance that is disclosed by the assured. The agent could not fully compliance with this provision if there is lacking of the assured's disclosure.

(3) Exception

Although the duty of disclosure is requested to disclose every material circumstances, there are exceptions on the duty of disclosure that allowed the assured to not disclose. It shall consider that the insurer is presumed to be known the circumstances by itself without any disclosure and no fault from the part of assured. The insurer will know the material circumstances that are relating to himself, its industry or available in public. The aforesaid circumstances shall be as follows:[96]

"(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty."

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[94] Section 19(a) of the Marine Insurance Act 1906.
[95] Section 19(b) of the Marine Insurance Act 1906.
[96] Section 18(3) of the Marine Insurance Act 1906.

(4) Period

It is clearly stated that the duty of disclosure is requested the assured to disclose the material circumstances prior the contract is concluded.[97] The conclusion of contract has been defined that *"...when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not..."*.[98] By the virtue of law provisions, it could explain that the duty of disclosure is requested to comply with before the execution of marine insurance contracts.

3.1.1.2 Remedy

Since the marine insurance contracts are subject to the doctrine of utmost good faith, it state that the marine insurance contracts may be avoided if the utmost good faith is not observed by another party.[99] The aforesaid is the provision relating to the remedy arising from failure to comply with the duty of disclosure. If the assured does not comply with the duty to disclose under the marine insurance contracts, the contracts may be avoided regardless of the level of assured's act or mind. Likewise, if the agent does not comply with the duty, the remedy will be the same.

In the author's view, it seems to be unfair if the assured has not intended to not comply with due to he may be unfamiliar with or insufficient understanding about how to disclose the circumstances to the insurer. This view was support by the case named Kauser v Eager Star Insurance Co Ltd. stated as follows:[100]

"Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid…for I consider there should be some restraints on this doctrine."

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[97] Section 18(1) of the Marine Insurance Act 1906.
[98] Section 21 of the Marine Insurance Act 1906.
[99] Section 17 of the Marine Insurance Act 1906.
[100] Kauser v Eager Star Insurance Co Ltd. [2000] Lloyd's Rep 1 R 154.

Apart from the above, there is silent for the situation that the agent fails to comply with the duty due to his negligence. There is also no remedy in case the insurer has partaken or induced the assured for non-compliance with the duty of disclosure.

3.1.2 Insurance Act 2015

There were comments that the Marine Insurance Act 1906 is difficult to be developed and kept pace by judges with modern development for the marine insurance industry.[101] In a meantime, several provisions are also considered to be out of date and out of line with international expectations[102] that include the duty of disclosure provision. The explanation is that this duty has created problems in practice, for example, the assured poorly understands the duty of disclosure, the insurer plays a passive role without asking questions before the executing of insurance contracts but asking question at claim stage instead, single remedy of avoidance in all cases is too harsh[103]. The remedy arising from the non-compliance with the duty of disclosure leads to adversarial disputes.[104]

The Insurance Act 2015 tries to balance the duty by making the insurer more active part of the pre-contractual stage.[105] The duty of fair presentation is introduced for applying to commercial insurance.[106] This Act introduce the new duty to the marine insurance industry named "duty of fair presentation" in lieu of the duty of disclosure for non-consumer who involving to all businesses related to the marine

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[101] Law Commission Her Majesty Treasury, *Insurance Contract Law: Updating the Marine Insurance Act 1906, Impact Assessment (IA) 26 August 2014*, 11 (Jul 17, 2015), http://www.parliament.uk/documents/impact-assessments/IA14-19A.pdf.
[102] *Id*, at 5.
[103] Law Commission Paper No. 353, **Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fradulent Claims; and Late Payment**, 16 (Jul 2014).
[104] Law Commission Her Majesty Treasury, *supra note* 101.
[105] Laura Reevs, "*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, 2 (2015).
[106] *Id.,* at 8.

insurance policy.[107] 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,[108] however, the new duty still retains the concept of the disclosure of information.[109] 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.[110] Interestingly, this Act has been reformed the remedies based on the insurer's point of view.[111] The remedies could separate causes 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.

However, this Act has passed to the parliament of the United Kingdom since 12 February 2015 and come into effect after 18 months from the day on which it is passed.

3.1.2.1 The application of the duty of fair presentation

(1) Responsible person

Under the duty of fair presentation, the assured obliges disclose all material circumstances to the insurer prior the marine insurance contracts are concluded.[112] The assured has to provide sufficient facts in order to let the insurer makes a decision whether to accept the risk, either on presentation alone or by being alerted to the need to ask further questions.

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[107] 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/.

[108] Laura Reevs, *supra* note 105, at 8.

[109] *Id.*, at 10.

[110] Michael Axe, *supra* note 107.

[111] Laura Reevs, *supra* note 105, at 10.

[112] Section 3(1) and (2) of the Insurance Act 2015 CHAPTER 4.

Interestingly, the Insurance Act 2015 identifies and scopes the assured's definition for individual and non-individual that could not be found in the Marine Insurance Act 1906. The definition of non-individual means the employee in accordance with the assured's agent, individual is responsible for the assured's insurance and senior management who involve deciding in accordance with how the assured's activities are to be managed or organized.[113]

(2) Circumstances

The Insurance Act 2015 clearly identifies that every material circumstances are requested to disclose with a limit at the assured knows or ought to know. It should consider a measure to decide which the material circumstances are because the assured may have difference knowledge. For material circumstances, the definition refers that it would influence the judgment of a prudent insurer for determining and assessing regarding to the risk. If such risks are able to accept, what the proposed terms and conditions to the assured will be. [114]

In the author's view, the assured should disclose every circumstance that he knows or ought to know and such circumstances should also relate to the matter of marine insurance. In case the assured ignores to disclose the material circumstances, the insurer has obliged to make further queries in order to obtain sufficient facts prior to enter a contract of marine insurance without any fault to the assured.[115] In case the assured disclose irrelevant of material circumstances or even immaterial facts, the insurer could ignore without any fault to the assured.

(3) Exception

Likewise the Marine Insurance Act 1906, the exception on duty of fair presentation has been identified for being convenience to the assured. It shows that some burden is shifted to the insurer at its own risk. It could explain that law provides the exception to the duty without any request to be disclosed from the assured as follows:[116]

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[113] Section 4(3) and (8) of the Insurance Act 2015 CHAPTER 4.
[114] Section 7(3) of the Insurance Act 2015 CHAPTER 4.
[115] Section 3(4) of the Insurance Act 2015 CHAPTER 4.
[116] Section 3(5) of the Insurance Act 2015 CHAPTER 4.

"(a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives the information."

(4) Period

It is clearly stated that the duty of fair presentation should be done prior a contract of marine insurance is entered into.[117] There are no express terms to state the compliance with the duty after the entering of marine insurance contracts. It could understand that this duty may not need to comply for such period. The supported reason is that after the assured has disclosed the material circumstances and entering into the marine insurance contracts, any incurred risks should be considered at the insurer's risks.

3.1.2.2 Remedy

The Insurance Act 2015 identifies the remedy for breach to the insurer in the event that the assured fails to comply with the duty of fair presentation.[118] The remedies for breach have been separately for two causes which are one, deliberate and reckless and another, neither deliberate nor reckless.[119] It could explain that the new remedies have assisted the assured for avoiding in the event that the insurer refuses the claim and avoid the contract because the assured does not comply with duty. The new remedies are rather fair if the assured fails to comply because of lacking of intention.

For remedies arising from either deliberate or reckless,[120] the insurer entitles a right to avoid the contract, refuse all claims and not to return any premium paid.

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[117] Section 3(1) of the Insurance Act 2015 CHAPTER 4.
[118] Section 8(1) of the Insurance Act 2015 CHAPTER 4.
[119] Section 8(4) of the Insurance Act 2015 CHAPTER 4.
[120] Section 2, Schedule 1 Insurer's remedies for qualifying breach Part 1 Contracts of the Insurance Act 2015 CHAPTER 4.

For remedies arising from neither deliberate nor reckless, the law has been provided for the following events.

First, *"if, in the absence of the qualifying breach, the insurer would not have entered into contract on any terms, the insurer may avoid the contract and refuse all claims, but must in the event return the premium paid"*.[121]

Second, *"if the insurer would have entered into the contract but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires"*.[122]

Third, *"if the insurer would have entered into the contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount be paid on a claim."*[123]

3.2 Norway

The Norwegian Marine Insurance Plan was firstly introduced and published in 1871 and new plans followed in 1881, 1894, 1907, 1930 and 1964 respectively.[124] It was considered to be a successful plan in Norwegian and in Nordic marine insurance law. The Norwegian Marine Insurance Plan composed of the key marine insurance conditions in Norway for more than 125 years and it also influence to the draft of corresponding conditions in other Nordic countries, which are Finland and Sweden respectively.[125] The Norwegian Marine Insurance Plan 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

[121] Section 4, Schedule 1 Insurer's remedies for qualifying breach Part 1 Contracts of the Insurance Act 2015 CHAPTER 4.
[122] Section 5, Schedule 1 Insurer's remedies for qualifying breach Part 1 Contracts of the Insurance Act 2015 CHAPTER 4.
[123] Section 6, Schedule 1 Insurer's remedies for qualifying breach Part 1 Contracts of the Insurance Act 2015 CHAPTER 4.
[124] Hans Jacob Bull, **Insurance Law and Marine Insurance Law: The Unequal Twins**, Stockholm Institute for Scandinavian Law, 19.
[125] *Id.*

Market.[126] The Norwegian Marine Insurance Plan was drafted by the Central Union for Marine Underwriters (CEFOR) in co-operation with the Norwegian Shipowner's Association that purports to balance of interests and negotiating power.[127]

3.2.1 Norwegian Marine Insurance Plan of 1964

3.2.1.1 The application of the duty of disclosure

(1) Responsible person

It clearly states that the person effecting the insurance is the person who have the duty of disclosure without undue delay.[128] Under the Norwegian Marine Insurance Plan of 1964, the provision does not apply wording of assured as well as the Marine Insurance Act 1906. It considers that whether there is difference meaning between *"the person effecting the insurance"* and *"assured"*. The definition of the person effecting the insurance has been provided that *"the party which has concluded the insurance contract with the insurer"*.[129] Also, the definition of assured has been provided that *"the party whose interest is assured"*.[130] It could explain that the person effecting the insurance would apply in situation marine insurance contracts are requested to conclude and the aforesaid of contract conclusion does not need to let the assured to execute by itself. The supported rationale is that the marine insurance contracts do not require the party to the contracts has insurable interest at the time of contract execution. The insurable interest to the party of marine insurance contracts is required when the claim is made only.

In the author's view, this Norwegian Marine Insurance Plan of 1964 attempts to avoid confusion between these wording by defining a separate definition. Although there is different wording, the person effecting the insurance and the assured may be the same person except there is an agent on behalf of the assured. Subject to this provision, it is vague to interpret that the person effecting the insurance shall include the agent. The definition of person effecting the

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[126] Sooksripaisarnkit, *supra note* 66, at 34.
[127] *Id*., at 35.
[128] §24 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[129] §1 (b) of Chapter 1 under the Norwegian Marine Insurance Plan of 1964.
[130] §1 (c) of Chapter 1 under the Norwegian Marine Insurance Plan of 1964.

insurance is rather broad while the duty to disclose still belong to the person in accordance with the assured's side.

Apart from the above, even the insurer does not require to perform a duty to disclose, the insurer is still required for compliance with the duty of notify in case the insurer become aware that incorrect or incomplete disclosure has been made.[131] The duty of notify is requested the insurer to give notice to the person effecting the insurance without undue delay and clarify that the insurer has intend to invoke. In case of failure, he will lose his right to invoke accordingly.

(2) Circumstances

The person effecting the insurance has to make full and correct disclosure of every circumstances of importance for the insurer's decision whether the risk under the insurance could be accepted and what the terms and conditions will be.[132] It could notice that the circumstances in accordance with this disclosure should be importance to the insurer. Under the Norwegian Marine Insurance Plan of 1964, there is no extension scope for the circumstances to be disclosed.

In addition, the person effecting the insurance is requested to provide *"all available particulars from the classification society concerning the condition of the ship before and during the period of insurance"*.[133]

(3) Exception

Under the Norwegian Marine Insurance Plan of 1964, there is no exception on the duty of disclosure. But, there is a provision to protect the responsible person on the duty of disclosure. It will apply in case the disclosure is made with the incorrect or incomplete circumstance even the insurer was aware of the fact, the insurer cannot plead in accordance with the insufficient disclosure.[134]

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[131] §29 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[132] §24 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[133] §30 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[134] §28 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.

(4) Period

The duty of disclosure is requested to comply prior the conclusion of the contract. To the extent, the contract is considered to be concluded once the person effecting the insurance may demand the policy.[135] It could understand that the person effecting the insurance is considered to be on duty to disclose until before the conclusion of contract. There is no clarification in this Norwegian Marine Insurance Plan of 1964 to extend this duty for the post-contractual period.

3.2.1.2 Remedy

The remedies arising from failure to comply with the duty are significance and outstanding to the marine insurance because it provide sanctions for all types of breach.[136] The insurer is not only protected by the standard terms in this Norwegian Marine Insurance Plan but also including the person effecting the insurance. This Norwegian Marine Insurance Plan of 1964 provided six scenarios for remedies on the duty of disclosure as follows:

First, in the event that the person effecting the insurance fraudulently or dishonestly has neglected his duty. The remedy for breach is that the contract shall not bind on the insurer. [137]

Second, in the event that the person effecting to the insurance has neglected his duty to disclose in any other way provided that in case the disclosure has been made, the insurer would entitle a right to not accept the insurance. The remedy for breach is that the insurer is released from liability.[138]

In a contrary, in the event that the insurer will accept the insurance but on other terms and conditions. The remedy for breach is that the insurer is only liable for the event that it is proved that the loss does not arise from such circumstances as the person effecting the insurance ought to have disclosed. Additionally, the insurer is allowed to terminate the insurance by giving seven days' notice.

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[135] §2 of Chapter 1 under the Norwegian Marine Insurance Plan of 1964.
[136] Sooksripaisarnkit , *supra* note 66, 36.
[137] §25 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[138] §26 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.

Third, in the event that the person effecting the insurance has disclosed with incorrect or incomplete facts without any blame attaching to him. The remedy for breach is that the insurer is still liable as if the correct or complete disclosure had been made. Additionally, the insurer is allowed to terminate the insurance by giving fourteen days' notice. [139]

Forth, in the event that the disclosure is made incorrectly or incompletely and the insurer was aware of the act at the time when disclosure should have been made. The remedy for breach is that the insurer cannot plead and, importantly, invoke if the circumstances have ceased to be of importance to him. [140]

Fifth, in the event that the insurer becomes ware that incorrect or incomplete disclosure has been made but he fails to notify in accordance with the intention to invoke. The remedy for breach is that the insurer shall lose the right to invoke. [141]

Sixth, in the event that the person effecting the insurance neglects to provide the insurer with all available particulars from the classification society concerning the condition of the ship before and during the period of insurance. The remedy for breach is that the insurer entitles a right to terminate the insurance by giving seven day's notices, but with expiry, at the earliest, on the ship's arrival at the nearest port in accordance with the insurer's direction. [142]

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[139] §27 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[140] §28 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[141] §29 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.
[142] §30 under Subdivision 1. Duty of disclosure by the person effecting the insurance of Chapter 3 under the Norwegian Marine Insurance Plan of 1964.

3.2.2 Norwegian Marine Insurance Plan of 1996, Version 2010

The Norwegian Marine Insurance Plan 1996 was revised from the Norwegian Marine Insurance Plan of 1964 based on four elements as follows:[143]

First, as there were significant changes to general insurance contract law, the marine insurance law under the Norwegian Marine Insurance Plan was revised in light of the Insurance Contract Act 1989.

Second, the important development between 1964 and 1996 was the ship owner and registered ships. To extent that, a foreign owned and/or foreign registered ship was a significant part of the portfolios of several of the Norwegian insurers in 1996.

Third, there was the revision process in the dissolution tendencies in international shipping.

Forth, there was a need to consider a general review and update of the marine insurance conditions, for example, P&I insurance were removed from the Norwegian Marine Insurance Plan of 1964.

3.2.2.1 The application of the duty of disclosure

(1) Responsible person

Under this Norwegian Marine Insurance Plan of 1996, the person effecting the insurance obliges to comply with the duty of disclosure.[144] Considering the provided definition, it is minor adjustment of the person effecting the insurance which stated that *"the party who has entered into the insurance contract with the insurer".*[145] While definition of assured, there has a significant change stated that *"the party who is entitled under the insurance contract to compensation or the sum assured in liability insurance the assured is the party whose liability for damages is covered".*[146] In practice, the person effecting the insurance and the assured may be the same person.

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[143] Hans Jacob Bull, *supra* note 124, at 9.
[144] § 3-1 Para 1 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[145] § 1-1(b) of Chapter 1under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[146] § 1-1(c) of Chapter 1under the Norwegian Marine Insurance Plan of 1996, Version 2010.

It should further consider that whether the broker is included as the responsible person to the duty of disclosure. Under § 1-3 of Chapter 1 under this Norwegian Marine Insurance Plan, there is a provision in accordance with the marine insurance contracts enter into through a broker. Clearly, it state that when insurance is advised to take out by the person effecting the insurance to a broker, a written draft of the marine insurance contracts shall be sent by the broker to the person effecting the insurance for his approval.[147] It could explain that the person effecting the insurance and broker are the difference person. Therefore, the duty to disclose shall not extend to include broker even he works on behalf of the assured.

Apart from the person effecting insurance, 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.[148] However, the insurer's duty is difference for the Norwegian Marine Insurance Plan of 1964 and 1996. The difference point is that the insurer is requested to inform the person effecting insurance by giving a written notice.

(2) Circumstances

The circumstance matter is rather the same with the Norwegian Marine Insurance Plan of 1964. The person effecting the insurance shall disclose with full and correct of every material circumstances for the insurer's decision whether the risk could be accepted under the insurance and what the terms and conditions will be.[149] This Norwegian Marine Insurance Plan of 1996 has adjusted wording from "all circumstance of importance" to be "all circumstances that are material" but there is no difference for interpretation. Also, this Norwegian Marine Insurance Plan of 1996 has not extended a scope for the disclosed circumstance.

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[147] § 1-3 of Chapter 1under the Norwegian Marine Insurance Plan of 1996, Version 2010.

[148] § 3-6 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.

[149] § 3-1 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.

Apart from the above, *"all available particulars from the classification society concerning the condition of the ship before and during the period of insurance"* are still required to be disclosed by the person effecting the insurance.[150]

(3) Exception

There is no exception on the duty of disclosure as well as the Norwegian Marine Insurance Plan of 1964. However, the provision regarding to the protection of responsible person on the duty of disclosure still exists in this Norwegian Marine Insurance Plan of 1996. The insurer could not disclaim if the facts are made with the incorrect or incomplete facts even the insurer was aware of the fact.[151] To the extent, the aforesaid incorrect or incomplete facts shall include in the event that the insurer knew or ought to have known.

(4) Period

There is some adjustment in wording for duration to perform the duty of disclosure. The Norwegian Marine Insurance Plan of 1964 identifies *"prior conclusion of the contract"*[152] while this Norwegian Marine Insurance Plan of 1996 identifies *"at the time the contract is concluded"*.[153] It could further explain that new wording under this Norwegian Marine Insurance Plan of 1996 attempts to cover the specific time at the conclusion of contract while the Norwegian Marine Insurance Plan of 1964 does not cover for this specific period. For the post-contractual period, however, there is still no further evidence to extend the scope of this duty.

3.2.2.2 Remedy

This Norwegian Marine Insurance Plan of 1964 still provides the remedies arising from non-compliance with the duty of disclosure as well as the previous Norwegian Marine Insurance Plan. Some provisions have been updated but there are no changes in the remedies. However, six scenarios for remedies on the duty

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[150] § 3-7 Para 1 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[151] § 3-5 Para 1 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[152] §2 of Chapter 1 under the Norwegian Marine Insurance Plan of 1964.
[153] § 3-1 Para 1 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.

of disclosure shall be provided by comparison with the Norwegian Marine Insurance Plan of 1964 as follows:

First, in the event that the person effecting the insurance fraudulently fails to fulfill his duty. The remedy is that the contract shall not bind on the insurer. Additionally, this Norwegian Marine Insurance Plan of 1996 grants the right to the insurer for cancellation other insurance contract that has with the person effecting the insurance by giving fourteen days' notice. [154]

Second, in the event that the person effecting to the insurance fails to fulfill his duty of disclosure in any other way provided that in case the disclosure has been made, the insurer would entitle a right to not accept the insurance. The remedy for breach is updated to be the contract is not bound to the insurer. [155]

In the event that the result is to be the insurer would have accepted the insurance but on other conditions. The remedy on this event is still the same. It could explain that the insurer is only liable for the event that it is proved that the loss does not arise from such circumstances as the person effecting the insurance ought to have disclosed. Additionally, the updated provision states that the insurance could be terminated by the insurer by giving fourteen days' notice.

Third, in the event that the person effecting the insurance has disclosed the incorrect or incomplete facts without any blame attaching to him. The remedy for breach is still the same. The insurer is still liable as if the correct or complete disclosure had been made. Additionally, the insurance could be terminated by the insurer by giving fourteen days' notice. [156]

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[154] § 3-2 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.

[155] § 3-3 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.

[156] § 3-4 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.

Forth, in the event that the facts are made incorrectly or incompletely, at the time when the facts should have been given, the insurer knew or ought to have known. The remedy for breach is that the insurer cannot plead and, importantly, invoke if the circumstances have ceased to be of importance to him.[157]

Fifth, in the event that the insurer becomes aware that incorrect or incomplete disclosure has been made but he fails to notify in writing in accordance with the intention to invoke. The remedy for breach is still the same. The insurer shall loss the right to invoke. [158]

Sixth, in the event that the person effecting the insurance neglects to provide the insurer with all available particulars from the classification society concerning the condition of the ship before and during the period of insurance. The remedy for breach is updated to be that the insurer entitles a right for cancellation the insurance by giving fourteen day's notices, but with effect no earlier than on arrival of the ship at the nearest port regarding to the insurer's instructions. However, there are differences from the Norwegian Marine Insurance Plan of 1964 because the duty of person effecting the insurance is requested upon the insurer's request. [159]

3.2.3 Nordic Marine Insurance Plan of 2013, Version 2016

This Nordic Marine Insurance Plan of 2013, Version 2016 is the latest version of the Norwegian Marine Insurance Plan which based on the Norwegian Marine Insurance Plan of 1996, Version 2010. The main amendments of this plan are related several parts, for example, policy definition, broker definition, Safety Management System, time limit, co-insurance of third parties, premium in the event of total loss and etc.[160]

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[157] § 3-5 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[158] § 3-6 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[159] § 3-7 of Chapter 3 under the Norwegian Marine Insurance Plan of 1996, Version 2010.
[160] Cefor – The Nordic Association of Marine Insurers, *Global Risk Global Coverage: An introduction to the Nordic Marine Insurance Plan of 2013, Version 2016*, 7. http://www.cefor.no/Documents/Clauses/Version%202016/Cefor%20Plan%20brochure_11-2015.pdf.

For a provision of the person effecting the insurance, there is no changes. These provisions under this Nordic Marine Insurance Plan are identical with the Norwegian Marine Insurance Plan 1996, Version 2010.

3.3 The People's Republic of China

In light of the international practices, the Maritime Code of the People's Republic of China or known as the "CMC" codified almost of every aspects of the maritime law. A contract of marine insurance is governed by the Maritime Code of the People's Republic of China[161] that has been influenced by the Marine Insurance Act 1906.[162] Under Chapter XII Contract of Marine Insurance of the Code, it composed of several matters, for example, insurable value, the duty of disclosure, conclusion of marine insurance contracts, insured obligations, insurer's liability and payment of indemnity.[163]

3.3.1 Maritime Code of the People's Republic of China

3.3.1.1 The application of the duty of disclosure

(1) Responsible person

The assured obliges to inform a truthful of material circumstances to the insurer before the conclusion of contract.[164] Noticeably, this provision of law applies the wording of *"inform"* and *"truthful"* for explanation the character of disclosure.

For *"inform"* wording, it may be slightly difference from the disclosure. The latter seems to be more strengthen than inform. It could consider why this provision of law selects this wording that seems to be difference from other jurisdictions. It might be that the assured is expected to inform all material facts

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[161] Yu Zheng, *supra note* 44, at 19.

[162] *Id*, at 2.

[163] กรกาญจน์ แก้วมูลคำ, *"ประมวลกฎหมายพาณิชยนาวีของสาธารณรัฐประชาชนจีน"*, **วารสารกฎหมายขนส่งและพาณิชยนาวี** ปีที่ 10 ฉบับที่ 10, 98 (2558). (Kornkarn Kaewmoonkam, *"Maritime Code of the People's Republic of China"*, **Maritime Law J.** 10th Vol 10, 98 (2015)).

[164] Article 222 of the Maritime Law of the People's Republic of China.

without consider what facts appropriate to inform the insurer are. While, the assured needs to select the facts to disclose to the insurer. In the author's view, however, it may be just a poor translation due to, if considering the character of informed, the assured needs to select the facts to disclose provided that the disclosed facts should have a bearing on the insurer for deciding the premium whether he agrees to insure.

For *"truthful"* wording, the assured is requested for compliance with the duty provided that circumstances informed must be true. It could explain that the assured can neither conceal the truth nor make misrepresentation.[165] In the author's view, this provision of law attempts to identify that the informed of material facts to the insurer have to be truthful only.

(2) Circumstances

It defines that the circumstances should be disclosed by the assured at his knowledge or ought to have knowledge of in this ordinary business practice.[166] It also requires such disclosed circumstance should bear on the insurer for deciding the premium of whether he agrees to insure. Regardless the circumstances shall be disclosed by the assured, it could explain that the said disclosure should be material circumstance effecting to the insurer's making decision. If it is agreed to insure, how much for the premium will be calculated. However, it is hardly for the assured to disclose circumstance that will affect to the insurer's making decision. The main reasons are that the assured may not have experience and familiar to disclose circumstances to the insurer.

(3) Exception

The disclosure's exception has defined in the event that the insurer has known or the insurer ought to have knowledge in his ordinary business practice provided that the insurer made no inquiry.[167] It could explain that the assured does not need for disclosing the said circumstance due to it is an estoppel provision.

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[165] Yu Zheng, *supra* note 44, at 21.
[166] Article 222 Para 1 of the Maritime law of the People's Republic of China.
[167] Article 222 Para 2 of the Maritime law of the People's Republic of China.

(4) Period

It is clearly stated that the duty to disclose should be performed prior the conclusion of contract.[168] And, there is no evidence discussing whether this duty shall be applied after the conclusion of contract.

3.3.1.2 Remedy

In the event the assured does not comply with the duty to disclose, the remedies are separated cause as follows:

First, the assured does not comply with the duty because of his 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 contract. [169]

Second, the assured does not comply with the duty because of no intentional act. The remedy for breach is that the insurer could either terminate the marine insurance contracts or demand a corresponding for increasing the premium. [170]

3.4 Comparison

3.4.1 Duty of Disclosure and Duty of Fair Presentation of Risk

Under the United Kingdom, the below is the comparison table between the duty of disclosure under the Marine Insurance Act 1906 and duty of fair presentation of risk under Insurance Act 2015.

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[168] Article 222 Para 1 of the Maritime law of the People's Republic of China.
[169] Article 223 Para 1 of the Maritime law of the People's Republic of China.
[170] *Id.*

DISCLOSURE COMPARISON: KEY CHANGES

Marine Insurance Act 1906	*Insurance Act 2015*
The assured has a duty to disclose every material circumstance which is known to the assured.	The insured has a duty to make a **"fair presentation of the risk"** to the insurer. This means that the insured must: • Disclose every material circumstance which it **knows or ought to know**; or • Failing that, the insured must give the insurer **sufficient information to put a prudent insurer on notice that it needs to make further enquiries** for the purpose of revealing those material circumstances. The insured must also: • Make the disclosure **"In a manner which would be reasonably clear and accessible to a prudent insurer"**; and • Must not make misrepresentations.
The assured is deemed to **"know"** every circumstance which, in the ordinary course of business, ought to be known to him. In the context of a business assured, the knowledge of the directing mind and will is attributed to the assured.	A business insured is taken to know what is known to the insured's **"senior management" and individuals "responsible for the insured's insurance"** (which includes risk managers and any employee who assists in the collection of data, or who negotiates the terms of the insurance). An insured **"ought to know"** what would have been revealed by a **"reasonable search"** of information available to the insured.
The duty to disclose material facts is owed by the assured and also independently by the broker.	The broker's independent duty of disclosure is abolished, but the broker's knowledge is attributed to the insured.

Single (draconian) remedy of **avoidance** ab initio for nondisclosure and misrepresentation.	A new regime of **proportionate remedies** for non-disclosure and misrepresentation is introduced. Unless the non-disclosure or misrepresentation is deliberate or reckless (in which case avoidance is still available to the insurer), the onus is on the insurer to show what it would have done had it received a fair presentation of the risk: • The insurer is still entitled to avoid the policy if it can show that, had it received a fair presentation of the risk, it would not have entered into the contract at all; but • If the insurer shows that it would have entered into the contract, but on different terms (other than premium), the insurer may treat the policy as having included those different terms from the outset; or • If the insurer would have entered into the contract but only at a higher premium, the insurer may reduce the amount to be paid on a claim proportionately. For example, if the premium would have been GBP 400,000 rather than GBP 300,000, then the insurer need only pay 75% of any claim.

Table 3.1: Disclosure Comparison: Key Changes[171]

[171] Marsh, *Adviser Insurance Contract Act 2015,* March 2015, 2 (June 12, 2016), http://www.oliverwyman.com/content/dam/marsh/Documents/PDF/UK-en/Adviser%20The%20Insurance%20Act%202015%20Issue%201-03-2015.pdf.

3.4.2 Foreign laws

The marine insurance laws in accordance with the above jurisdictions are compared as follows:

First, the duty of fair presentation is introduced in lieu of the duty of disclosure for the marine insurance contracts in the United Kingdom. It is a significant change for making clearer provision on this duty and remedy. While, the duty of disclosure still exists in Norway and the People of Republic of China without a prospective development at this times.

Second, all provisions have mentioned the assured to perform the duty of disclosure but it may be slightly difference on the wording indicated in the provision. In Norway, it is the indication of person effecting insurance. In United Kingdom, the assured is the applicable wording with a classification of individual and non-individual while other provisions silent on this classification. However, there is further discussed to consider whether other persons on behalf of the assured, i.e. broker or agent, will be responsible to perform this duty. There is its own answer for each jurisdiction. In the United Kingdom, the broker's independent the duty of disclosure is abolished. In Norway, there is excluded the broker or agent from the person effecting the insurance. In the People's Republic of China, it is still vague for this provision because there is no supported evidence.

Third, there are similar provisions for the circumstances matter. All jurisdictions have required disclosing material circumstances with the assured's knowledge or ought to know in the business practice and such material circumstances should involve in the course of business practice. In addition, there is slightly difference in Norway to request the assured to disclose the facts in accordance with the condition of the ship before and during the period of insurance.

Forth, the People's Republic of China has a similar provision but differences in details with the United Kingdom on the exception of this duty. In particular, the latter contain clearer provisions, for example, the diminishing of risk, presumption clause, insurer's waiver facts. While, there is no exception clause in Norway jurisdiction.

Fifth, the duty of disclosure has required performing at the pre-contractual stage for all jurisdictions. Subject to the post-contractual stage, however, it is still a discussed matter in practice for each jurisdiction.

Sixth, the Norway contains the clearer of remedy provisions than other jurisdictions. While, the United Kingdom and the People's Republic of China have classified the remedy based on a same concept. Noticeably, the remedy in the United Kingdom is to be more flexible in nature, proportionately protecting the insurer where the circumstances have not been disclosed.[172]

[172] Laura Reevs, *supra* note 105, at 14.

CHAPTER 4
DUTY OF DISCLOSURE IN THAILAND

This chapter is to study the relevant laws throughout the application of such relevant laws for Thailand jurisdiction. As aforesaid, there is no marine insurance law to govern the marine insurance contracts, the relevant laws are to study for demonstrating a correlation with the marine insurance law in Thailand. It will study the application of the relevant laws to the marine insurance cases and being followed by the discussions for addressing the problems and solutions. A draft of marine insurance act is to study as the conclusion of this chapter.

4.1 Relevant Laws of Duty of Disclosure under the Marine Insurance

4.1.1 Civil and Commercial Code

The Civil and Commercial Code identifies the provisions of insurance law that are insurance against loss, insurance on carriage, guarantee insurance and life insurance. The main provisions of insurance law are regarding to the insurance against loss and life insurance that those are called as non-marine insurance [173] while the marine insurance has been referred in a separate provision

4.1.1.1 Provision of Marine Insurance Contract

The marine insurance contract has been referred in Section 868. It is only one provision to refer the marine insurance for Thailand's jurisdiction. It provides that the contract of marine insurance shall be governed by the specific provision of maritime law. The insurance law under this Civil and Commercial Code could not apply to the marine insurance contracts because the intention of drafter is to exclude the marine insurance contract from the insurance contract or those called as non-marine insurance.[174] The rationale is that the marine insurance has the difference

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[173] ไชยยศ เหมะรัชตะ, **คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วย ประกันภัย**, 33 (พิมพ์ครั้งที่ 16 2556). (Chaiyos Hemarachata, Textbook – Insurance law, 33 (16th ed. 2013)).

[174] จิตติ ติงศภัทิย์, **กฎหมายแพ่งและพาณิชย์ว่าด้วย ประกันภัย** 4 (พิมพ์ครั้งที่ 12 2543). (Jitti Tingsapat, Textbook on Insurance 4 (12nd ed. 2000)).

characteristics from non-marine insurance, for example, perils, insurable interest and etc.

4.1.1.2 General Provisions of Insurance Law

The general provisions of insurance law have been referred in Section 861 – Section 868. These provisions are basis matters of insurance laws that apply to non-marine insurance. It could explain that if any matter of insurance against loss or life insurance does not mention, the general provisions of insurance law shall be applied instead.

It is further to consider that whether the general provisions of insurance law are able to apply for the marine insurance contracts. It could explain that those provisions could not apply 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, it refers to Section 865 that governs the insurance contracts. The aforesaid duty is an insured's obligation for compliance under the utmost good faith doctrine otherwise the insurance contracts shall be treated as voidable. It could explain the main elements of this section as follows:[175]

(1) Responsible person

The insured oblige to disclose his facts to the insurer or agent. For life insurance, it is clearly understood that the insured is required for disclosing his facts because the disclosed facts are belonged to him. The insurer could not know the aforesaid facts if the insured does not disclose.[176]

Supreme Court Judgment No. 1675/2500, the insurer discloses the incorrect facts regarding to his occupation and the premium were paid by him. But, the correct facts were contrary with his disclosed facts due to the insurer did not have occupation and the person who paid the premium was the beneficiary. The insurer considered that such disclosed facts would be material facts to the insurer. If he knew the correct facts, he would not execute the insurance contract with the insured. Therefore, the insurance contract shall be voidable.

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[175] *Id.*
[176] *Id.*, at 41.

(2) Facts

The disclosed facts should be the facts that would have induced the insurer to raise the premium or refuse to execute the insurance contracts. It could explain that the facts to be induced the insurer should consider based on the facts to be disclosed by the reasonable person. The rationale is that this provision would intent to protect the insured under the duty of disclosure.[177]

(3) Exception

None of exceptions regarding to the disclosed fact is stated in this provision.

(4) Period

The period of disclosed facts is at any time until before or at the time to execute the insurance contracts. To extent that, the aforesaid period shall include the time prior the renewal period of insurance contract. For the period after the execution of insurance contracts, it states that the insured does not oblige for disclosing the material facts.[178]

(5) Remedy

In case the insured discloses incorrect facts and those facts cause the insurer to agree and accept the execution of insurance contracts with the lesser premium that it should be, the insurance contracts shall be voidable. The insurer entitles a right to avoid this insurance contract provided that the aforesaid right should be exercised within one month from the time when the insurer has knowledge in accordance with the ground of avoidance. The maximum period for the insurer to exercise the rights will be limited at five years otherwise the aforesaid right shall be extinguished. If the rights have not been exercised within the timeframe, the insurer shall be responsible and liable to the insurance contracts even the insured have disclosed the incorrect facts.[179]

The remedies for breach of the duty shall be deemed to have been void from the beginning and the parties to the contract shall be restituted to

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[177] *Id*., at 42.

[178] เหมะรัชตะ (Hemarachata), *supra* note 173, at 156.

[179] *Id.,* at 149.

the conditions which they were in previous. If such restitution could not be possible, the indemnification in the equivalent amount shall be replaced.[180]

For the insurance against loss, when the insurance contracts are avoided, the insurer shall return the paid premium to the insured. If there have further claim, the insurer have not obliged for paying the compensation to the insured. But, if the compensation has already paid, the aforesaid compensation should return to the insurer.[181]

For life insurance, when the insurance contracts are avoided, the insurer shall return the redemption value of the policy to the insured of his heirs.[182]

4.1.1.3 Provisions of Contract

The provisions of contract have been referred to Section 368 under the Civil and Commercial Code. The provision may be the relevant laws to the marine insurance contracts in accordance with the interpretation of marine insurance contracts should be based on the good faith.

Supreme Court Judgment No. 1564/2525, the Court applied Section 368 of the Civil and Commercial Code that are given that the contract shall be interpreted in accordance with the requirement of good faith, ordinary usage being taken into consideration for interpretation of marine insurance contracts.

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[180] Section 176 of the Civil and Commercial Code.

[181] เหมะรัชตะ (Hemarachata), *supra* note 173, at 154.

[182] *Id.*

4.1.2 Unfair Contract Terms Act B.E. 2540

The Unfair Contract Terms Act B.E. 2540 is the law to protect a party from unfair contract terms after the contract execution. This protection will be considered and decided by the court in order to enforce the contract terms to be appropriate and fair depending upon the case.

Based on legal doctrines for the contract execution, there are several legal doctrines, for example, freedom of contract, good faith, equity, certainty of law or liability prior the contract execution. This part will study the freedom of contract as the main doctrine to cause this Unfair Contract Terms Act.[183]

Freedom of contract (หลักเสรีภาพในการทำสัญญา) has two meanings as below:[184]

One, freedom to execute the contract means a freedom to initiate, execute or cease any process to cause a contract. It could explain that the initiation, execution or agreement to execute the contract are able to interpret to be an act in a positive sense and the cease of negotiation process or entering agreement are able to interpret to be unacted in a negative sense.

Another, freedom to not be interfered when the contract is executed means a freedom to not be interfered from the government in accordance with the individualism doctrine. This freedom could be called as the autonomy of will. It could explain that the government could not interfere any agreement of the parties when the execution of contract. Otherwise, the freedom in accordance with the individualism doctrine would be ruined.

The law will respect to the freedom of party to the contract throughout intention of party to the contract. Each party has obliged to follow the terms of contract regardless of any advantages or disadvantages of the party to the

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[183] ศนันท์กรณ์ (จำปี) โสตถิพันธุ์, **คำอธิบายนิติกรรม-สัญญา,** พิมพ์ครั้งที่ 16, วิญญูชน, 483 (2554). (Sanunkorn (Jampee) Sotthiphan, **Juristic Act – Contract Law**, 16th ed, Winyuchon, 483 (2001).

[184] *Id.* at 279.

contract.[185] However, those freedom are accepted for appropriate usage in order to avoid any interference or damages to others or public.[186] In the real circumstances, some party to the contract may have more power of bargaining than another. The party who has more power of bargaining will take advantages to negotiate or control another who has less power of bargaining for terms of the contract. The objective of party who has more power of bargaining is to achieve for having satisfy terms in the contract regardless any fairness of the contract.[187] If the party who has less power of bargaining does not accept the terms, the execution of contract would be declined by another party. These circumstances show significant factor to change of society and economic which are considered to be a problem. However, this problem is expected to be resolved by this Unfair Contract Terms Act.

For the duty of disclosure, this Unfair Contract Terms Act does not directly involve but it may relate for considering whether the terms under marine insurance contracts are fair. The duty of disclosure is one of important terms to be imposed for ensuring the assured will comply this duty after the execution of marine insurance contracts. It should consider that if the duty of disclosure is imposed to the marine insurance contracts, whether these terms should consider as fair terms.

Firstly, it should consider whether the marine insurance contracts could be governed by this Unfair Contract Terms Act. It could explain that the Unfair Contract Terms Act is to apply any contracts or adhesion contracts executing between the consumer and professional operator.[188] Briefly, the consumer is defined that a person entering into a contract in the capacity of insured so as to acquire the services or benefits and such contract shall not be for trade of such service or benefits.[189] And,

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[185] ธีระพล มิตรประยูร, *การใช้บังคับกรมธรรม์ประกันภัยตัวเรือมาตรฐานของสถาบันผู้รับประกันภัยแห่งลอนดอนในประเทศไทย*, วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย, 160 (2542). (Theeraphol Mitprayoon, *The Applicability of the Institute of London Underwriters' Marine Hull Policies in Thailand*, Master of Law's Thesis Chulalongkorn University, 160 (1999)).

[186] โสตถิพันธุ์ (Sothiphan), *supra* note 183, 283.

[187] มิตรประยูร (Mitprayoon), *supra* note 185, 160.

[188] Section 4 of the Unfair Contract Terms Act B.E. 2540.

[189] Section 3 of the Unfair Contract Terms Act B.E. 2540.

the professional operator is also defined that a person entering into contracts in a capacity of insurer so as to supply the services or benefits and such contracts must be for the trade of services or benefits in accordance with their ordinary course of business.[190] The difference between the definition of consumer and professional operator are that the consumer has not entered contracts for trade of services or benefits. It should further consider that when entering into the marine insurance contracts, whether the assured agrees to enter the contracts for the trade of services or benefits. The answer on this matter should depend on case by case basis because, subject to a nature of marine insurance contracts, the most assured agrees to execute the marine insurance contracts on behalf of their company to protect their property during facing of the marine perils.

Secondly, it should consider if the duty of disclosure is imposed and enforced the assured for after the execution of marine insurance contracts, it is to consider whether there is fair terms. It could explain that the aforesaid consider as unfair terms because, subject to the applicable law, the duty of disclosure will not require the assured to perform after the execution of marine insurance contracts and the assured is imposed unnecessary burden. Therefore, the aforesaid unfair terms could not be enforced because the terms attempt to enforce the assured to be liable more than obligations imposed by the law.[191] Comparing the obligation between the assured and insurer, the assured have more burdens on the duty of disclosure than the insurer. However, the legal consequence is that the unfair terms will be enforced to the extent that they are fair and reasonable according to the circumstances only.[192]

Thirdly, it should further consider that if the unfair terms are imposed as a standard terms and the party who has not imposed this unfair terms agrees to accept due to less of bargaining power, whether this unfair term could be enforced. In general, there is considered to be unfair terms because 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.[193]

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[190] *Id.*
[191] Section 4 of the Unfair Contract Terms Act B.E. 2540.
[192] *Id.*
[193] *Id.*

4.1.3 Marine Insurance Act 1906

The Marine Insurance Act 1906 does not have the status either domestic law for Thailand's jurisdiction or international law. It is the internal law of the United Kingdom that has widely accepted for the marine insurance industry in a global. This Marine Insurance Act is the provision that accepted by several countries to be a model of marine insurance law including Thailand. For the provisions of law governing the marine insurance contracts are the Marine Insurance Act 1906 and the Insurance Act 2015.

Broadly speaking, the Marine Insurance Act 1906 is to govern the marine insurance contracts including other related matters, for example, utmost good faith doctrine and duty to disclose. While the Insurance Act 2015 is the revision of the preceding law, the main content is to introduce the duty of fair presentation, warranties and fraudulent claims respectively.

As explained in Chapter 3, the duty of disclosure in the United Kingdom's jurisdiction has been reformed and replaced with the duty of fair presentation. The main reform this duty are that both assured and insurer have obliged to disclose the facts to each other, the insurer needs to ask questions and the remedies from non-compliance with the duty. It is considered as significant changes to this duty that require the parties to the marine insurance contracts who are in the United Kingdom for complying with.

4.2 The application of the Relevant Laws of Duty of Disclosure under the Marine Insurance

In accordance with the law of Thailand, the application of relevant laws to the marine insurance contracts could apply as follows:

4.2.1 Specific Provision

In case there has a specific provision to be applied, the aforesaid provision could directly apply to the case.

For the marine insurance contracts, there is Section 868 as the specific provision to apply the case of marine insurance. However, the aforesaid section could not assist to resolve the marine insurance issue due to there is no details on marine insurance contracts. It refers to the maritime laws that should apply to the marine insurance contracts.

4.2.2 Gap-Filling Provision

Section 4 of the Civil and Commercial Code provides that:

"The law must be applied in all cases which come within the letter or the spirit of any of its provisions.

Where no provision is applicable, the case shall be decided according to the local custom.

In there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by general principles of law."

The objective of gap-filling provision is to resolve problems on interpretation and gap in the law.[194] The gap-filling provision in the law shall be applied in case there is neither the written in law nor the custom of law for applying

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[194] หยุด แสงอุทัย, **คำบรรยายความรู้เบื้องต้นเกี่ยวกับกฎหมายทั่วไป** 143(พิมพ์ครั้งที่ 12 2538). (Yud Sang-Uthai, **Fundamental Description of General Law** 143 (12th ed. 1995).

into the fact.[195] In case there is none of any law to apply for the case, the gap-filling provision should be applied by local custom, analogy to the provision most nearly applicable and general principles of law respectively.

In accordance with the duty to disclose under the marine insurance contracts, the gap filling provision could explain as follows:

4.2.2.1 Provision of law

In case there is a provision of Thai law addressing a disputed issue, such provision would be applicable to the issue. In that case, it does not need to look further to the local custom, the provision most nearly applicable and the general principles of law.

For the duty to disclose under the marine insurance contracts, there is no provision of law to govern. Therefore, it needs to consider the following tier.

4.2.2.2 Local Custom

The definition of *"custom"* and *"local custom"* have been provided by several scholars as follows:

Prof. Dr. Yud Sang-Uthai defines that:

"Custom is a practice which has been followed by a group of people for a long time. It is normally related to traditions, cultures and human behaviors such as dressing or communication method. As the social factors of each group of people are of difference, depending on social classes, ways of life, occupations, one society contain various specific custom, e.g. diplomatic custom and commerce custom, nature and character of which are totally different."[196]

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[195] *Id*, at 142.
[196] *Id.*, at 73.

Prof. Dr. Preedee Kasemsup defines that:

"Custom must be practiced so long and having frequency so that the people agree and accept that it is good and rightful."[197]

Prof. Somyos Chuathai defines that :

"Local Custom is the customary law considering as the originate of the Thai's law."[198]

The aforesaid custom could be used to decide the issue subject to the following requirements:

(1) Localization: The custom which is used to determine the case is considered as the law. Based on the general principle that the law applicable to the dispute should be one of place where the dispute occurs, the custom which is used to decide a case should be local in the sense that it must be a local custom of the people where the dispute has taken place.[199]

(2) Well-Recognition: The custom must be well-recognized and followed by people for a long time; the fact that the custom has existed for a long period of time means that the practice is recognized and good for majority of the society.[200]

(3) Law Compliance: The custom which is contrary to the law cannot be used to decide the case. Besides, the person who complies with such custom may be considered as committing as illegal act.[201]

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[197] ปรีดี เกษมทรัพย์, **กฎหมายแพ่ง : หลักทั่วไป** 7 (พิมพ์ครั้งที่ 5 2526). (Preedee Kaemsup, **Civil Law : General Doctrines** 26 (5th ed. 1983)).

[198] สมยศ เชื้อไทย, **ความรู้กฎหมายทั่วไป** 92 (พิมพ์ครั้งที่ 20 2557). (Somyos Chuathai, **Introduction to the law** 92 (20th ed. 2014)).

[199] ประสิทธิ์ โฆวิไลกูล, **กฎหมายแพ่ง - หลักทั่วไป** 32 (2545). (Prasit Kovilaikool, **Civil Law – General Doctrine** 32 (2002)).

[200] *Id.*

[201] *Id.*, at 33.

(4) Good Moral: The custom must not be contrary to the good moral and public order. As the general principle of the public law is considered to be idea of the supremacy of the public interest, the custom which would be adopted to fill the gap in law must be consistent to the good moral and public policy.[202]

For the marine insurance in Thailand, it could explain that either custom or local custom related to the marine insurance have not been addressed for Thailand.[203] The marine insurance has been introduced to Thailand by the practices of foreign law.

4.2.2.3 Analogy to Provision Most Nearly Applicable

There are several opinions for analogy to the provision most nearly applicable by classifying in three groups of opinion as follows:

First, the analogy to the provision most nearly applicable should be any section under the Civil and Commercial Code that are considered to be a nearest provision.[204]

Second, the analogy to the provision most nearly applicable should not limit to the section under the Civil and Commercial Code but also including other Thai's law that have similar principle.[205]

Third, the analogy to the provision most nearly applicable should be any section under the Civil and Commercial Code, other Thai laws and including any provision of foreign laws. This opinion was provided by the Court of Appeal in the Supreme Court Judgment No. 999/2496. Before the aforesaid judgment were brought to the Supreme Court, the Court of Appeal opined that the Marine Insurance Act 1906 should apply as the provision most nearly applicable. However, this opinion was overruled by the Supreme Court with the reason that the application

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[202] *Id.,* at 34.

[203] เอกจริยกร (Eagjariyakorn), *supra* note 33, at 193.

[204] มนู รักวัฒนศิริกุล, *การใช้บังคับกฎหมายเกี่ยวกับการประกันภัยสินค้าทางทะเล,* วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย 54 (2537). (Manu Rakwattanasirikul, *Problems of Application of Law Concerning Marine Cargo Insurance*, Master of Law's Thesis, Chulalongkorn University 54 (1994).

[205] *Id.*

of foreign laws to the case should be considered based on the general principle of law not analogy to the provision most nearly applicable.[206]

The conclusion in this matter is that the analogy to the provision most nearly applicable should mean any Thai's laws including the Civil and Commercial Code.[207]

For the marine insurance in Thailand, the analogy to provision most nearly applicable is considered to be the insurance laws under the Civil and Commercial Code because the marine insurance is one type of insurance against loss. But, the marine insurance and insurance against loss are noticeable difference in nature as aforesaid. The insurance provision under the Civil and Commercial Code has been referred to the duty of disclosure as a part of general provision of insurance law. There have a similar concept with the duty to disclose under the marine insurance contracts but the details are difference.

However, the application of analogy to provision most nearly applicable has been selected to be applied in the Supreme Court Judgment No. 6649/2537. Further details of this issues and judgment are to discuss in 4.3.

4.2.2.4 General Principle of Laws

Prof. Dr. Preedee Kasemsup explains that there are two concepts in accordance with the general principle of laws as follows:

First, the general principle of laws should not be limited but it should be the laws that could decide the case. It could explain that this idea is also to bring any laws in other system of laws to be applied to the case. The concerned is about the law that bring from other systems of laws may have contradict to the principle or intent of law itself. However, this idea seems to be uncertain and incorrect. [208]

Second, the general principle of laws should mean the principle of laws that places in the law system of the country. It explains that the general principle of laws could be sought in the domestic law.[209]

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[206] *Id.*, at 54-55.
[207] *Id.*, at 55.
[208] เกษมทรัพย์ (Kasemsup), *supra* note 197, at 26.
[209] *Id.*, at 26 - 27.

For the marine insurance in Thailand, the general principle of laws has been referred to the marine insurance contracts by application of the Marine Insurance Act 1906 as the general principle of law. However, the application of the Marine Insurance Act 1906 within Thai's jurisdiction has been selected to be applied in the Supreme Court Judgment No. 999/2496 and 7350/2537. Further details of this issues and judgment are to discuss in 4.3.

4.2.3 Conflict of Law Act B.E. 2481

The Conflict of Law Act B.E. 2481 is another law for considering the gap-filling in the law.[210] Due to permission under provisions of the Conflict of Law, the Court is able to apply foreign laws to a case provided that the facts and parties to the case have the international elements.[211] In reality, the facts and parties to the case may relate to several countries and this Conflict of Law shall indicate the applicable law to the case.

4.2.3.1 International Elements of Duty of Disclosure under Marine Insurance Contract

When the marine insurance contracts have involved the international elements i.e. the parties to the contract have difference nationalities; this Conflict of Law Act shall come into operation for being resolved a dispute by the Court. It generally studies when two or more states are tied up with a contract by the below connecting factors: [212]

(1) Nationality of parties to contract

In accordance with a relationship between people and national state, nationality is connected legal relationship on the ground that the state

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[210] แสงอุทัย (Sang U-thai), *supra* note 194, at 146.

[211] ประสิทธิ์ ปิวาวัฒนพานิช, **ความรู้ทั่วไปเกี่ยวกับกฎหมาย** 80 (พิมพ์ครั้งที่ 2 2546). (Prasit Piwawattanapanich, **Introduction to the Laws** 80 (2nd ed. 2003).

[212] นันทวัน เจริญชาศรี และ พันธุ์ทิพย์ กาญจนะจิตรา สายสุนทร, *"ฎีกาวิเคราะห์ คำพิพากษาศาลฎีกาที่ 7350/2537 กฎหมายที่มีผลบังคับต่อสัญญาประกันภัยทางทะเล"*, **วารสารนิติศาสตร์** ปีที่ 25 ฉบับที่ 4, 793 (2540) (Nantawan Charoenchasri and Pantip Kanjanajitra Saisoonthorn, *"Analysis of the Supreme Court Judgment No. 7350/2537 – Applicable law to Marine Insurance"*, 4 **Nitisart J.** 793 (1997).

would have sovereignty over its citizen. It should also consider that if the contract is made by two companies which are incorporated in different states, those states will be related to the contract as the national states of the parties to the contract.

(2) Domicile of parties to contract

In accordance with a relationship among state, people and things, the state can be tied up with the contract by domicile of the parties on the ground that the state would have sovereignty over people and things on its territory. In this case, if the contract is made by two companies which are domiciled in different states, those states will be related to the contract as the states of domicile of the parties to the contract.

(3) Place where contract is formed

Sovereignty is considered belonging to every states to control any act done in their territories. In case the contract is formed in a particular state, the aforesaid state will be related to the contract as the place where the contract is formed.

(4) Place where contract is in effect

The place where the contract is in effect can be considered as a connecting factor on the ground that every state would have sovereignty over any effects occurred in their territories. In case the obligation under the contract is performed in a particular state, the aforesaid state would be related to the contract as the place where the contract is in effect.

(5) Place where property is situated

The place where the property is situated could be recognized as a connecting factor on the ground that the state would have sovereignty over people and things on its territories.

The aforesaid is an international element for considering the duty of disclosure under the marine insurance contracts. A general situation is that the parties to the marine insurance contracts are from different states and the aforesaid parties have also difference of nationalities and domiciles that should lead to consider the international elements.

4.2.3.2 Designated Law regarding Duty of Disclosure under Marine Insurance Contract

In details, the Conflict of Laws Act B.E. 2481 has involved several matters composing of the status and capacity of a person, obligation, property, family and succession respectively.

In relation to the marine insurance contracts, there have three main issues that necessitate to study under this Act as follow:

First, validity of contract issue;[213] there has indicated the form of contract as a legal requirement of the country where the executing of contract and request the parties to contract for compliance with. Consequently, such contract shall be valid and bound the parties to contract. However, there has some exception to allow executing the contract depends on the form of contract in the country where the property is situated if there is related to immovable property.

Second, abilities of the parties issue;[214] there has indicated that the ability of the each person shall normally depend on the law of nationality in each jurisdiction. Likewise, in case the contract is executed in Thailand, the party who is the foreigner would have the ability depending on the indication by Thai laws. There has some exception to exclude the matter of family and succession.

Third, the elements and consequences of the contract issue;[215] there has indicated that in case there is a doubt regarding which law shall be applicable for the essential elements or effects of the contract, the said issue should be considered based on the intention of the parties. In the absence of the said intention, the law of nationality for the parties who have the same nationalities shall govern. In the absence of the same nationality, the law of the place where the contract has been executed shall thereby govern.

For a question which is the applicable law for the duty of disclosure under the marine insurance contracts, however, this issue should firstly determine by considering Section 13 of the Conflict of Law Act. B.E. 2484 related to

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[213] See Section 9 of the Conflict of Law Act B.E. 2489.
[214] See Section 10 of the Conflict of Law Act B.E. 2489.
[215] See Section 13 of the Conflict of Law Act B.E. 2489.

the elements and consequences of the contract issues. Therefore, the aforesaid section should be taken into account to determine the applicable law for the dispute.

Under Section 13 of the Conflict of Law Act B.E. 2481, there are steps to determine as follows:

(1) Parties' intention

Firstly, the parties' intention must consider for response to the question stated that which is the applicable law to the essential elements or effect of the contract. To extent that, the law respects to the parties' intention for selecting the applicable law governing to their contract as a choice of law.

(2) Lack of Parties' Intention

Secondly, in the absence of the parties' intention for selecting the applicable law, the designated law that will be applicable to the essential elements or effect of the contract would be determined respectively as below:

- The law of the national state will be the designated law provided that the parties to the contract have the same nationality.
- The law of the state where the contract is formed will be the designated law provided that the parties to the contract have different nationalities.
- The law of the state where the contract is performed will be the designated law provided that the place where the contract is formed cannot be ascertained.

It should note that the conflict of law rule does not apply to every dispute involving the international elements. This's law provision will be considered by the Court when the rule is raised by a party to the dispute. In accordance with the sovereignty in each state, there is no jurisprudential justification for the Thai's Court to apply foreign laws by themselves except the foreign laws will be requested for application by the parties to the dispute.

From a perspective of Thai's Court, the foreign law is a matter of fact. In case the parties to the dispute would like to apply the foreign law, they must prove the existence and content of the foreign law to the satisfactory of Thai's Court, otherwise, the internal law would also apply to the case regarding to Section 8 under the Conflict of Laws Act B.E. 2481 instead.

Therefore, in case absence of the parties' request to apply foreign law to the contract regarding to the conflict of laws, Thai's Court would apply the internal law to the dispute.

4.3 Discussions

As aforesaid, there are two ways to determine regarding to the application of the relevant laws under the marine insurance contracts as given in the Supreme Court Judgment as below:

First, the application of the insurance provisions under the Civil and Commercial Code as analogy to provision most nearly applicable

Supreme Court Judgment No. 6649/2537, there was a case regarding to cargo insurance was partially damaged during the transport by sea. This case is related to a prescription. The court has applied Section 882 of the Civil and Commercial Code which is a part of non-marine insurance into the contract of marine insurance. There has further explanation that as there was neither the maritime law nor the local custom applicable to marine insurance in Thailand. Therefore, it necessitate to decide the case by analogy to the provision most nearly applicable which is the provision of insurance against loss.

Second, the application of the Marine Insurance Act 1906 as the general principle of laws.

Supreme Court Judgment No. 7530/2537, there was a case in accordance with the marine insurance law and marine insurance contract under Section 868 of the Civil and Commercial Code shall be governed by the provision of the maritime law. Thailand had neither maritime law nor local custom regarding marine insurance, therefore, the case must be decided by virtue of the general principles of law. Due to the insurance contract was made in English, English marine insurance law must be considered as the general principles of law. The insurance policy contained a warranty for the assured under which the vessel in dispute must be checked and repaired in accordance with suggestions of Maritime Surveyors (Thailand) Co., Ltd. within 30 days after insurance effective date was a strict warranty under Section 33 of the

Marine Insurance Act. Since the assured had breached that warranty, the insurer was able to deny liability under the insurance contract.

However, the latter judgment had been widely discussed the matter in accordance with why the court considered the Marine Insurance Act 1906 as the general principles of law.

Prof. Dr. Pantip Kanjanajitra Saisoonthorn comments as follows:[216]

1. In absence of the specific provision of marine insurance, the local custom, the provision most nearly applicable and the general principles of law must be taken into consideration respectively. Although it was already stated in the judgment that there was no local custom regarding to the marine insurance, the Court should consider the analogy to the provision most nearly applicable prior to further consider and decide the cases by the general principles of law. In this case, the Court failed to describe why the provisions of the contract of insurance against loss in the Civil and Commercial Code could not be analogically applied to the cases as the provision most nearly applicable.

2. The rationale why the Court recognized the Marine Insurance Act 1906 as the general principles of law is also criticized on the ground that the applicable law to the case should not only consider in the insurance policy language. If the insurance policy is made in Laotian language, the general principles of law should not be Laotian law regarding to the marine insurance. However, this given rationale is likely to be incorrectness.

Prof. Atthaniti Disathaamnarj also explained that Thai's court did not use the Marine Insurance Act 1906 in the aforesaid case as the internal law, but used it as the general principles of law under Section 4 of the Civil and Commercial Code. The reasoning behind the verdict is that United Kingdom is one of the dominant sea powers and has a long history of sea carriage, and consequently has a good understanding of marine insurance practice. Further, it is widely accepted that Lloyd's institute in England is the world's specialist insurance markets that provides insurance

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[216] เจริญชาศรี และ กาญจนะจิตรา สายสุนทร, (Charoenchasri and Kanjanajitra Saisoonthorn), *supra* note 212, at 799-800.

services in over 200 countries and territories and is a part of many marine insurance developments. [217]

Prof. Dr. Kamchai Jongjakaphan further explain the status of Marine Insurance Act 1906 that in fact there is no either international law or rule to govern a marine insurance but just merely have the Marine Insurance Act 1906 is widely applied and accepted as a model law in several countries including Thailand. Although the Marine Insurance Act 1906 shall be a domestic law in the United Kingdom, the aforesaid law plays a vital role for the international trade. Therefore, it could explain that this Marine Insurance Act 1906 has become as *'a de facto international marine insurance legal regime'*[218] or likely to be as international treaty.[219]

In conclusion, the author opines to the application of relevant laws for duty to disclose under the marine insurance contracts as follows:

1. There is no specific provision of law governing the marine insurance contracts 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.

2. The provision of insurance law under the Civil and Commercial Code is not suitably for applying to the marine insurance contracts by the analogy to provision most nearly applicable as the gap-filling provision under Section 4 of the Civil and Commercial Code. The problem arising from the application of the insurance law under the Civil and Commercial Code is regarding to the characteristics of marine insurance and non-marine insurance are totally difference, therefore, the remedy for breach may be also difference.

3. The Marine Insurance Act 1906 is suitably for applying to the marine insurance contracts. But, the problem arising from application of the Marine Insurance Act 1906 is regarding to the method to apply into Thai's case. It should have further controversy to discuss that whether the Court has power to take and

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[217] ดิษฐอำนาจ (Dissatha-Amnarj), *supra* note 16, at 223.

[218] รักวัฒนศิริกุล (Rakwattanasirikul), *supra* note 204, at 211.

[219] กำชัย จงจักรพันธ์, **กฎหมายการค้าระหว่างประเทศ**, 295 (พิมพ์ครั้งที่ 5 2555). (Kumchai Jongjakaphan, **International Trade Law**, 295 (5th ed. 2012).

consider the aforesaid foreign law by their own. However, the author opines that the aforesaid foreign law is not the law that the Court should generally know by their own.

4. It would be clearer to apply the Marine Insurance Act 1906 to Thai's case. If the parties to the marine insurance contracts agree to apply the Marine Insurance Act 1906 as the governing law, the application of aforesaid Act will be subjected to the Conflict of Law Act B.E. 2481. The parties to the marine insurance contracts have burden to investigate the Marine Insurance Act 1906 to the Court's consideration. However, the further problems are that how the parties to the marine insurance contracts ensure that the Supreme Court Judgment will be certain and in line with the Marine Insurance Act 1906. Thai's Court Judgment may be expected to be in line with the United Kingdom's judgment.

4.4 Draft of Thai Marine Insurance Act

There was idea for drafting the marine insurance law in the light of Section 868 of Civil and Commercial Code. The draft was originated by the Office of Maritime Promotion Commission as the authority which at the time was responsible for drafting marine insurance in Thailand. The intention of the draft was to govern the contract of marine insurance that necessitate to have specific provision applying to the marine insurance law. At that time, there had several ideas to discuss on the issue of whether Thailand should have the Thai Marine Insurance Act. There were two views as follows: [220]

First, as the fact that the Supreme Court had applied the Marine Insurance Act 1906 to the marine insurance disputes, therefore, there was no necessity for Thailand to draft the Thai Marine Insurance Act. In their opinion, application of the Marine Insurance Act 1906 was harmonious with the Thai marine insurance practice in which Marine Insurance Act 1906 as prescribed in the policy as governing law. Therefore, if the Thai Marine Insurance Act was drafted with the different principles

[220] เอกจริยกร (Eagjariyakorn), *supra* note 33, at 209-210.

from English law, it would be difficult for the Thai insurers to take out reinsurance with the foreign reinsurers due to their concern of Thai law.

Second, as there is no marine insurance law for Thailand, it was an uncertainty in law application because the Courts had to apply the Marine Insurance Act 1906 by virtue of Article 4 of the Civil and Commercial Code. In addition, in adversary system, the Court acted as a referee over the contest between disputed parties who had to produce foreign law to the Court under Article 8 of the Conflict of Laws act B.E. 2481.

The Office of Maritime Promotion Commission had agreed with the latter views and appointed the committee to draft the Thai Marine Insurance Act. The Marine Insurance Act 1906 was a model law for Thailand because its provision influences to the marine insurance industry over the world.

After the completion of the draft Thai Marine Insurance Act, there were problems for enactment of such Act. First, the Office of the Maritime Promotion Commission who was responsible for drafting the Thai Marine Insurance Act was merged to the Marine Department. Second, there was an objection to enact such Act since law applicable by the Thai Supreme Court and governing law in insurance policy was English law. Third, it was afraid that the draft Thai Marine Insurance Act would be revised by the Parliament as they previously did in other maritime laws. This revision would lead to wrong principles of marine insurance law. Finally, the draft of Act has not been submitted to the parliament for enactment.

The draft of Thai Marine Insurance Act was comprised of several chapters to cover the entire of marine insurance law matters as follows:

Chapter 1	Marine Insurance Contract
Chapter 2	Disclosure and Representations
Chapter 3	Insurable Interest
Chapter 4	Insurable Value
Chapter 5	Insurance Policy
Chapter 6	Warranties
Chapter 7	Voyage
Chapter 8	Insurance Premium
Chapter 9	Loss

Chapter 10 Measure of Indemnity
Chapter 11 Subrogation
Chapter 12 Double Insurance
Chapter 13 Under Insurance
Chapter 14 Mutual Insurance
Chapter 15 Prescription

The most provisions under the aforesaid draft of Act were similar with provisions of the Marine Insurance Act 1906 including the duty of disclosure. The duty of disclosure was required the assured to disclose the material facts to the insured before the execution of marine insurance contracts.[221] If the assured fails to disclose the aforesaid facts, the marine insurance contracts may be avoided by the insurer.[222] The broker who acting on behalf of the assured is also required disclosing the material facts to the insurer.[223] But there was no provision to request the broker's liability if the failure to disclose of the assured's facts would cause by him. Noticeably, there was no provision to identify the insurer's obligation to disclose the material facts as well as the assured. But, there was provision reference to insurer's obligation stating that the circumstance shall include any communication or information received by the assured.[224]

Until year of 2015, the draft of Thai Marine Insurance Act would have been initiated to reconsider by the Office of Insurance Commission (OIC). Dr. Suthipong Taweechaikarn as the Secretary General of the OIC had appointed the committee for studying of the necessity to prepare the draft of Thai Marine Insurance Act. On December 15th 2015, a result from meeting was that the draft of Thai Marine Insurance Act was necessity to prepare in order to clearly state the rights, obligations and liabilities of relevant person to the marine insurance contracts. For the guidance of preparing draft of Thai Marine Insurance Act, it were agreed to bring the Marine Insurance Act 1906 and the Insurance Law Act 2015 as a model of marine insurance

[221] Section 19 of Draft Thai Marine Insurance Act B.E….
[222] *Id.*
[223] Section 21 of Draft Thai Marine Insurance Act B.E….
[224] Section 22 of Draft Thai Marine Insurance Act B.E….

law to adapt with the nature and development of marine insurance industry in Thai's jurisdiction.[225]

However, a proposal to draft of Thai Marine Insurance Act in part of the duty of disclosure will be recommended in Chapter 5.

[225] *"สุทธิพล" ชับเคลื่อนนโยบายเชิงรุกเดินหน้าผลักดัน กฎหมายประกันภัยทางทะเลฉบับแรกของไทย*, สืบค้นเมื่อวันที่ 18 ธันวาคม 2558, จาก http://www.oic.or.th/th/consumer/news/releases/84533.

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The duty of disclosure is to assist the parties to the marine insurance contracts have an equal status prior to the execution of marine insurance contracts. In real circumstance, the assured knows his facts, for example, subject matter insured, marine perils and etc. while the insurer does not know the assured's facts. The marine insurance contracts are therefore executed once the material facts have been disclosed in order to insure the subject matter under the marine insurance contracts. For the provisions of law, the duty to disclose is a fair concept in order to facilitate the insurer to get more material and sufficient facts for assessing the risks and making a decision to execute the marine insurance contracts. On the other hands, it seems to be a loophole on this provision when this duty is applicable for the marine insurance business. The problems on the application of the duty of disclosure are in accordance with the vague of law provisions. It could explain that the law provisions has not clearly stated the duty for the parties to the marine insurance contracts, exception of disclosed facts throughout a fair remedy. These problems could lead to the broad interpretation by the Court in particular the extension of duty scope from the pre contractual period to the post contractual period. Although the provision bars this duty from the post contractual period, the Court in the United Kingdom had ruled this duty covering the post-contractual period. It is deemed to increase more burdens to the assured while the insurer has performed nothing. The problems still continue to the assured since it found that the assured does not have sufficient knowledge to comply with this duty. It may lead to other problems indicating that the insurer may probably take a benefit arising from the assured's non-compliance with the duty.

In the United Kingdom jurisdiction, these problems have intent to be resolved by the reform of law provisions. The duty of fair presentation of risks has been introduced and replaced with the duty of disclosure. The aforesaid provisions are

good sign for presenting that this duty will be going to treat as a fair provision to the parties in the marine insurance contracts.

In Norway, the relevant provisions have been developed before other jurisdictions. The agreed document named the Norwegian Marine Insurance Plan are governed a contract of marine insurance including the duty of disclosure. It should note that the insurer is imposed the duty of disclosure for giving a notice once the incorrect or incomplete of information are provided by the assured. The remedies are provided based on several scenarios which impose to both assured and insurer. Most provisions are appropriate in practice especially the remedy under the duty.

In the People's Republic of China, the provisions of the duty to disclose seem to be out of date if comparing with other jurisdictions. The obligation under this duty imposes to the assured while there is silence on the insurer's duty. The remedies are also imposed against the assured's breach based on the acts that are either intention or non-intention.

It should bear in mind that if the duty to disclose applies the marine insurance contracts without in-depth consideration, it may cause tremendous problems between the assured and insurer. It subsequently effect to a trust of players in accordance with the applicable law. At this times, it should therefore prevent and correct those problems that those arising from the application of the duty of disclosure under the marine insurance contracts.

5.2 Recommendations

In order to find out solutions for the problems to be addressed in Chapter 1, the recommendations are proposed as follows:

First, as there was an attempt to make the duty of disclosure provision to be reciprocal but, in practice, the assured have more obligation than the insurer. The reason is that the assured has less power of bargaining than the insurer. To avoid unfairness, the duty of disclosure provision needs to clarify that what kind of facts that the insurer need to be disclosed. The disclosed facts by the insurer should be the facts that the assured could not know but the assured really wishes to know such facts for considering whether the risks could be accepted.

Second, the duty to disclose should be limited to perform at the time before the execution of marine insurance contracts only in order to reduce the uncertainty in practice. The duty of disclosure provision should be strictly interpreted and not extended to apply for period after the execution of marine insurance contracts because it may be a loophole. The insurer could take this benefit for further claims to the assured.

Third, it could widely accept that the brokers have partaken to marine insurance business since most of assured will execute the marine insurance contracts via their brokers. Brokers could facilitate the insurance service throughout assisting to contact the insurer. Therefore, the duty of disclosure provision should be clearly extended to the assured's broker. It further recommends identifying the additional provisions to ensure that the broker will not ignore their obligation on behalf of the assured. Additionally, the reasonable penalty should be imposed if it could prove that the brokers cause damages to the assured.

Fourth, the avoidance of insurance contract is considered to be unfairness. It recommends that 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, as there are uncertainties regarding to the applicable law to the marine insurance contracts, Thailand should have its own marine insurance law to resolve these problems. 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 in accordance with the duty of disclosure that are appropriate and suitable to the marine insurance industry in Thailand's jurisdiction.

Subject to the aforesaid recommendations, the duty of disclosure under the draft of Thai Marine Insurance Act will be also recommended as follows:

Section 18 A contract of marine insurance is a contract based upon the utmost good faith.

Section 19 Before entering into a marine insurance contract, a party to the contract must disclose the material circumstance to another party with a purpose to assess its own risk and make a decision for entering a contract.

The material circumstance under the preceding paragraph means any communications or information that would influence to the party, who has been acknowledged of communications or has been received of information, for determining whether to take the risk and to decide for entering a contract.

If a disclosure of material circumstance has been failed, a party who suffers from such failure may decline to enter a contract. But, if a party who suffers from such failure agrees to enter of a contract for whatsoever reason, it shall be deemed that such party agrees to waive of such material circumstance and right of further claim to another party.

Section 20 Under Section 19, the assured must disclose of every material circumstance which he knows or ought to know, except the following circumstance if:

(a) it diminishes the risk,

(b) the insurer know it, ought to know it, or is presumed to know it, or

(c) the insurer waives circumstance.

Section 20/1 If a contract of marine insurance will execute via the assured's broker, who currently works as professional insurance broker and, on behalf of the assured, is empowered to contact with the insurer, the assured's broker shall have obligation to comply with these provisions in accordance with duty disclosure as if he is the assured.

Section 21 Under Section 19, the insurer as a prudent insurer must disclose of every material circumstance which he knows, ought to know, is presumed to know or considering that the assured necessitate to know in a course of insurance business.

Any failure to disclose circumstance by the assured or providing insufficient circumstance that those circumstances are necessary to be known by insurer, the insurer obliges to make further queries for the purpose of revealing those material circumstances.

Section 22 The remedies for breach against the party who fails to comply the duty under the marine insurance contract shall be as follows:

1) The insurer shall entitle a remedy against the assured for a breach of duty disclosure as follows:

(a) if a breach of duty disclosure caused by the assured's intention, the insurer shall entitle a right to terminate a contract of marine insurance.

(b) if a breach of duty disclosure caused by the assured with other causes, the insurer shall entitle a right to either refuse all claims or charging a higher premium and reduce proportionately the amount to be paid on claim.

(c) the aforementioned of remedies shall not prejudice to a right of insurer to take a legal procedure in court for requesting avoidance of contract throughout claiming further compensation from the assured.

2) The assured shall entitle a remedy against the broker for a breach of duty disclosure. If a breach of duty disclosure caused by the broker's fault, the assured shall entitle a right to compensate a reasonable compensation. For avoidance of doubt, if this case causes the insurer to entitle a remedy from the assured as set forth the preceding item, the assured will also entitle to claim all of such remedy from the broker.

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APPENDICES

APPENDIX A

MARINE INSURANCE ACT 1906

1906 CHAPTER 41 6 Edw 7

DISCLOSURE AND REPRESENTATIONS

17 Insurance is uberrimæ fidei.

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18 Disclosure by assured.

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

(6) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.**]**

19 Disclosure by agent effecting insurance.

(1) Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20 Representations pending negotiation of contract.

(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

(8) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.**]**

21 When contract is deemed to be concluded.

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

APPENDIX B

INSURANCE ACT 2015

CHAPTER 4

PART 2

THE DUTY OF FAIR PRESENTATION

2 Application and interpretation

(1) This Part applies to non-consumer insurance contracts only.

(2) This Part applies in relation to variations of non-consumer insurance contracts as it applies to contracts, but—

(a) references to the risk are to be read as references to changes in the risk relevant to the proposed variation, and

(b) references to the contract of insurance are to the variation.

3 The duty of fair presentation

(1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.

(2) The duty imposed by subsection (1) is referred to in this Act as "the duty of fair presentation".

(3) A fair presentation of the risk is one—

(a) which makes the disclosure required by subsection (4),

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

(4) The disclosure required is as follows, except as provided in subsection (5)—

(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) failing that, disclosure which gives the insurer sufficient information to

put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—

(a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives information.

(6) Sections 4 to 6 make further provision about the knowledge of the insured and of the insurer, and section 7 contains supplementary provision.

4 Knowledge of insured

(1) This section provides for what an insured knows or ought to know for the purposes of section 3(4)(a).

(2) An insured who is an individual knows only—

(a) what is known to the individual, and

(b) what is known to one or more of the individuals who are responsible for the insured's insurance.

(3) An insured who is not an individual knows only what is known to one or more of the individuals who are—

(a) part of the insured's senior management, or

(b) responsible for the insured's insurance.

(4) An insured is not by virtue of subsection (2)(b) or (3)(b) taken to know confidential information known to an individual if—

(a) the individual is, or is an employee of, the insured's agent; and

(b) the information was acquired by the insured's agent (or by an employee of that agent) through a business relationship with a person who is not connected with the contract of insurance.

(5) For the purposes of subsection (4) the persons connected with a contract of insurance are—

(a) the insured and any other persons for whom cover is provided by the

contract, and

(b) if the contract re-insures risks covered by another contract, the persons who are (by virtue of this subsection) connected with that other contract.

(6) Whether an individual or not, an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).

(7) In subsection (6) "information" includes information held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance).

(8) For the purposes of this section—

(a) "employee", in relation to the insured's agent, includes any individual working for the agent, whatever the capacity in which the individual acts,

(b) an individual is responsible for the insured's insurance if the individual participates on behalf of the insured in the process of procuring the insured's insurance (whether the individual does so as the insured's employee or agent, as an employee of the insured's agent or in any other capacity), and

(c) "senior management" means those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised.

5 Knowledge of insurer

(1) For the purposes of section 3(5)(b), an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity).

(2) For the purposes of section 3(5)(c), an insurer ought to know something only if—

(a) an employee or agent of the insurer knows it, and ought reasonably to

have passed on the relevant information to an individual mentioned in subsection (1), or

(b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).

(3) For the purposes of section 3(5)(d), an insurer is presumed to know—

(a) things which are common knowledge, and

(b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business.

6 Knowledge: general

(1) For the purposes of sections 3 to 5, references to an individual's knowledge include not only actual knowledge, but also matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.

(2) Nothing in this Part affects the operation of any rule of law according to which knowledge of a fraud perpetrated by an individual ("F") either on the insured or on the insurer is not to be attributed to the insured or to the insurer (respectively), where—

(a) if the fraud is on the insured, F is any of the individuals mentioned in section 4(2)(b) or (3), or

(b) if the fraud is on the insurer, F is any of the individuals mentioned in section 5(1).

7 Supplementary

(1) A fair presentation need not be contained in only one document or oral presentation.

(2) The term "circumstance" includes any communication made to, or information received by, the insured.

(3) A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.

(4) Examples of things which may be material circumstances are—

(a) special or unusual facts relating to the risk,

(b) any particular concerns which led the insured to seek insurance cover for the risk,

(c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

(5) A material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.

(6) A representation may be withdrawn or corrected before the contract of insurance is entered into.

8 Remedies for breach

(1) The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—

(a) would not have entered into the contract of insurance at all, or

(b) would have done so only on different terms.

(2) The remedies are set out in Schedule 1.

(3) A breach for which the insurer has a remedy against the insured is referred to in this Act as a "qualifying breach".

(4) A qualifying breach is either—

(a) deliberate or reckless, or

(b) neither deliberate nor reckless.

(5) A qualifying breach is deliberate or reckless if the insured —

(a) knew that it was in breach of the duty of fair presentation, or

(b) did not care whether or not it was in breach of that duty.

(6) It is for the insurer to show that a qualifying breach was deliberate or reckless.

SCHEDULES

SCHEDULE 1 Section 8(2).

INSURERS' REMEDIES FOR QUALIFYING BREACHES

PART 1

CONTRACTS

General

1 This Part of this Schedule applies to qualifying breaches of the duty of fair presentation in relation to non-consumer insurance contracts (for variations to them, see Part 2).

Deliberate or reckless breaches

2 If a qualifying breach was deliberate or reckless, the insurer —
(a) may avoid the contract and refuse all claims, and
(b) need not return any of the premiums paid.

Other breaches

3 Paragraphs 4 to 6 apply if a qualifying breach was neither deliberate nor reckless.

4 If, in the absence of the qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.

5 If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.

6 (1) In addition, if the insurer would have entered into the contract (whether the

terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.

(2) In sub-paragraph (1), "reduce proportionately" means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 5), where—

$$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

PART 2

VARIATIONS

General

7 This Part of this Schedule applies to qualifying breaches of the duty of fair presentation in relation to variations to non-consumer insurance contracts.

Deliberate or reckless breaches

8 If a qualifying breach was deliberate or reckless, the insurer—

(a) may by notice to the insured treat the contract as having been terminated with effect from the time when the variation was made, and

(b) need not return any of the premiums paid.

Other breaches

9 (1) This paragraph applies if—

(a) a qualifying breach was neither deliberate nor reckless, and

(b) the total premium was increased or not changed as a result of the variation.

(2) If, in the absence of the qualifying breach, the insurer would not have agreed to the variation on any terms, the insurer may treat the contract as if the variation was never made, but must in that event return any extra premium paid.

(3) If sub-paragraph (2) does not apply—

(a) if the insurer would have agreed to the variation on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms if the insurer so requires, and

(b) paragraph 11 also applies if (in the case of an increased premium) the insurer would have increased the premium by more than it did, or (in the case of an unchanged premium) the insurer would have increase the premium.

10 (1) This paragraph applies if—

(a) a qualifying breach was neither deliberate nor reckless, and

(b) the total premium was reduced as a result of the variation.

(2) If, in the absence of the qualifying breach, the insurer would not have agreed to the variation on any terms, the insurer may treat the contract as if the variation was never made, and paragraph 11 also applies.

(3) If sub-paragraph (2) does not apply—

(a) if the insurer would have agreed to the variation on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms if the insurer so requires, and

(b) paragraph 11 also applies if the insurer would have increased the premium would not have reduced the premium, or would have reduced it by less than it did.

Proportionate reduction

11 (1) If this paragraph applies, the insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation.

(2) In sub-paragraph (1), "reduce proportionately" means that the insurer need pay on the claim only Y% of what it would otherwise have been under an obligation to pay under the terms of the contract (whether on the original terms, or as varied, or under the different terms provided for by virtue of paragraph 9(3)(a) or 10(3)(a), as the case may be), where—

(3) In the formula in sub-paragraph (2), "P"—

(a) in a paragraph 9(3)(b) case, is the total premium the insurer would have charged,

(b) in a paragraph 10(2) case, is the original premium,

(c) in a paragraph 10(3)(b) case, is the original premium if the insurer would not have changed it, and otherwise the increased or (as the case may be) reduced total premium the insurer would have charged.

APPENDIX C
NORWEGIAN MARINE INSURANCE PLAN OF 1964

Chapter 3

Duties of the person effecting the insurance and of the assured.

Subdivision 1. Duty of disclosure by the person effecting the insurance

§ 24. Scope of duty of disclosure

The person effecting the insurance shall, prior to the conclusion of the contract, make full and correct disclosure to the insurer of all circumstances of importance to him when deciding whether and on what conditions he is prepared to accept the insurance.

Should the person effecting the insurance subsequently become aware of any such circumstances as are mentioned in the first paragraph, he must without undue delay inform the insurer.

§ 25.Fraud and dishonesty

Where the person effecting the insurance fraudulently or dishonestly has neglected his duty of disclosure, the contract is not binding on the insurer.

§ 26. Other neglect of the duty of disclosure

Where the person effecting the insurance, at the conclusion of the contract, in any other way has neglected his duty of disclosure, and it must be assumed that the insurer would not have accepted the insurance if the person effecting the insurance had made such disclosure as it was his duty to make, the insurer is free from liability.

Where it must be assumed that the insurer would have accepted the insurance, but on other conditions, he shall only be liable to the extent that it is proved that the loss is not attributable to such circumstances as the person effecting the insurance ought to have disclosed. The liability is limited in the same manner where the person effecting the insurance neglects his duty of disclosure subsequent to the conclusion of

the contract, unless it is proved that the loss occurred before the person effecting the insurance was in a position to correct the information supplied by him.

In the cases referred to in the second paragraph, the insurer may terminate the insurance on giving seven days' notice.

§ 27. Neglect of the duty of disclosure not imputable to the person effecting the insurance

Where the person effecting the insurance has made incorrect or incomplete disclosure without any blame attaching to him, the insurer is liable as if correct disclosure had been made, but he may terminate the insurance on giving fourteen days' notice.

§ 28. Cases where the insurer cannot plead insufficient disclosure

The insurer cannot plead that incorrect or incomplete disclosure has been made if, at the time when disclosure should have been made, he was aware of the fact. Nor can he invoke § 26 and 27 if the circumstances, about which incorrect or incomplete disclosure has been made, have ceased to be of importance to him.

§ 29 Insurer's duty to notify

Where the insurer becomes aware that incorrect or incomplete disclosure has been made, he must without undue delay notify the person effecting the insurance of the extent to which he intends to invoke § 26 and 27. If he fails to do so, he loses his right to invoke these provisions.

§ 30 Insurer's right to require particulars from the classification society

The person effecting the insurance is bound to provide the insurer with all available particulars from the classification society concerning the condition of the ship before and during the period of insurance.

Where the person effecting the insurance neglects his duty according to the first paragraph, the insurer may terminate the insurance on giving seven days' notice, but with expiry, at the earliest, on the ship's arrival at the nearest port in accordance with

the insurer’s direction.

APPENDIX D
NORWEGIAN MARINE INSURANCE PLAN OF 1996, VERSION 2010

Chapter 3

Duties of the person effecting the insurance and of the assured

Section 1. Duty of disclosure of the person effecting the insurance

§ 3-1 Scope of the duty of disclosure

1. The person effecting the insurance shall, at the time the contract is concluded, make full and correct disclosure of all circumstances that are material to the insurer when deciding whether and on what conditions he is prepared to accept the insurance.
2. If the person effecting the insurance subsequently becomes aware that he has given incorrect or incomplete information regarding the risk, he shall without undue delay notify the insurer.

§ 3-2 Fraudulent misrepresentation

1. If the person effecting the insurance has fraudulently failed to fulfill his duty of disclosure, the contract is not binding on the insurer.
2. The insurer may also cancel other insurance contracts he has with the person effecting the insurance by giving fourteen days' notice.

§ 3-3 Other failure to fulfill the duty of disclosure

1. If the person effecting the insurance has, at the time the contract is concluded, in any other way failed to fulfill his duty of disclosure, and it must be assumed that the insurer would not have accepted the insurance if the person effecting the insurance had made such disclosure as it was his duty to make, the contract is not binding on the insurer.

2. If it must be assumed that the insurer would have accepted the insurance, but on other conditions, he shall only be liable to the extent that it is proved that the loss is not attributable to such circumstances as the person effecting the insurance should have disclosed. Liability is limited in the same manner if the person effecting the insurance has been in breach of the duty of disclosure after the contract was concluded, unless it is proved that the loss occurred before the person effecting the insurance was able to correct the information supplied by him.
3. In the cases referred to in paragraph 2, the insurer may cancel the insurance by giving fourteen days' notice.

§ 3-4 Innocent breach of the duty of disclosure

If the person effecting the insurance has given incorrect or incomplete information without any blame attaching to him, the insurer is liable as if correct information had been given, but he may cancel the insurance by giving fourteen days' notice.

§ 3-5 Cases where the insurer may not invoke breach of the duty of disclosure

The insurer may not plead that incorrect or incomplete information has been given if, at the time when the information should have been given, he knew or ought to have known of the matter. Nor may be invoke § 3-3 and § 3-4 if the circumstances about which incorrect or incomplete information as given have ceased to be material to him.

§ 3-6 Duty of the insurer to give notice

If the insurer become aware of the fact that incorrect or incomplete information has been given, he shall, without undue delay and in writing, notify the person effecting the insurance of the extent to which he intends to invoke § 3-2, § 3-3 and § 3-4. If he fails to do so, he forfeits his right to invoke those provisions.

§ 3-7 Right of the insurer to obtain particulars from the ship's classification society, etc.

1. The person effecting the insurance shall, at the insurer's request, provide him with all available particulars from the classification society concerning the condition of the ship before and during the insurance period.
2. If the person effecting the insurance fails to fulfill his duty under paragraph 1, the insurer may cancel the insurance by giving fourteen days' notice, but with effect no earlier than on arrival of the ship at the nearest safe port, in accordance with the insurer's instructions.
3. The insurer is authorized to obtain information referred to in paragraph 1 directly from the classification society and from the relevant authorities in the country where the ship is registered or has been through port-State control. The person effecting the insurance shall be notified no later than the time when the insurer seeks to obtain such information.

APPENDIX E
NORDIC MARINE INSURANCE PLAN OF 2013, Version 2016

Chapter 3

Duties of the person effecting the insurance and of the assured

Section 1. Duty of disclosure of the person effecting the insurance

Clause 3-1 Scope of the duty of disclosure

The person effecting the insurance shall, at the time the contract is concluded, make full and correct disclosure of all circumstances that are material to the insurer when deciding whether and on what conditions he is prepared to accept the insurance.

If the person effecting the insurance subsequently becomes aware that he has given incorrect or incomplete information regarding the risk, he shall without undue delay notify the insurer.

Clause 3-2 Fraudulent misrepresentation

If the person effecting the insurance has fraudulently failed to fulfill his duty of disclosure, the contract is not binding on the insurer.

The insurer may also cancel other insurance contracts he has with the person effecting the insurance by giving fourteen days' notice.

Clause 3-3 Other failure to fulfill the duty of disclosure

If the person effecting the insurance has, at the time the contract is concluded, in any other way failed to fulfill his duty of disclosure, and it must be assumed that the insurer would not have accepted the insurance if the person effecting the insurance had made such disclosure as it was his duty to make, the contract is not binding on the insurer.

If it must be assumed that the insurer would have accepted the insurance, but on other conditions, he shall only be liable to the extent that it is proved that the loss is not attributable to such circumstances as the person effecting the insurance should have disclosed. Liability is limited in the same manner if the person effecting the insurance has been in breach of the duty of disclosure after the contract was concluded, unless it is proved that the loss occurred before the person effecting the insurance was able to correct the information supplied by him.

In the cases referred to in paragraph 2, the insurer may cancel the insurance by giving fourteen days' notice.

Clause 3-4 Innocent breach of the duty of disclosure

If the person effecting the insurance has given incorrect or incomplete information without any blame attaching to him, the insurer is liable as if correct information had been given, but he may cancel the insurance by giving fourteen days' notice.

Clause 3-5 Cases where the insurer may not invoke breach of the duty of disclosure

The insurer may not plead that incorrect or incomplete information has been given if, at the time when the information should have been given, he knew or ought to have known of the matter. Nor may be invoke § 3-3 and § 3-4 if the circumstances about which incorrect or incomplete information as given have ceased to be material to him.

Clause 3-6 Duty of the insurer to give notice

If the insurer become aware of the fact that incorrect or incomplete information has been given, he shall, without undue delay and in writing, notify the person effecting the insurance of the extent to which he intends to invoke § 3-2, § 3-3 and § 3-4. If he fails to do so, he forfeits his right to invoke those provisions.

Clause 3-7 Right of the insurer to obtain particulars from the ship's classification society, etc.

The person effecting the insurance shall, at the insurer's request, provide him with all available particulars from the classification society concerning the condition of the ship before and during the insurance period.

If the person effecting the insurance fails to fulfill his duty under paragraph 1, the insurer may cancel the insurance by giving fourteen days' notice, but with effect no earlier than on arrival of the ship at the nearest safe port, in accordance with the insurer's instructions.

The insurer is authorized to obtain information referred to in paragraph 1 directly from the classification society and from the relevant authorities in the country where the ship is registered or has been through port-State control. The person effecting the insurance shall be notified no later than the time when the insurer seeks to obtain such information.

APPENDIX F
MARITIME CODE
OF THE PEOPLE'S REPUBLIC OF CHINA

Article 222 Before the contract is concluded, the insured shall truthfully inform the insurer of the material circumstances which the insured has knowledge of or ought to have knowledge of in his ordinary business practice and which may have a bearing on the insurer in deciding the premium or whether be agrees to insure or not.

The insured need not inform the insurer of the facts which the insurer has known of or the insurer ought to have knowledge of in his ordinary business practice if about which the insurer made no inquiry.

Article 223 Upon failure of the insured to truthfully inform the insurer of the material circumstances set forth in paragraph 1 of Article 222 of this Code due to his intentional act, the insurer has right to terminate the contract without refunding the premium. The insurer shall not be liable for any loss arising from the perils insured against before the contract is terminated.

If, not due to the insured's intentional act, the insured did not truthfully inform the insurer of the material circumstances set out in paragraph 1 of Article 222 of this Code, the insurer has right to terminate the contract or to demand a corresponding increase in the premium. In case the contract is terminated by the insurer, the insurer shall be liable for the loss arising from the perils insured against which occurred prior to the termination of the contract, except where the material circumstances uninformed or wrongly informed of have an impact on the occurrence of such perils.

APPENDIX G

DRAFT OF THAI MARINE INSURANCE ACT B.E. ….

Chapter 2

Duty of disclosure and Representations

Section 18 A contract of marine insurance is a contract based upon the utmost good faith

If the utmost good faith be not observed by either party before the contract is concluded, the contract may be avoided by the other party.

If the utmost good faith be not observed by either party during the terms of the contract, the contract may be terminated by the other party.

The termination of contract shall not prejudice to the previous rights and obligations of the parties.

Section 19 The assured must disclose the material circumstance to the insurer before the contract is concluded.

The material circumstances under Section 20 are known to the assured, deemed to be known in the ordinary course of business that would influence the judgment of prudent insurer in fixing the premium or determining to decline not executing the contract.

If the assured fails to make such disclosure, the insurer may avoid the contract.

Section 20 In the absence of inquiry the following circumstances need not to be disclosed, namely:

(1) Any circumstance which is diminishes the risk

(2) Any circumstances which is known or presumed to be known to the insurer in the course of business. The insurer is presumed to know matters of common knowledge.

(3) Any circumstances as to which information is waived by the insurer.

(4) Any circumstances which it is superfluous to disclose by reason of any express of implied warranty.

Section 21 Subject to the provisions of section 20 as to circumstances which need not be disclosed, where insurance is effected for the assured by an agent, the agent must disclose to the insurer

(1) Every material circumstance which is known to himself, and an agent to insurer is deemed to know every circumstance which in the ordinary course of business ought to be known by or to have been communicated to him.

(2) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Section 22 The term “circumstance” under Section 19, 20 and 21 includes any communication made to or information received by the assured.

BIOGRAPHY

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