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From a pre-contractual duty of disclosure to a duty of fair presentation in the Insurance Act 2015: Should Hong Kong adopt the same approach?

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Having over history of two century, the common law pre-contractual duty of disclosure for insurance contracts ("**duty of disclosure**") is still in use in many common law jurisdictions, including Hong Kong. It found its origin in the judgment of Lord Mansfield in *Carter v Boehm*,[1] which has been codified with modifications in the Marine Insurance Act 1906 ("**MIA**") in the United Kingdom and, in its identical counterpart, the Marine Insurance Ordinance (Cap 329) ("**MIO**") in Hong Kong,[2] and applies to all types of insurance.[3] However, the application of the law is not free of problems and has been criticized for its uncertainty, rigidity and draconian nature to the assured.[4]

Against this backdrop, the codified duty has been reformed in the United Kingdom and is now governed by Consumer Insurance (Disclosure and Representations) Act 2012 ("**CIA**") for consumer insurance and the Insurance Act 2015 ("**IA**") for non-consumer insurance. It is the purpose of this essay to evaluate whether Hong Kong should follow the change and the approach of IA.

For the avoidance of doubt, this paper confines its discussions mainly to the assured's

[1] (1766) 3 Burr 1905, 1909.
[2] Robert Merkin, *Colinvaux's Law of Insurance in Hong Kong* (2nd edn, Sweet & Maxwell 2012) para 6.002.
[3] *Pan-Atlantic Insurance v Pine Top Insurance* [1995] 1 AC 501, 518
[4] Peter Macdonald Eggers & Ors, *Good Faith and Insurance Contracts* (3rd edn, Lloyd's List 2010) paras 16.23-16.26.

duty of disclosure for non-consumer insurance. Therefore, the issue of whether the segregation of consumer and non-consumer insurance is justified is out of concern here. Law on variations made to an ongoing insurance cover is also out of our present concern. The paper will first give a summary of the common law position of the duty of disclosure followed by criticisms of the current law. It then delves into the latest UK position with respect to IA and subsequently critically analyses the merit(s) of adopting such approach. Ultimately, it seeks to show that, despite of the defects of the current law and the need to reform in Hong Kong, Hong Kong should not reform its law as the UK did.

I. Common Law and Hong Kong position

The common law position as has been adopted in MIO imposes a duty of disclosure, which is a duty of utmost good faith under section 17 MIO and applies to both the insurer and the assured.[5] The duty of disclosure bears two folds at a pre-contractual stage.

First, the parties must disclose every material circumstance which is known and is ought to be known by them in the ordinary course of business.[6] However,

[5] *La Banque Financiere de la Cite v Westgate Insurance Co* [1990] 2 All ER 847, 960.
[6] s18(1) MIO.

information that, *inter alia*, is common knowledge or should have been known to an insurer in its ordinary course of business needs not be disclosed.[7] Second, every material representation as to fact or belief must be true.[8] Thus, the materiality of a statement is a key issue.

A. Knowledge

In terms of a business assured, according to *PCW Syndicates v PCW Reinsurers*,[9] the knowledge of a company has been restricted to 'the directing mind and will' along with those employees who arrange for the insurance.[10] However, the knowledge of other employees are 'perhaps' also relevant.[11] As for the insurer, on receiving information prompting a reasonable insurer to make enquiries, failure to do so may invite the defence of waiver.[12]

B. Materiality and inducement

The objective test for materiality propounded in *Pan-Atlantic Insurance v Pine Top Insurance*, approved by the Hong Kong court,[13] is whether the insurer can show the undisclosed fact would have an actual influence on a prudent underwriter in assessing

[7] s18(3)(b) MIO.
[8] s20(1), (3) MIO.
[9] [1996] 1 Lloyd's Rep 241, 253.
[10] Ibid, 253.
[11] Ibid, 253.
[12] *Synergy Health v CGU Insurance* [2011] Lloyd's Rep IR 500, [172]-[175].
[13] *Lam Charn Yung v Axa China Region Insurance* [2007] 1 HKLRD 770, [117], [122].

the risk.[14] The test does not depend on what a reasonable assured thinks. It is satisfied if a prudent underwriter would have wanted to know the fact concerned,[15] even though he might not have acted differently having known the fact.[16] Save and except facts that are obviously material,[17] expert evidence would be called for the purpose of finding how a prudent insurer would have thought.[18]

In addition to materiality,[19] in order to constitute a breach of duty, there is another requirement of inducement.[20] The actual insurer has to prove that he was effectively induced by the material non-disclosure or misrepresentation to conclude the contract.[21] That is, he would have acted otherwise in the absence of non-disclosure or misrepresentation.[22] However, there is no legal presumption of inducement and such is not required to be the sole effective cause of the contract.[23]

C. Remedy

Currently, the only remedy for a breach is avoidance,[24] i.e. void *ab intio*. The court

[14] *Pan-Atlantic* (n3) 516-517, 538, 550.
[15] *Container Transport International v Oceans Mutual Underwriting Association* [1984] 1 Lloyd's Rep 476, 492, 496-497.
[16] *Pan Atlantic* (n3) 440.
[17] *The Ming An Insurance Co (HK) v Chan Man Dun* [2005] HKCU 185, [32].
[18] *Lam Charn Yung* (n13) [118].
[19] *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [56].
[20] *Pan Atlantic* (n3) 586.
[21] *Assicurazioni* (n19) [62].
[22] *Drake Insurance plc v Provident Insurance plc* [2003] EWCA Civ 1834, [62].
[23] *Assicurazioni* (n19) [62].
[24] *Banque Financière de La Cité SA v Westgate Insurance Co* [1990] 2 Lloyd's Rep 377, 387.

does not have the jurisdiction to grant any proportionate remedy.[25] Avoidance discharges both parties from all past and future obligations arising from the contract,[26] restoring them to the original position as if there has been no contract and all accrued benefits (including premium) has to be returned to another.[27] This remedy applies whenever there is non-disclosure or misrepresentation. In other words, it applies to breaches arising from any kind of state of mind, including negligent and innocent,[28] and to where the assured had no reasonable opportunity to know the statement being untrue.[29] However, for marine insurance, premium would be forfeited in case of fraudulent breach of duty of disclosure,[30] while whether the same applies to non-marine insurance is unclear from precedents.[31]

The rigidity of this remedy stems from the need for an effective insurance market,[32] with the acknowledgement of asymmetrical information possessed by the assured and the insurer in which the assured have almost all the information.[33] It is also said to be for encouraging good faith and deterring fraud,[34] so as to allow fair assessments of

[25] *Pan-Atlantic Insurance v Pine Top Insurance* [1993] 1 Lloyd's Rep 496, 508.
[26] *Black King Shipping Corp v Massie; The Litsion Pride* [1985] 1 Lloyd's Rep 437, 514-516.
[27] *Mackenzie v Royal Bank of Canada* [1934] AC 468, 475-476.
[28] *The Litsion Pride* (n26) 514-516.
[29] For example, *Merchants & Manufacturers Insurance Co Ltd v Hunt* [1941] 1 KB 295.
[30] s84(1) MIO.
[31] John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 91.
[32] *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65, 76.
[33] *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, 86.
[34] *Carter* (n1) 1911, 1918.

risk.[35]

II. Criticisms of the current common law and Hong Kong position

A. Knowledge

The law requiring the business assured to disclose facts known to it, as propounded in *PCW Syndicates*, creates uncertainty, as it provides no test as to when the knowledge of employees other than the 'directing mind and will' and those responsible for insurance arrangement would be relevant. This point has also been succinctly identified by the United Kingdom Law Commission.[36]

B. Materiality

Presently, the materiality test requires that any non-disclosure must have some impact on a 'prudent underwriter'. The term 'prudent underwriter' appears to be problematic. Essentially, it requires the assured to anticipate what a prudent insurer would think. However, the assured can hardly know what information a prudent insurer would deem material even if they have acted with due care.[37] Small-business assureds may not understand what kind of information they have to volunteer.[38] Research indicates

[35] *Uzielli v Commercial Union Insurance Co* (1865) 12 LT 399, 401.
[36] United Kingdom Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com No 353, 2014) para 8.18.
[37] Yeo Hwee Ying, 'Recent Developments in Materiality Test of Insurance Contracts' [1995] Sing JLS 56, 70.
[38] See *Roselodge v Castle* [1966] 2 Lloyd's Rep 113.

even large corporate assureds with professional brokers advising on what information is to be disclosed also encounter difficulties in fitting their cases exactly within the law.[39] This problem would be particularly apparent when the subject risk is new and unique in its nature.

The corollary of this problem generates another practical problem. Assureds, in order to minimize the risk of avoidance resulting from breach of duty, would tend to practice data-dumping, i.e. to send a huge amount of data to the insurers for their analysis.[40] This results in the insurers putting in more human resources than that of originally necessary in the absence of data dumping.

Further, calling expert evidence to assist the court with finding what a 'prudent insurer' would have done seems to favour insurers in a number of ways. First, in light of insurers' experience in the industry, insurers are in a much better position than that of ordinary assureds to seek expert evidence from peer insurers.[41] Second, there can be no way for the court to confirm 'prudence'. Conceivably, there can be 'professional bias' that judges can have no way other than observing the behaviour in

[39] United Kingdom Law Commission (n36) paras 5.8-5.9.
[40] United Kingdom Law Commission, Insurance Contract Law: Issues Paper 1: Misrepresentation and Non-Disclosure (Sep 2006) <http://www.lawcom.gov.uk/wp-content/uploads/2015/06/ICL1_Misrepresentation_and_Non-disclosure.pdf> accessed 2 December 2015, paras 7.47-7.48.
[41] Semin Park, *The Duty of Disclosure in Insurance Contract Law* (Dartmouth Publishing 1996) 15.

court to judge whether expert evidence is intentionally or subconsciously given in favour to insurers.[42] Third, it would be 'artificial' to ask expert witness the question of 'what he would have done had something taken place which did not take place'.[43] It is because with the benefits of hindsight, underwriters can know the events that actually followed, where these might not have been expected when the slip was first presented. Also, it seems the materiality of certain data may vary among insurers, especially when the risk is unique and it would be difficult for the court to find what a prudent insurer would have done.

C. Remedy

The remedy of avoidance has been repeatedly criticized by the court and academic commentators. For examples, Clarke LJ described it as 'draconian' to the assured,[44] while Lord Hobhouse even criticized it being 'penal'.[45] Although it might be said that the draconian effect could be mitigated by the hurdle of materiality and inducement,[46] such can still be seen in its nature of being inflexible, potentially disproportionate and one-sided.[47] In short, this remedy creates manifest injustice.

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[42] Poomintr Sooksripaisarnkit, 'Reform of 'non-disclosure' in UK marine insurance law: Exotic Approach or Original Understanding?' <https://lra.le.ac.uk/handle/2381/8661> accessed 14 November 2015, 80.
[43] Guy Blackwood, 'The Pre-Contractual Duty of (Utmost) Good Faith: The Past and the Future' (2013) LMCLQ 311, 319.
[44] *Drake* (n22) [145].
[45] *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd; The Star Sea* [2001] UKHL 1, [51], [79].
[46] *Sealion Shipping v Valiant Insurance* [2012] EWHC 50 (Comm).
[47] Ibid, [57].

First, its 'all-or-nothing' nature[48] leaving no room for any intermediate position would be draconian to the assured. The current law gives insurers the power to avoid the contract however minor the breach is. For example, an insurance contract can be avoided where the material non-disclosure of fact, if disclosed, in the view of a prudent insurer, would only have caused minimal adjustments to the premium.[49]

Another instance would be an exercise of avoidance in a case of technical breach, which has no bearing at all on the claim pursued by the assured.[50] This is because the essence of breach is at the time of the contract but not the time of the presentation of the claim. Thus, for claims of substantial loss, insurers may carry out investigations regarding the adequacy of disclosure in order to look for possibilities to avoid the contract.[51] And upon discovery of any breach, the insurer would deny liability and the assured would be left unprotected for which he believed he had contracted and paid.[52]

Avoidance further inclines towards the interests of insurers. Although the remedy is

[48] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427, 439.
[49] See *Mackay v London General Insurance Co Ltd* (1935) 51 Ll L Rep 201, 202.
[50] See *Seaman v Fonereau* (1743) 2 Stra 1183.
[51] Martin Bakes, 'Pre-contractual information duties and the Law Commission's review', in Baris Soyer(ed), *Reforming Marine and Commercial Insurance Law* (Informa 2008) 32.
[52] *Kausar v Eagle Star Insurance Co* [1997] CLC 129, 132.

reciprocal between assureds and insurers, assureds are almost always in the position to disclose as they possess all the information of the subject to insure, whereas insurers can almost have nothing to disclose. Further, even if the insurer fails to disclose material facts, it is usually of minimal interests for the assured to avoid the insurance contract.[53] Thus, the effects of avoidance are said to be one-sided.

III. Position in the United Kingdom

In view of the weaknesses of the law on duty of disclosure, the United Kingdom has reformed its insurance law segregating consumer and non-consumer contracts. The former is addressed in the CIA with the removal of the duty to volunteer information, while the latter is dealt in IA. As said at the outset, only the latter concerns us for the purpose of this paper.

In replacement of the duty of disclosure in MIA, IA introduces a new default regime[54] namely the duty of fair presentation covering both non-disclosure and misrepresentation in a pre-contractual context.[55] It requires the disclosure of 'every material circumstance which the insured knows or ought to know' or of 'sufficient information to put a prudent insurer on notice that it needs to make further

[53] *The Star Sea* (n45) [57].
[54] United Kingdom Law Commission (n36) para 3.6.
[55] United Kingdom Law Commission (n36) para 1.49; s3(1), (3) IA.

enquiries'.[56] Such disclosure must be done in a reasonably clear and accessible manner.[57]

A. Knowledge

As to the knowledge of the assured, in the case of business assureds, the law attributes such knowledge only to persons engaging in 'senior management' or those held responsible for the insurance.[58] IA confines the assured's scope of disclosure to what it 'should reasonably have been revealed by a reasonable search of information available' to the assured.[59] Further, there is no duty to disclose what the insurer should, or presumed to, know,[60] including information held by and readily available to the insurer,[61] common knowledge[62] and information reasonably be expected to know by the insurer 'in the ordinary course of business'.[63]

B. Materiality and inducement

The test for materiality remains to be whether the information would have influenced a prudent insurer's judgement in assessing the risk.[64] Examples of material

[56] s4 IA.
[57] s3(b) IA.
[58] s4(3) IA.
[59] s4(6) IA.
[60] s3(5) IA.
[61] s5(2)(b) IA.
[62] s5(3)(a) IA.
[63] s5(3)(b) IA.
[64] United Kingdom Law Commission (n39) para 7.25; s7(3) IA.

information given by IA include special information and any particular concern pertinent to the risk.[65]

Similarly, the new law preserves the requirement of inducement in terms of 'but for' test: but for the breach, there would not have been any insurance contract or the contract would have been constructed in different terms.[66]

C. Remedy

Avoidance is now of limited applicability and co-exists with other newly-introduced remedies. Remedies available to insurers vary with the assured's state of mind, with which the insurer bears the burden of proof.[67]

For deliberate or reckless breach, where the assured knew the breach of duty of fair presentation or did not care about any breach of the same,[68] insurers can then avoid the contract alongside forfeiting any premium paid.[69]

Avoidance is available for breaches neither deliberate nor reckless when upon proof

[65] s7(4) IA.
[66] United Kingdom Law Commission (n39) para 11.11; s8(1) IA.
[67] s8(6) IA.
[68] s8(3)-(5) IA.
[69] s2 of Sch1 IA.

by the insurer, but for the breach, there would not have been any insurance contract.[70] However, under these circumstances, the insurer is obliged to return the premiums paid.[71] Where the contract would have been made on different terms, it would be deemed to have been made on those different terms.[72] However, if the breach renders that higher premiums would have been charged, payment of claims would be reduced proportionately in terms of the formula provided in section 6(2) of Schedule 1 IA.[73]

IV. Analysis

As have been noted, IA has modified the element of knowledge and substantially reformed the remedy for breach of duty of disclosure. Leaving the requirements of materiality and inducement as they currently are, IA has addressed the issue of data dumping by introducing assureds the duty to submit data in a 'clear and accessible' way.[74] The following parts present an analysis on the changes brought by IA.

A. Knowledge

(1) Assured

The new law, which stipulates to whose knowledge in the business assured is relevant,

[70] s4 of Sch1 IA.
[71] Ibid.
[72] s5 of Sch1 IA.
[73] s6(1) of Sch1 IA.
[74] s3(3)(c) IA.

has its benefits. It now makes it clear that only persons positioned as senior management and those responsible for the insurance would bear the duty of disclosure. This makes knowledge of other persons in the business assured irrelevant. The approach appears more reasonable than the position suggested in some precedents, for instance, where the assured's knowledge extends to persons responsible for take care of the subject matter of the insurance.[75]

However, as to the requirement for the business assured to disclose information reasonably revealed 'by a reasonable search of information', defining the reasonableness of a search may be hard for transnational enterprises which pursue insurance covers for both itself and potentially its numerous subsidiaries.[76]

(2) Insurers

Besides some minor changes in archaic wordings,[77] in the light of technological advance in IT systems,[78] IA now imputes insurers with knowledge of information which is held by the insurer and which is readily available to the underwriters responsible for that risk assessment.[79] Although, on the reading of s5(2)(b) IA, it

[75] *Simner v New India Assurance Co* [1995] LRLR 240, 254-255.
[76] Rob Merkin and Ö zlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) 78(6) MLR 1004, 1012.
[77] United Kingdom Law Commission (n39) para 10.57-10.59.
[78] United Kingdom Law Commission (n39) para 10.53.
[79] s5(1) IA; s5(2)(b) IA.

seems the information must be *both* held by the insurer and readily available to the responsible underwriters, this provision can still generate ambiguity as to the extent of duty and may impose burden on underwriters.

The definition of 'readily available' is unclear. For example, it was once described by underwriters as 'impracticable' to look for information, which might appear 'readily available' to us, concerning previous policies of the assured from another department.[80] Equally, the scope of 'held by the insurer' is also unclear. Although it is said that the insurer is 'not expected to know everything available on the internet',[81] it seems it would be expected to know something that is available online. Noting that the current law, as in *The Ho Feng 7*, does not impute knowledge on insurers even for materials which can be easily obtained on the internet, such as on professional media forums,[82] it is unclear what materials would be said to be held by the insurer.

B. Remedy

It is true that the new system of remedies have lessened the draconian nature of the common law. It is possible under IA for business assureds to escape from avoidance for negligent or innocent breach of duty. However, the new system does give

[80] *Mahli v Abbey Life Assurance Co* [1994] CLC 615, 616, 620.
[81] United Kingdom Law Commission (n36) para 10.54.
[82] *Hua Tyan Development Ltd v Zurich Insurance* [2012] 4 HKLRD 827, [16.20]-[16.21], affirmed by the Court of Final Appeal (2014) 17 HKCFAR 493.

theoretical and practical difficulties.

(1) Hindsight and arbitrariness

The introduction of proportionate remedies for breaches neither deliberate nor reckless presumes the possibility of 're-rating of [a] risk' in business insurance at the hindsight upon the discovery of undisclosed materials.[83] Certainly, re-rating is possible and much easier in consumer contracts. For instance, in medical insurance, premium is readily adjustable according to some pre-existing guidelines in case of non-disclosure of hospital admission records.

Yet, many business insurances are far more complicated and sophisticated. It is noteworthy that under IA any re-rating is to be made according to the contemporaneous situations at the time of the contract. In this premise, it is submitted that re-rating could be almost impossible since it could mean re-assessment of business trends, the assured's internal affairs and situations of the assured's employees at the time of the contract.[84] Further, re-rating becomes increasingly difficult as time passes from the conclusion of contract. Ultimately, such re-rating practice would

[83] Baris Soyer, 'Reforming pre-contractual information duties in business insurance contracts - one reform too many?' (2009) 1 JBL 15, 30.
[84] Ibid, 30.

render a decision being too discretionary and thus arbitrary.[85]

Arbitrariness can be further seen in IA's failure to consider the assured's notional conduct.[86] Given the notional situation of full disclosure is the only consideration for remedies, there seems no logical and theoretical reason of why the law should consider only from the perspectives of the insurer. For instance, under the situation of full disclosure, there could have been a term imposed by the insurer of which the assured found unacceptable and, had the assured known of the term, he would have not purchased any insurance at all.

(2) Proof of insurer's notional position

The proof regarding the insurer's position in cases of breach that are neither deliberate or reckless seems to be easy at the first glance, since all the insurer has to do is to submit its readily available practice guidelines, office memoranda, pricing manuals or alike.

However, the proof of insurer's practice cannot be over-simplified. It can be a grave challenge to the court since the findings of the notional position are to be based on

[85] Thomas Schoenbaum, *Key Divergences Between English and American Law of Marine Insurance: A Comparative Study* (Cornell Maritime Press 1999) 127.
[86] Blackwood (n43) 319.

matters solely within the insurers' possession.[87] Further, the standard of proof is by no means low. From the plain wording of IA,[88] it seems proving what *could or might* have happened under full disclosure is insufficient as the law requires the proof of what *would* have happened.[89]

Indeed, the potential difficulties in the proof of the insurer's notional position is even said to be 'inevitable'[90] in Australia. The Australian insurance law, similar to IA, provides that the insurer has to prove what would have happened to the insurance cover in the absence of the breach.[91] The difficulty is evident in insurance practice as some insurers were found not to have sufficiently uniform underwriting practice.[92]

Putting the absence of uniform practice aside, furnishing general underwriting guidelines may be easy for insurers, and helpful to the court, for some simple and consumer-like business insurances, such as general employment insurance. However, it is submitted that given their previous experiences in these types of insurances, business assureds would unlikely fall into any breach in these insurances. Further, with the help of pre-existing guidelines, arguably, the underwriters would have asked

[87] Soyer (n83) 30.
[88] s4-6 of Sch 1 IA.
[89] See *Moltoni Corp v QBE Insurance* [2001] HCA 73, [16]-[18].
[90] Julie-Ann Tarr, *Disclosure and Concealment in Consumer Insurance Contracts* (Routledge 2013) 70.
[91] s28(3) Insurance Contract Law (Australia).
[92] *Ayoub v Lombard Insurance Co* [1989] 97 FLR 285, 287.

for information needed for risk assessment as per the guidelines. Therefore, non-disclosure in simple and consumer-like business insurance is unlikely a concern.

Rather, the non-disclosure would appear more likely in insurances of specialist or unique risks. The presence of some general underwriting guidelines could hardly be helpful in court for these cases as the non-disclosure in business insurance is likely in turn to be 'something rather unique'.[93] Indeed, the Law Commission acknowledged the potential inapplicability of proportionate remedies in specialist risks. Their response to this, regrettably, was:-

> 'That is why we propose to introduce them as a default regime. The parties would be entitled to contract out of proportionate remedies if they wished to do so.'[94]

Respectfully, this is unsatisfactory and somewhat irresponsible. It is noteworthy that contracting out has already been permissible under MIA, as endorsed in *HIH Casualty and General Insurance v Chase Manhattan Bank*.[95] If contracting out has ever been a satisfactory option in response to defects of law, at least in the respect of remedies in

[93] Blackwood (n43) 320.
[94] United Kingdom Law Commission, Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties (Law Com No 204, 2012) paras 9.34.
[95] [2001] 1 Lloyd's Rep 30, [22]-[23].

business insurance, there is no need to reform MIA because, as the Law Commission said, parties to an insurance contract would be entitled to contract out of the undesirable effects of avoidance. In short, the new proportionate remedy may encounter real difficulties in practice when proving the insurers' notional position.

(3) Unwarranted rigid remedy for deliberate or reckless breach

It is agreed that strict punishment is justified for deliberate or reckless breaches and that the current remedies in this respect under IA is to be applauded. However, having acknowledged the argument that fraud vitiates consent, if IA really intends to reshape the law to be less draconian to assureds, it seems there may still be truly exceptional circumstances not justifying the imposition of a single rigid remedy in cases of deliberate or reckless breach. For instances, this could be where the fraudulent misrepresentation constitutes only a *very* small part of the risk,[96] or where the assured itself is a victim of its broker's fraud.[97]

(4) Omission

The provisions on remedy under IA appear to attach too much emphasis on the prospective effect on the policy but fail to consider some retrospective matters which

[96] For example, *Von Braun v Australian Associated Motor Insurers* [1998] ACTSC 122.
[97] For example, *Evans v Sirius Insurance Co Ltd* (1986) 4 ANZ Ins Cas 160-755.

lead to unfairness to insurers.

On the reading of IA, in the absence of any claim and any express contractual stipulation, where there is a breach of duty of disclosure disclosed and the newly-disclosed material would have raised the premium charged, IA seems to provide no remedy for the insurer with regard to the underpaid premium.[98] That is, IA provides no mechanism for the insurer to chase back the difference between the underpaid premium and the premium that would have been charged. Given there is no 'actual' loss suffered by the insurer consequential upon the breach, particularly for careless breach, it seems the insurer will be left only with the remedy to terminate the insurance cover under the general law.

Such omission by IA can also be seen from its failure to provide for the situation, be there a claim or not, where there has been a renewal of policy since the original non-disclosure occurred and where the insurer's notional position for the non-disclosure is to increase premium.[99] Given renewal means formation of a new contract, premium loss under past policies is arguably unrecoverable.[100]

[98] Paul Jaffe, 'Reform of the Insurance Law of England and Wales—Separate Laws for the Different Needs of Businesses and Consumers' (2013) 87 Tulane LR 1075, 1102.
[99] See Samantha Traves, 'Disclosure Obligations in Insurance' in Tina Cockburn and Leanne Wiseman (eds) *Disclosure Obligations in Busine*ss *Relationships* (The Federation Press 1996) 133.
[100] Ibid, 133.

The remedy for any breach of the duty of disclosure in Australia provided in section 28 of the Insurance Contract Law bears great resemblances with that of IA. They both, therefore, share some similar defects. Unlike avoidance where its effect is to restore both parties to the position as if there has never been any insurance contract, IA fails, as it has been in Australia, to provide for the treatment of claims made and paid under the same policy prior to an unearthing of any breach. Although other legal avenues, such as mistake, may be suggested for insurers to recover the paid claims,[101] the situation is, it is submitted, far from clear and satisfactory under IA.

V. Conclusion

It is in no doubt that the current position of the law on pre-contractual duty for business insurance in Hong Kong deserves a change in light of its defects concerning the elements of knowledge and materiality and the remedy. On a literal and superficial reading, the approach of IA in the United Kingdom appears attractive. Indeed, of course, it has its advantages in some way. However, while it must be acknowledged that any new law would create some uncertainties, a closer look would suggest that not the entire IA concerning pre-contractual disclosure should be carried forward to

[101] David Kelly and Michael Ball, *Insurance Legislation Manual* (3rd edn, Butterworths 1995) 115.

Hong Kong. It is particularly noteworthy that IA has never attempted to address problems brought about by the element of materiality in the common law, except having addressed the issue of data dumping. Another major concern under IA is the system of remedy. Given the problems analyzed and shown above, the adoption of such system of remedy should be strongly opposed.

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