CALL FOR CONSUMER REFORM OF INSURANCE LAW IN SINGAPORE

The technical doctrine of good faith (*uberrima fides*) relating to pre-contractual disclosure and representation in insurance law has for a long while been operating in a notoriously unfair manner both in England and Singapore. Recently in England, the Consumer Insurance (Disclosure and Representations) Act 2012 has abolished in one legislative stroke the duty of disclosure for the consumer insured who now only has a duty to take reasonable care not to misrepresent facts. Singapore cannot remain insulated and should consider reforms in response to these new legislative developments.

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I. Introduction

1 Tracing its roots back to the mid-18th century, insurance law essentially developed from a commercial context – the shipping business. Although the insurance industry subsequently extended coverage services to consumers, the courts proceeded to employ in consumer disputes rules that were similar to those applied in commercial cases. Over the intervening 25 decades, the doctrines were inflexibly applied in favour of the insurance companies.[1] As such, many of the insurance doctrines which had been forged centuries earlier have since evolved to become increasingly unpopular and politically unacceptable (especially *vis-à-vis* consumers).

2 Of particular concern are the doctrines relating to disclosure, representations, warranties and intermediaries, all of which operated in a notoriously unfair manner. The UK recently sought to reform these doctrines in the consumer regime via the introduction of the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA").[2] As a

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1 See Adam Samuel, "Consumer Financial Services in Britain: New Approaches to Dispute Resolution and Avoidance" (2002) 3(3) EBOR 649–694.

2 c 6 (UK). The Law Commission of England and Wales and the Scottish Law Commission have since 2006 embarked on a joint project to reform the law of

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legatee jurisdiction which inherited many of the inherent problems associated with these doctrines, Singapore needs to consider whether there are any insights that can be gleaned from this new legislation enacted by the UK Parliament. This paper will argue that the way forward for Singapore is to create a separate consumer regime by considering the following areas:

(a) the unfairness of the doctrines of disclosure, representations and warranties;

(b) how the UK has dealt with it in the CIDRA;

(c) the present position in Singapore and its problems; and

(d) the applicability of the UK reforms in Singapore's context.

II. Developments in the UK

3 English commercial law has left its legacy over practically the entire ex-Commonwealth, with many countries having adopted variations of the UK-based common law jurisdiction. In particular, the influence of the Marine Insurance Act 1906[3] has spread far and wide but the latent inequities have over the years become increasingly unacceptable in many of the legatee jurisdictions.

4 Although the UK Law Commission had dutifully raised the call for parliamentary action as long ago as 1957 (because "[t]here is general recognition that the law is overly harsh and unsuited to a twenty-first century consumer market"),[4] "successive UK Governments have not given these particular matters the attention which they deserve"[5] and the "consumer insurance market evolved over decades which were characterised by a lack of legislative action".[6] Instead, the UK authorities

insurance contracts. This legislation is the culmination of their first phase of review.

3 c 41.

4 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 2.59.

5 See response letter (dated 23 March 2010) of Scottish Minister for Community Safety, available at <http://www.scotlawcom.gov.uk/index.php/download_file/view/200/107/> (accessed 30 July 2013).

6 See response letter (dated 23 March 2010) of Scottish Minister for Community Safety, available at <http://www.scotlawcom.gov.uk/index.php/download_file/view/200/107/> (accessed 30 July 2013).

allowed the insurance industry to experiment with "less than wholly successful attempts at self-regulation":[7]

> (a) During the 1980s, the UK insurance industry sought to ameliorate the worst of the doctrines through self-regulation, primarily in the form of soft law via voluntary codes of conduct. These codes contained certain statements of practice by which many insurance companies undertook not to strictly enforce their legal rights (originally concerned with the consequences of non-disclosure and misrepresentation as well as breach of warranties and conditions). Accompanying this was the establishment in 1981 of an insurance complaints bureau (in the form of the Insurance Ombudsman Bureau ("IOB"))[8] for individual consumers. The key feature of this industry-initiated tribunal was that legal technicality was deferred to general principles of good insurance practice, regulatory guidance and statements of practice, especially if they favoured the lay complainant. Armed with the remit to reach a fair and reasonable result,[9] the IOB could recommend more flexible remedies when the consumer insured was in breach and disallowed the insurer to capitalise on any unreasonable terms.
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> (b) During the 1990s, there was a gradual take-over by regulators culminating in the creation in 2001 of a one-stop ombudsman service (Financial Ombudsman Service ("FOS"), established under the English Financial Services and Markets Act 2000)[10] that supplanted the IOB. The remit became broader, extending beyond insurance to cover financial services such as mortgages, savings and credit. With regard to insurance, the FOS was a compulsory scheme for insurers and its awards could be enforced through the courts; in contrast, individual consumers did not need to accept any decisions and could opt for the court system instead. The FOS's key feature is to resolve

7 See response letter (dated 23 March 2010) of Scottish Minister for Community Safety, available at <http://www.scotlawcom.gov.uk/index.php/download_file/view/200/107/> (accessed 30 July 2013).

8 It was not compulsory in nature; membership was voluntary although the Association of British Insurers encouraged membership of the Insurance Ombudsman Bureau ("IOB"). Each member agreed to be bound by the IOB's decision up to the value of £100,000. In contrast, consumers who used the scheme did not enter into any such agreement but they lost their right to go to court if they accepted the IOB's decision or any settlement agreement reached during the process. For a snapshot of the pre-Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) consumer position, see John Lowry, Philip Rawlings & Robert Merkin, *Insurance Law Doctrines and Principles* (Hart Publishing, 3rd Ed, 2011) at pp 141–142; and John Birds, *Birds' Modern Insurance Law* (Sweet & Maxwell, 9th Ed, 2013) at pp 14–19.

9 See the Insurance Ombudsman Bureau, *Annual Report* (1989) at pp 29–30.

10 c 8.

disputes by reference to what is "fair and reasonable in all the circumstances of the case";[11] in doing so, it is enjoined to draw on legal rules, regulatory guidance and codes of practice.

5 However, the practice of relying on such paralegal measures gave rise to confusion due to inconsistencies in the decisions for insurance-claim disputes. To obviate the worst excesses of the pre-contractual insurance doctrines, there has been increasing protection for consumers over the past three decades or so, with rules made by the UK Prudential Regulation Authority[12] and a body of growing consumer law that incorporated best industry practice which would operate in a fairer manner *vis-à-vis* the consumer. This law for consumers has since become very distinct from that of commercial law. In addition, such multi-layered tiering of the law, together with the fact that strict legal doctrines are not applied, lends itself to a very untidy situation; *eg*, for disputes where the claims exceed the £100,000 limit or where the issues require cross-examination of witnesses, the insured cannot approach the FOS or its new equivalent for adjudication as the insurers have recourse to the courts which naturally remain bound by strict technical law.

6 In the modern era of heightened jurisdictional competition for the position of having the most optimal and progressive laws which best address modern business requirements, several of the legatees have already forged ahead to improve on what they have deemed as outmoded doctrines. Indeed, certain of these former legatees (*eg*, Australia and New Zealand) have even proposed much friendlier regimes to temper the worst excesses of the existing law.[13] Likewise,

11 Financial Services and Markets Act 2000 (c 8) (UK) s 228(2). Financial Ombudsman Service determinations may involve financial compensation of up to £100,000 and/or injunctive style relief; these are binding on businesses and enforceable in the courts but not on consumers who retain the right to reject an ombudsman award and pursue the matter in court.

12 See s 228 of the English Financial Services & Markets Act 2000 (c 8): ombudsmen, who are empowered to determine complaints "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case", have been known to depart from the law when they consider the law to be unjust (but certain limits have been prescribed for the range of disputes that may be brought to them for adjudication). Furthermore, the Insurance: Conduct of Business Sourcebook, available at <http://fshandbook.info/FS/html/handbook/ICOBS> (accessed 30 July 2013), published by UK Financial Services Authority (which has since been replaced by two bodies: Prudential Regulation Authority and Financial Conduct Authority) contains pro-consumer rules that are binding on insurers (but they do not modify the law which the courts must apply when hearing insurance cases that fall outside the purview of ombudsmen). Hence, there is confusion caused by the inconsistent layers of law, rules and self-regulation in addition to ombudsmen discretion.

13 See Robert Merkin, *Reforming Insurance Law: Is there a Case for Reverse Transportation? Report for the English and Scottish Law Commissions on the*

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various bodies in the UK have lobbied for serious reform of insurance law not only for consumers but also for businesses. These clarion calls for reform have generated many reports and proposals, resulting most recently in the CIDRA (which is the first major legislative reform).

7 Legislating what is essentially good industry practice and the consumer-friendly soft law already encapsulated in the FOS scheme, the UK Parliament has taken the long-awaited step forward to "update the law relating to pre-contractual disclosure and misrepresentations and simplify the existing legal framework by removing layers of case law, guidance and voluntary codes".[14] The CIDRA has specifically been designed to address, *inter alia*, problematic areas of pre-contractual disclosure and representations, remedies for breach of the duty of disclosure, basis of contract clauses as well as statutory guidelines for identifying intermediaries. In addition to providing a minimum standard that all insurers must adhere to, the CIDRA prevents the parties from contracting out of this base standard in any manner that will place the consumer in a worse position *vis-à-vis* his position under the Act.[15] The disclosure and misrepresentation provisions in ss 18–20 of the Marine Insurance Act 1906 no longer applies to consumer insurance contracts[16] now that the CIDRA has come into effect.

III. Current situation in Singapore

8 The present legatee situation in Singapore regarding pre-contractual disclosure and representation remains outdated, uncertain and unduly skewed in favour of the insurer. It may be argued that an even balance must similarly be sought by way of a separate consumer regime as in UK. The ensuing subsections will explore the relevance of specific CIDRA reforms to Singapore and discuss their potential efficacy in addressing the problems of pre-contractual disclosure and representation here.

Australian Experience of Insurance Law Reform (2006) (report for English and Scottish Law Commissions on ongoing insurance law reform debate, available at <http://lawcommission.justice.gov.uk/docs/ICL_Merkin_report.pdf> (accessed 30 July 2013)).

14 See Explanatory Notes to Consumer Insurance (Disclosure and Representations) Bill 2011 (HL Bill 68) at para 9.

15 See s 10 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

16 See s 11 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6). Consumer insurance is defined as any contract entered into for purposes unrelated to the individual's trade, business or profession: see s 1 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

A. Pre-contractual disclosure duty

9 The pre-contractual duty of utmost good faith arises before the conclusion of the contract as well as at the point of any subsequent renewal. In principle, either party may avoid the contract *ab initio* if utmost good faith is not observed by the other party[17] but such a remedy is hardly of any practical utility to the insured who will invariably prefer the coverage to remain in force.

10 The proposer breaches his duty of utmost good faith if he fails to disclose any material fact[18] (regardless of the questions included by the insurer in the proposal form), or makes an untrue representation of some material fact.[19] The test of materiality is the same for both non-disclosure and misrepresentation.[20] In contrast to the post-CIDRA situation in UK, Singapore still insists that a material circumstance is one which would have an effect on the mind of the *prudent* insurer[21] in assessing the risk. In addition, the *particular* insurer must have been induced by the non-disclosure or misrepresentation to enter into the policy on the agreed terms;[22] evidence must be adduced to show that the insurer relied on the representations in determining the risks.[23]

11 However, the problem is that lay consumers are often oblivious to the existence of such a duty; unfamiliar with insurance terms and conditions, many of them may not even have been properly apprised of the strict requirement to disclose all material information. In fact, lay consumers cannot be expected to know what is considered a material circumstance that needs to be disclosed[24] since materiality is considered from the prudent insurer's point of view rather than from the reasonable insured's common understanding.

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17 See s 17 of the Marine Insurance Act (Cap 387, 1994 Rev Ed). The Marine Insurance Act is cited only because the provisions are taken to be reflective of the common law position which generally applies equally to general (non-marine) insurance law.

18 Marine Insurance Act (Cap 387, 1994 Rev Ed) s 18.

19 Marine Insurance Act (Cap 387, 1994 Rev Ed) s 20.

20 Marine Insurance Act (Cap 387, 1994 Rev Ed) ss 18(2) and 20(2).

21 See *Tat Hong Plant Leasing Pte Ltd v Asia Insurance Co Ltd* [1993] 1 SLR(R) 728.

22 See *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501; *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992; and *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2008] SGHC 188.

23 See *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2008] SGHC 188 at [30]–[31]. These principles were recently affirmed in *Sealion Shipping Ltd v Valiant Insurance Co* [2012] EWHC 50 (Comm).

24 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at paras 2.20–2.22.

12 Imposing a duty on the consumer to disclose what is material is, in effect, an exercise in speculation as the insurer is actually not under a duty to explain what is considered a material circumstance. There is in Singapore some legislative attempt to highlight this duty to volunteer information: to remind the proposer of his duty to disclose all material facts,[25] s 25(5) of the Insurance Act[26] stipulates that the proposal form must "have prominently displayed therein a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy."[27] However, this provision, which is phrased too generally to proffer any actual guidance to proposers, fails to be precise enough in sketching out the content of the duty. Typically, the warnings found in insurers' proposal forms[28] are rather unhelpful in clarifying what is considered a material fact that ought to be disclosed by the proposer.

13 In fact, it remains unclear in some of these proposal forms that there is a separately independent duty to volunteer information apart from the questions compiled by the insurer. In addition, such warnings do not clearly state that the duty of disclosure terminates only at the conclusion of the contract.[29] This is an egregious defect which is tantamount to a trap for consumers in Singapore. The use of questions in proposal forms may even be viewed as misleading since the impression thus given is that the proposal form is already comprehensive and the proposers need only respond to what the insurers asked for.[30] If, furthermore, insurers phrased their questions in overly general terms, there is the additional likelihood of proposers misconstruing what they are required to disclose. This unfairness is exacerbated by the fact that the insured will be severely penalised for failing to disclose all material information even if due to innocent mistakes.

14 There are in Singapore two insurance associations (*viz*, General Insurance Association[31] ("GIA") and Life Insurance Association[32] ("LIA")) which had previously adopted statements of practice that

25 See H J Quek, "Several Steps Taken Already to Protect Policy-holders' Interests" *The Straits Times* (25 April 1997) at p 63.

26 Cap 142, 2002 Rev Ed.

27 Insurance Act (Cap 142, 2002 Rev Ed) s 25(5).

28 Typically phrased as: "If a material fact is not disclosed in this application, any policy issued may not be valid. If you are in doubt as to whether a fact is material, you are advised to disclose it."

29 See P Y Woo, "The Duty of Disclosure – Proposals for Reform" (2000–2001) 21 Sing L Rev 100 at 123.

30 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at paras 2.10–2.11.

31 <http://www.gia.org.sg> (accessed 30 July 2013).

32 <http://www.lia.org.sg> (accessed 30 July 2013).

mirror much of the British Insurance Law Association's statements of practice for both general insurance and long-term life insurance:

> (a) Regrettably, GIA has since taken the regressive step of replacing its previous statement of practice (which was more comprehensive and consumer-friendly) by the publicly-available General Insurance Code of Practice (which merely contains general and vague statements relating to claims handling[33] that fail to provide much guidance regarding what ought to be disclosed to the insurers).
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> (b) LIA, on the other hand, has retained its Statement of Life Insurance Practice ("LIA Statement") which requires insurers to ask clear questions about matters commonly found to be material and additionally states that matters not asked in the proposal form are deemed to be immaterial. Furthermore, LIA members are enjoined to "develop clearer and more explicit proposal forms and policy documents whilst bearing in mind the legal nature of insurance contracts".[34] Hence, the LIA Statement strives to align Singapore's life insurance regime with that of the CIDRA (which does not require UK proposers to disclose information not specifically addressed by the questions contained in the proposal forms). Unfortunately, the LIA Statement is expressly circulated only to members;[35] by not informing consumers what may be expected of life assurance companies (which are LIA members), policy-holders may not have full recourse to the entitlements that are actually available to them.

15 However, LIA does release to the general public its Code of Life Insurance Practice which offers the following assurance:[36]

> We will not unreasonably reject a claim. In particular, we will not reject a claim or make your policy invalid because you have not given us information or given us incorrect information unless
>
> (a) it is an important fact – in other words it is a fact we have questioned you about in the application form and which we believe would affect our decision as to whether to accept your application;

33 See General Insurance Association's General Insurance Code of Practice 2012 at para 6.2: "We will … bring to your attention the need to disclose material information to insurers" (available at <http://www.gia.org.sg/pdfs/code_of_practice.pdf> (accessed 30 July 2013)).

34 See Life Insurance Association's Statement of Life Insurance Practice at para 2(a).

35 See A Myint Soe, *Life Insurance Law* (Singapore College of Insurance, 2006) Appendix 1.

36 See of Life Insurance Association's Code of Life Insurance Practice 2013 at para B-2 (available at <http://www.lia.org.sg/files/document_holder/Consumer_Guides/COLIP_4thEdition_2013.pdf> (accessed 30 July 2013)).

> (b) it is a fact you should reasonably know about; or
>
> (c) it is a fact which we could reasonably expect you to reveal.
>
> We will reject your claim if it involves using fraud or deception or deliberately giving false information.

In contrast, GIA does not specifically mention in its General Insurance Code of Practice the insurer's processing of claims *vis-à-vis* the insured's duty of disclosure. Included, instead, are the following blanket assurances from insurers (which are GIA members) but they are not particularly elucidating to the general public:

> (a) "We promise that we will act fairly and reasonably when we deal with you …"
>
> (b) "We will consider and handle your claim fairly and promptly, and tell you how your claim is progressing …"[37]

Overall, the current state of industry self-regulation in Singapore is inadequate in addressing the pitfalls lurking in the area of pre-contractual disclosure as the existence of soft law via any parallel non-judicial regime appears to be inadequately established. This places consumers in a far weaker position when compared to even the pre-CIDRA UK position (where consumers then could at least fall back on established industry norms[38] to mitigate the strictness of the law).

16 It thus stands to reason that Singapore should consider the possibility of adapting the CIDRA which has in one stroke abolished the long-castigated duty of disclosure:[39] sub-s 2(2) stipulates that "[i]t is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer" and sub-s 2(4) adds that:

> … [t]he duty set out in sub-section (2) replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied.

The burden has been effectively reversed with the CIDRA imposing a due diligence duty on the insurer to make inquiry for any information that may be of interest to the risk-assessment process: this inquiry-based approach[40] thus places the proactive discovery responsibility on the

37 See General Insurance Association's General Insurance Code of Practice 2012 at para 1.

38 Such as rules of Association of British Insurers and Financial Services Authority which are binding on authorised insurers.

39 See s 2 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

40 In Australia (see s 21A of Insurance Contracts Act 1984 (Act No 80 of 1984) (Cth)) and even People's Republic of China (see H Y Yeo, Z Yu & J Chen, "Of remedies and non-disclosure in insurance law of People's Republic of China" (2011) JBL 556).

insurer to pose relevant questions. On the other hand, the CIDRA merely imposes on the proposer a passive reactive duty "to take reasonable care not to make a misrepresentation during pre-contractual negotiations"[41] (*ie*, merely to "answer insurers' questions honestly and to take reasonable care that their replies are accurate and complete").[42]

17 The CIDRA also sheds some light on the question of whether the insured has taken reasonable care to answer questions correctly: sub-s 3(1) states that this "is to be determined in the light of all the relevant circumstances", with the provision spelling out an indicative rather than exhaustive list. The list includes, *inter alia*, the type of consumer insurance contract, relevant explanatory materials and the clarity of the insurer's questions.[43] The standard of care is that of a reasonable consumer[44] – an objective yardstick which disregards the particular characteristics of the individual consumer but still subject to the following riders:

> (a) "If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account."[45] This is intended to catch those characteristics and circumstances which the insurer should have noticed but failed to do so during the risk-evaluation process.
>
> (b) "A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care."[46]

Overall, the CIDRA places the burden of proof on the insurer to show lack of reasonable care on the proposer's part.[47]

18 It has been argued that formulating more detailed proposal forms will incur additional expenses for insurers,[48] hence resulting in

41 See Explanatory Notes to Consumer Insurance (Disclosure and Representations) Bill 2011 (HL Bill 68) at para 10.

42 See Explanatory Notes to Consumer Insurance (Disclosure and Representations) Bill 2011 (HL Bill 68) at para 21.

43 See s 3(2) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

44 See s 3(3) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

45 See s 3(4) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

46 See s 3(5) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

47 See s 5(4) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

48 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 11.23. This is because insurers, when asking general

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increased premiums for consumers;[49] however, this is merely a one-off cost[50] as "[g]eneral characteristics, which apply to large segments of the population, can simply be built into the general risk pool".[51] Furthermore, the common use in Singapore of proposal forms for consumer insurance (where insurers are required to draft specific questions) suggests that such reforms will not be unduly disruptive; they would merely replace *ad hoc* industry self-regulation with formal judicial supervision. The replacement of the duty to disclose all material information by the duty to answer the insurer's questions with reasonable care "accords with present expectations of insureds and does not unduly burden insurers"[52] and "correspond[s] to the realities of a mass consumer market".[53] In fact, the use of online proposal forms has also "made it more likely that consumers fail to disclose things which insurers can try to use to avoid liability";[54] it is therefore necessary that the law responds to potential pitfalls engendered by the changing face of insurance practice.

B. Qualifying misrepresentations

19 Singapore should likewise consider the adoption of the following CIDRA conditions which entitle the insurer to a remedy for misrepresentation:

> (a) "[T]he consumer made the misrepresentation in breach of the duty set out in section 2(2)."[55]
>
> (b) "[T]he insurer shows that without the misrepresentation that insurer would not have entered into the contract … at all, or would have done so only on different terms."[56]

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questions, do not have to expend costs in processing detailed responses to the proposal forms.

49 See P Y Woo, "The Duty of Disclosure – Proposals for Reform" (2000–2001) 21 Sing L Rev 100.

50 P Y Woo, "The Duty of Disclosure – Proposals for Reform" (2000–2001) 21 Sing L Rev 100 at 111.

51 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 11.26.

52 See P Y Woo, "The Duty of Disclosure – Proposals for Reform" (2000–2001) 21 Sing L Rev 100 at 147.

53 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 1.2.

54 House of Commons Library, *Consumer Insurance (Disclosure and Representations) Bill [274] HL Research Paper 12/06* (20 January 2012) (by Timothy Edmonds) at p 2.

55 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) s 4(1)(a).

56 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) s 4(1)(b).

20 The second limb of CIDRA's test incorporates the inducement requisite – a recent judicial invention in the disclosure doctrine. In order to ameliorate the harsh disclosure test, Lord Mustill in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[57] ("*Pan Atlantic*") had incorporated the inducement requirement before the non-disclosure or misrepresentation can be actionable. The CIDRA has thus vindicated his Lordship's highly controversial statement that "[i]f this requires the making of new law, so be it".[58] In fact, s 4 now codifies the second requisite of the erstwhile common law test of materiality (*ie*, inducement of the particular insurer).

21 This new law has additionally removed the requirement for inquiry into the mind of the hypothetical insurer. In the absence of a duty to volunteer information, the first limb of the common law materiality test will thus be otiose and unworkable as there is no longer any need to consider what hypothetical insurers "want to know".

22 The CIDRA preserves only the inducement test from common law and scuttles the voluntary disclosure duty. This renders the law more logical and realistic as the concept of inducement has never gelled comfortably with the notion of voluntary disclosure: the determination of how an insurer can be induced by something he is unaware of entails considerable legal posturing in the realm of the abstract. Jettisoning this anomalous double-pronged approach is certainly a welcome change.

23 The upshot of s 4 is that misrepresentation becomes actionable (and is termed a "qualifying misrepresentation" in the CIDRA) only when it has been proven that the insured had failed to take reasonable care not to misrepresent in response to the questions posed and that the particular insurer was thereby induced.

C. Basis clauses

24 A basis clause in the proposal form has the effect of transforming the proposer's declarations and answers into warranties.[59] Unlike its counterpart in contract law, the warranty is a very fundamental term in insurance law, the breach of which automatically and *ipso facto* discharges the insurance contract from the point of breach. In the case of any inaccuracy in the proposal form, this will be tantamount to a discharge from the outset. Often, consumers do not fully grasp the import of signing proposal forms containing basis

57 [1995] 1 AC 501; [1994] 2 Lloyd's Rep 427.

58 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 at 549; [1994] 2 Lloyd's Rep 427 at 452.

59 See, *eg*, *Dawsons Ltd v Bonnin* [1922] 2 AC 413 and *Unipac (Scotland) Ltd v Aegon Insurance Co (UK) Ltd* [1996] SLT 1197.

clauses. The use of such clauses to convert representations into warranties is met with justified criticism as it permits insurers to avoid liability for breach of warranty, regardless of materiality or lack of causal connection.[60]

25 The UK Law Commission found that there was "general agreement among insurers not to refuse claims for immaterial errors";[61] neither were there recent consumer cases upholding "basis of the contract" clauses. Similar to what Australia has done earlier, the CIDRA has abolished the use of such clauses; hence, representations in proposal forms are no longer capable of being converted into warranties by means of these contract clauses.[62] The abolition, in effect, prevents UK and Australian insurers from bypassing a stricter pre-contractual disclosure regime in favour of the consumers by turning all representations into warranties. However, this does not preclude an insurer from inserting warranties in the main policy.

26 In Singapore, insurers appear to rely on material non-disclosure to avoid the contract rather than strictly enforce the "basis of the contract" clause. This approach has been encouraged by soft law; *eg*, LIA's Statement in principle proscribes any provision in the proposal form that converts statements made by proposers into warranties (except where such a warranty concerns the life to be assured under a "life of another" policy).[63] As a matter of strict law, the Singaporean insurer may rely on the basis clause to avoid liability even with regard to an immaterial non-disclosure; however, as a matter of local industry practice, any insurer will prefer to uphold its reputation in the market rather than reject a claim on technical grounds and tarnish its image in the process. Even so, Singapore should follow the CIDRA and similarly abolish "basis of the contract" clauses; there should be minimal opposition to codifying existing industry practice.

60 *Dawsons Ltd v Bonnin* [1922] 2 AC 413;I *Unipac (Scotland) Ltd v Aegon Insurance Co (UK) Ltd* [1996] SLT 1197. See also English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at paras 2.26–2.28.

61 See also English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 2.28.

62 See s 6(2) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

63 See Life Insurance Association's Statement of Life Insurance Practice at para 1(g)(i). As mentioned earlier, General Insurance Association no longer has such a similar or parallel code which was based on the UK British Insurance Law Association practice statements.

D. Remedy

27 At present, there is in Singapore only one remedy for the insured's breach: the insurer may avoid the contract retrospectively and the contracting parties are then placed in their original position as if the contract had not been made.[64] The rationale often proffered for such a remedy is that the insured's failure to disclose a material circumstance (which would have led the insurer to either reject the proposal or write the contract on different terms) would void the policy since the "risk run is really different from the risk understood and intended to be run, at the time of the agreement".[65] However, this line of argument is no longer as persuasive if insurers nowadays have at their disposal the means to discover the relevant information that they require.

28 A major weakness of this one-size-fits-all remedy is that the fault or *culpa* of the insured is completely disregarded. This problem manifests itself in several aspects:

> (a) Even if the proposer had acted "honestly and reasonably", the insurer is still entitled to avoid the policy in the event of any material non-disclosure or misrepresentation. As long as the insurer is able to prove materiality and inducement, it does not matter whether the consumer was innocent, whether the insurer would have demanded any changes of policy terms had the matter been disclosed,[66] or whether there was any causal connection between initial breach and resulting loss.[67] This draconian remedy deprives the hapless insured of the benefits provided in the contract whilst unfairly allowing the insurer to "escape retrospectively the liability to indemnify which he has previously and … validly undertaken".[68]
>
> (b) Furthermore, the problem is aggravated by the nature of the insurance contract. Unlike the avoidance of a normal contract, the consequences of avoiding an insurance contract are far more drastic for the insured who is not only left in the lurch for the present loss but also has to return any previous payments made by the insurer under successful claims for

64 See ss 18(1) and 20(1) of Marine Insurance Act (Cap 387, 1994 Rev Ed).

65 *Carter v Boehm* (1766) 3 Burr 1905 at 1909.

66 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 2.14.

67 See Peter M Eggers, "Remedies for the Failure to Observe the Utmost Good Faith" [2003] LMCLQ 249 at 262.

68 *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1 at [57]; [2001] 2 WLR 170 at 189.

> earlier losses. The insured is thus effectively "without the protection which he thought he had contracted and paid for".[69]

29 As it currently stands in Singapore, the insurer has an absolute and unfettered remedy regardless of the extent of the insured's loss and this inflexible remedy appears to leave the courts with little room to do justice. In practice, the courts do attempt to mitigate the harshness of the remedy and the judges are wont to adopt a vigilant attitude against unscrupulous insurers. The courts have thus far sought to work around the limitations by proactively taking a "realistic and even robust view"[70] regarding the materiality-cum-inducement requirements and focusing on the inducement of the particular insurer (the absence of which forecloses the right to avoid the policy in the first place).[71] In, for example, the local case of *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd*[72] the court embraced the reliance principle (requiring proof of inducement) to reject the defendant insurer's recourse to policy avoidance:

> … there was no evidence that the representations … were relied upon by the defendant apart from a bare statement in the affidavit … [and] there was no document which showed that the representations were considered by the defendant in assessing the risk and/or determining the rates to be applied to the policy.

30 Nevertheless, the present materiality-cum-inducement test does not and cannot adequately temper the inexorable application of the insurer's remedy to avoid the policy *ab initio*. So long as the insurer would have been induced to change a single term of the policy had there been neither non-disclosure nor misrepresentation, this would be a sufficient basis for the insurer to fall back on contract avoidance. If, for example, the insured would have been merely charged a higher premium for some risk element left undisclosed, the insurer is entitled to exercise his right of avoidance – a remedy that is wholly disproportionate to the loss suffered by the insurer.[73] In essence, the introduction of the materiality-cum-inducement requirements, while foreclosing the right to avoid in certain circumstances, does not adequately differentiate between the nature of the insured's breach and the remedy available to the insurer. Although this approach circumvents the problem of a disproportionate remedy by excising the right to avoid

69 *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154 at 157.

70 *Brotherton v Aseguradora Colseguros SA* [2003] EWCA Civ 705 at [28].

71 *Drake Insurance plc v Provident Insurance plc* [2003] EWCA Civ 1834.

72 [2008] SGHC 188at [30].

73 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319 and Scot Law Com 219, 2009) at para 2.14. See also English Law Commission and Scottish Law Commission, "Insurance Contract Law: Damages for Late Payment and Insurance Duty of Good Faith" (ICL issues paper 6) (2010) at para 9.13.

before it arises, the current law in Singapore does not go far enough to temper the harshness of the remedy so as to extend sufficient protection to the consumer.

31 There is, in principle, some offering of soft-law mitigation in the form of LIA's Statement of Life Insurance Practice to constrain the life insurers' right to avoid (emulating, as mentioned earlier, the British Institute of Life Assurance's Statement in earlier days). Accordingly, insurers should not unreasonably reject a claim or invalidate a policy on grounds of non-disclosure or misrepresentation (unless fraud or deception is involved). However, there is a lack of documentary trail to show how much the LIA Statement (which is not made available to public) has actually been applied in practice; indeed, one commentator has remarked that the LIA Statement "has largely been ignored".[74] Without a similar constraint in GIA's General Insurance Code of Practice on the insurers' right to avoid, the situation is even more pessimistic for consumers with general insurance policies. In the final upshot, it is clear that the existence of any self-regulatory code or statement in Singapore will never compensate for a technically harsh regime that is in dire need of reform.

32 In contrast, the CIDRA grants a more proportionate remedy to insurers in the event of material misrepresentation. The remedy basically depends on the proposer's state of mind: s 4(1) specifies that the insurer has a remedy "only if the consumer made the misrepresentation in breach of the duty in s 2(2),[75] and "the insurer shows that without the misrepresentation that insurer would not have entered into the contract … at all or would have done so only on different terms"[76] (with the second limb codifying the current test of inducement as set down in *Pan Atlantic*). In the face of a qualifying (*ie*, actionable) misrepresentation, the available remedy to the insurer is dependent on the mind or culpability of the errant party as spelt out in Sch 1 of the CIDRA:[77]

> (a) If the insured acted honestly and reasonably, the insurer cannot avoid liability.

74 See A Myint Soe, *Life Insurance Law* (Singapore College of Insurance, 2006).

75 See s 4(1)(a) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

76 See s 4(1)(b) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

77 See s 4(3) of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

(b) If the insured made a deliberate or reckless misrepresentation, the insurer is entitled to avoid the contract and retain the premiums, unless fairness demands otherwise.[78]

(c) If the insured made a careless misrepresentation, "[t]he insurer's remedies are based on what it would have done if the consumer had complied with the duty set out in section 2(2)".[79] If, for example, the proposal would have been rejected had there been no misrepresentation, the insurer can avoid the policy and refuse all claims (as well as return the premiums but this is subject to an exception to be discussed later). If, on the other hand, the insured would merely have been charged a higher premium, the insurer may then proportionately reduce the amount paid out on the claim for the loss suffered.

33 Recognising that life assurance is an "important long-term form of insurance where the premiums in the early years of the policy pay for the increased risk in the later years"[80] and claims under a life policy frequently occur when cover is most needed (*eg*, where the insured has been diagnosed with some critical illness when approaching retirement age), the CIDRA has on an exception basis specified that the insurer of a contract which is "wholly or mainly one of life insurance"[81] may not terminate the policy by reason of the proposer's careless misrepresentation.[82] Otherwise, it would have resulted in draconian consequences for the hapless insured as he is unlikely to find alternative life coverage at that stage[83] and it would also be grossly unfair to deprive the insured of any benefits provided in the life policy despite having dutifully paid the premiums over the years in the expectation of cover should disaster strike. Under such circumstances, the insurer must either proceed on the basis of amended terms or choose partial payment on existing terms. Upon receiving notice of the amended terms from the insurer,[84] the consumer has the choice of termination or otherwise.

78 See para 2 of Sch 1 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

79 See para 4 of Sch 1 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

80 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 6.97.

81 See para 9(5) of Sch 1 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

82 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para A.78.

83 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 6.95.

84 See para 9(4)(a) of Sch 1 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

34 Although the introduction of a proportionate remedy structure will entail major changes in the one-size-fits-all remedy scheme existing in Singapore, such reform is desirable as it allows the local courts greater remedial flexibility to obtain a fair result. Adopting a proportionate remedy that is pegged to the insured's level of fault will temper an unduly draconian application of the avoidance remedy while achieving a fair result for both parties. On the one hand, the honest and reasonable insured will not be denied coverage under the policy in the unfortunate event of an innocent mistake. On the other hand, allowing the insurer to avoid the contract if there had been deliberate or reckless misrepresentation will address industry's legitimate concern that proposers may then be given licence to conceal material information so as to secure lower premiums.

E. Intermediaries

35 Another common problem for consumers in this area of pre-contract disclosure and representations concerns the oft-encountered scenario where the intermediary receives information from the proposer and then proceeds to enter the details into the proposal form either on his own initiative or at the consumer's behest. The difficulty in identifying the correct principal is most prevalent when attempting to impute the knowledge of the agent to the principal. Such difficulty arises from the diversity of arrangements in the insurance market where the agency landscape is not a homogenous one and varies across different cases.[85] The intermediaries may be clearly linked to the insurer or they could be acting as independent agents advising individual consumers. In fact, there are different types of insurance intermediaries – agents, brokers, consultants, employees, part-time agents and, more recently in Singapore, representatives under the Financial Advisers Act[86] who perform a variety of tasks. Under these circumstances, every determination of an intermediary's relationships with both insurer and proposer depends on the court's careful examination of the facts and the lack of formal guidelines may regrettably result in uncertain results. Furthermore, the current availability of price comparison websites and internet selling (especially for travel insurance) makes it even more difficult to pinpoint with absolute certainty the principal *vis-à-vis* the agent.

36 Even when an agent (who has been sent by an insurance firm to scout for business) writes the answers in the proposal form, all replies and mistakes are generally attributable to the insured in the face of the

85 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 8.9.

86 Cap 110, 2007 Rev Ed.

latter's signature. This remains true even for the scenario where the proposer has conveyed the correct facts to the agent who unfortunately records certain details incorrectly. This area of law has been severely criticised as there is a serious mismatch between what consumers expect and what the law stipulates. In addition, the proposer cannot take for granted that any information disclosed to the agent will be conveyed or imputed to the insurer. The status of the intermediary in acting for either the insured or the insurer is not always obvious. Yet, the determination of an agent's status is crucial as it determines who ought to bear the risk of the agent's wrongdoing.

37 The insured may pursue a separate action in negligence against the intermediary if the latter has breached his duty of care and skill; for example, where the broker fails to raise certain issues which he knows to be material to the insurer, he is then liable to the insured for negligence (as in the case of *McNealy v Pennine Insurance Co Ltd*[87] where the broker was aware that the insurer refused to cover certain risks but failed to highlight this to the proposer who required such coverage). However, this particular option may not really be practical since it is easier for the consumer to sue the insurance company directly rather than pursue a separate cause of action against the intermediary. First, it is more straightforward to sue the insurer for failure to pay instead of proving the agent's negligence or fraud.[88] Second, if the insurer has successfully proven misrepresentation or non-disclosure, it may unfairly penalise the consumer when seeking future insurance coverage.[89]

38 The CIDRA sets out a framework of non-exhaustive guidelines[90] to determine whether the intermediary is acting as an agent for the insurer or insured, as the case may be. In particular, the CIDRA identifies three scenarios where an agent is considered to be the insurer's agent for the purposes of passing on pre-contract information and entering into contracts:[91]

> (a) when the agent does something in the agent's capacity as the appointed representative of the insurer for the purposes of the Financial Services and Markets Act 2000 …

87 [1978] 2 Lloyd's Rep 18.

88 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 8.6.

89 English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 8.6.

90 See Sch 2 of the English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6).

91 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) Sch 2, para 2.

(b) when the agent collects [pre-contract] information from the consumer, if the insurer had given the agent express authority to do so as the insurer's agent,

(c) when the agent enters into the contract as the insurer's agent, if the insurer had given the agent express authority to do so.

39 The CIDRA also provides additional examples of scenarios which may tend to confirm that the agent is acting for the insurer:[92]

(a) the agent places insurance of the type in question with only one of the insurers who provide insurance of that type,

(b) the agent is under a contractual obligation which has the effect of restricting the number of insurers with whom the agent places insurance of the type in question,

(c) the insurer provides insurance of the type in question through only a small proportion of the agents who deal in that type of insurance,

(d) the insurer permits the agent to use the insurer's name in providing the agent's services,

(e) the insurance in question is marketed under the name of the agent,

(f) the insurer asks the agent to solicit the consumer's custom.

40 Conversely, the CIDRA provides the following examples of scenarios which may tend to confirm that the agent is acting for the insured:[93]

(a) the agent undertakes to give impartial advice to the consumer,

(b) the agent undertakes to conduct a fair analysis of the market,

(c) the consumer pays the agent a fee.

41 In effect, the CIDRA preserves general normal agency law by reiterating that the principal is liable for the acts and omissions of his own agent's actions; accordingly, any wrongdoing (including fraud and misstatements) will be attributed to the relevant principal. If the insurer is considered the principal, the agent's wrongdoing will then be attributed to the insurance firm which will be liable for any claims arising therefrom. The agent's knowledge will likewise be attributed to the relevant principal; should this be the insured, then the agent's

92 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) Sch 2, para 3(4).

93 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) Sch 2, para 3(3).

knowledge will be attributed to the consumer even if he might have acted reasonably.

42 The CIDRA attempts to strike a balance between consumers and insurers. On the one hand, the insurance firm should be responsible for the actions of intermediaries who are operating under its control. On the other hand, it will be unfair to penalise any insurer with merely a limited relationship with the agent who is working for the consumer. It is naturally difficult to compile a comprehensive list of scenarios where the agent acts for either insurer or insured. Instead of a clear-cut demarcation, the provision of non-exhaustive guidelines as per the CIDRA is a practical and flexible method that allows for future technological changes and regulatory developments.[94] Given the present state of the law in Singapore regarding insurance intermediaries, adopting such legislative reform will give the local courts more clarity in this area.

IV. Conclusion

43 Singapore ought to consider the benefits of having a separate consumer-insurance regime with the draft rules encapsulating what is essentially best industry practice. This will offer consumers "increased peace of mind that they will be treated fairly and that valid claims will be paid".[95] As it currently stands, the local courts' ability to do justice is fenced in by strict law and precedents. The defects in this area arise from the application of outdated technical rules as well as the availability of disproportionate remedies for insurers.

44 At the same time, extra-judicial remedies and self-regulation, while in principle serving as alternative avenues of redress, fail to live up to their full potential and are generally seen to lack effectiveness. It has been argued that legislative reform may be costly and industry should by this reckoning be allowed to self-regulate.[96] However, the situation in Singapore still remains very opaque, with limited claims-handling information made available to consumers who remain largely in the dark regarding the content and application of such guidelines and are often left to speculate on the outcome of their complaints. Disputes over

94 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 8.20.

95 See English Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Law Com 319; Scot Law Com 219, 2009) at para 11.37.

96 See P Y Woo, "The Duty of Disclosure – Proposals for Reform" (2000–2001) 21 Sing L Rev 100 at 105.

liability cast insurers in a negative light, resulting in poor public confidence in the market for Singapore as a financial hub.

45 The CIDRA is intended to codify existing good practice within the industry[97] so as to simplify the overlapping layers of law; as such, any changes are expected to be modest at most. However, such best practices may not be as deeply ingrained in Singapore's insurance community. Consider, by way of example, how the UK Statements of Insurance Practice are easily accessible to the public and readily enforced by FOS but, in stark contrast, Singaporean consumers are not always aware of their rights *vis-à-vis* the insurers.

46 Given the CIDRA's wide-ranging implications on consumers, the position in Singapore arguably becomes tenuous. Singapore has previously relied much on English case law, but this body of case law based on the old English regime will now become increasingly obsolete. There is a pressing need for change lest the local position become increasingly out of touch with international developments.[98] The law in this area should be clear and fair and it is neither sufficient nor desirable for Singapore to look to the English common law or rely on vague industry guidelines. The case for a separate statutory consumer regime to protect local consumers is compelling.[99]

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97 See Explanatory Notes to Consumer Insurance (Disclosure and Representations) Bill 2011 (HL Bill 68) at para 99.

98 Interestingly, the Malaysian government in s 129 and Sch 9 of their recent Financial Services Act 2013 (Act 758 of 2013) has emulated some of these recent English provisions and reform suggestions on pre-contractual representations and disclosure to strengthen the protection of consumer rights.

99 The English Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) is an initial legislative breakthrough overhauling some aspects of rather archaic insurance doctrines. For an overview of the current ongoing review exercise, see David Hertzell & Laura Burgoyne, "The Law Commissions and Insurance Contract Law Reform: An Update" (2013) 19 JIML 105.