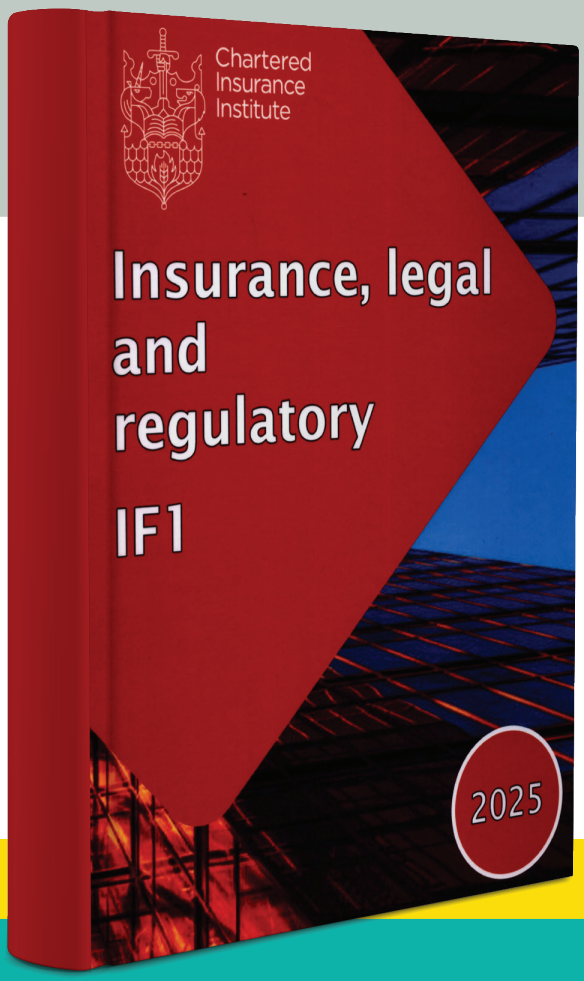

فراخوان ترجمه کتاب

پژوهشکده بیمه

پژوهشکده بیمه، به منظور کمک به گسترش دانش بیمه‌ای، ترجمه کتاب

Insurance, legal and regulatory (IF1)

را در دستور کار خود قرار داده است. لذا از کلیه اساتید، پژوهشگران، صاحبنظران و کارشناسان دعوت می‌شود که در صورت تمایل به ترجمه کتاب مذکور، کاربرگ درخواست ترجمه پیوست را به همراه سوابق علمی و اجرایی خود و ترجمه صفحات ذکر شده با ذکر عنوان کتاب، حداکثر تا تاریخ ۱۴۰۴/۰۷/۲۴ به آدرس ایمیل nashr@irc.ac.ir ارسال فرمایند.

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الف- اطلاعات عمومی

نام و نام خانوادگی	
شغل و سمت فعلی	
مرتبه علمی (ویژه اعضای هیات‌علمی)	
آخرین مدرک تحصیلی و رشته	
آدرس	
شماره تماس ثابت	
شماره تماس همراه	
پست الکترونیک	

ب- سابقه تألیف/ترجمه (حداقل ۳ عنوان از آثار خود را اعلام بفرمائید)

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ردیف	محل خدمت	مدت زمان خدمت

Introduction

Many contracts involve the purchase of a tangible product. A purchaser can inspect a tangible item at the time they buy to check that it is good value. Provided that the seller does not mislead them (for example, by showing a sample that is unrepresentative of the actual product), the law expects the purchaser to satisfy themselves about the obvious properties of the product being bought.

There are some obvious difficulties when trying to apply this principle to insurance contracts, which have until recently been treated as contracts of 'utmost good faith'. This meant, in simple terms, that the insurer and insured both had a duty to deal honestly and openly during their contractual relationship. This is still largely the case, although the law has been modified to reflect the imbalance of bargaining positions between insurers and insureds, with the rules for disclosure set out in the **Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA)** for consumer contracts, and the **Insurance Act 2015 (IA 2015)** for non-consumer contracts.

On the Web
The full content of CIDRA and IA 2015 can be found at *www.legislation.gov.uk*.

Key terms

This chapter features explanations of the following terms and concepts:

Duty of disclosure	Duty of fair presentation	Good faith	Material circumstances
Misrepresentation	Non-disclosure		

A Duty of good faith

Insurance contracts are subject to the legal principle of **good faith**.

Good faith means that disclosure must be made in a reasonably clear and accessible manner. Material representations of fact must be substantially correct. Information about something that is just an expectation or belief must be given in good faith (i.e. honestly).

This means that the parties to a contract must tell the truth in all negotiations before the contract comes into effect.

The duty applies equally to both the proposer and the insurer throughout the contract negotiations. However, it applies rather differently to each party. It is the proposer who has the duty to disclose **material circumstances** about the risk to the insurer. The nature of the subject-matter of the insurance contract and the circumstances surrounding it are facts known mainly by the insured.

The insurer on the other hand must be entirely open with the proposer in other ways. The insurer cannot introduce new non-standard terms into the contract that were not discussed during negotiations, neither can the insurer withhold the fact that discounts are available for certain measures that improve a risk (such as the fitting of an intruder alarm for household contents insurance).

Be aware
You may still hear your colleagues refer to good faith as 'utmost good faith'.

B Duty of disclosure

It has, historically, been implicit in all insurance negotiations that there is a duty to disclose material circumstances. The duty of disclosure was treated as particularly important at the proposal stage, before the contract comes into existence. At common law, once the policy is in force the duty of disclosure would be revived at each renewal date, and insurers would often add specific policy terms to make the disclosure requirement a continuing one.

When considering what should be disclosed, customers were traditionally expected to ask themselves 'What is a material circumstance?' and provide this information.

The definition, which is still relevant today, is taken from s.18(2) of the **Marine Insurance Act 1906 (MIA 1906)**:

> 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.

In this section, we look at the how the law has been modified to a position which reflects the different levels of knowledge of risk and the balance of bargaining powers for consumer and commercial policyholders.

B1 Insured's duty of disclosure – consumer insurance

The **Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA)** came into force on 6 April 2013. CIDRA removes the common law duty on consumers to disclose any information that a prudent underwriter would consider material and replaces this with a duty to **take reasonable care not to make a misrepresentation**.

CIDRA applies to **consumers** and not to business/commercial insurance – the Insurance Act 2015 alters commercial contracts of insurance. Under CIDRA a consumer is someone who takes out insurance 'wholly or mainly for purposes unrelated to the individual's trade, business or profession'. This is wider than the FCA definition of consumer, which is 'any natural person acting for purposes outside his trade, business or profession'.

CIDRA replaces the duty on consumers to volunteer information before taking out insurance, with a duty to take reasonable care to answer insurers' questions fully and accurately. It also sets out a Statutory Code, clarifying the law of agency relationship, provisions for group schemes and the insurance taken out on the life of another.

Other provisions in the Act include safeguards to prevent insurers from including terms in insurance contracts which put the insured in a worse position in respect of pre-contract disclosure and representation than the legislation will permit. One example is the banning of 'basis of contract clauses' which are sometimes found on proposal forms and warrant the truth or accuracy of the statements and make them the basis of the contract.

There have been a number of consequences of this legislation for intermediaries and insurers who have had to change their documentation, websites and ways of working. Insurers in particular have had to make sure they ask specific questions of their potential policyholders, and intermediaries have had to amend their terms of business agreements as well as consider how their agency relationship with the policyholder may impact them.

B2 Insured's duty of disclosure – non-consumer insurance

The **Insurance Act 2015** (**IA 2015**), which came into force on 12 August 2016, extends much of the legislation set out in CIDRA to non-consumer (commercial) insurance contracts.

B2A Good faith

The Insurance Act 2015 states that:

> any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.

It also states that:

> any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.

The concept of good faith continues, but the absolute remedy of voiding policies in the case of any breach no longer exists.

B2B Duty to make a fair presentation

The Insurance Act 2015 changes the obligations on the parties during placement as a new duty of fair presentation applies to non-consumer contracts.

The Act states that the 'insured must make to the insurer a fair presentation of the risk'.

Under this duty, a commercial insured must either:

- disclose to insurers 'every ***material circumstance***' which the insured knows or ought to know; or
- which makes the disclosure in a manner which would be reasonably clear and accessible to a prudent insurer; or
- provide the insurer with sufficient information to put a prudent insurer on notice that it needs to make further enquiries into those 'material circumstances'.

This is a substantial change – the insured must first make a 'fair presentation' of their risk. Insurers must then ask questions and probe for more information about the risk if they are in any doubt. After that exchange of information, insurers should know all they need to know about the risk being offered to them. There should be no need later (such as at the time of a claim) to try to unearth any more material underwriting information that could lead to policy voidance for non-disclosure or misrepresentation.

Be aware
The new duty of fair presentation applies before the contract of insurance is entered into. However, as the Act also deals with issues relating to breaches of duty during any variation process, it can be interpreted that the duty continues through the life of the contract.

B2C Measure of the insured's and insurer's knowledge

IA 2015 sets out what an insured or insurer should know or is expected to know.

Insured
An individual insured knows only:

- what is known to them as an individual; or
- what is known to one or more of the individuals who are responsible for their insurance.

A 'non-individual' insured knows only what is known to one or more of the individuals who are:

- part of the 'senior management team' (those who play significant decision-making roles about the organisation of insured activities); or
- responsible for the insured's insurances.

An insured is not deemed to know confidential information that is known to an individual employed by their agent, where that information has been obtained by the individual from a source unconnected with the insurance in question.

The measure of what the insured ought to know is defined as:

> what should 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).

Information can be held in the insured's organisation or by any other person such as the agent.

The Act specifically states that knowledge includes those things that an insured suspects and about which they would have had actual knowledge, but for deliberately refraining from

confirming/enquiring about the information. Insureds should not therefore turn a blind eye to issues they have suspicions about.

Insurer
An insurer knows something only if it is known to one or more individuals who participate on behalf of the insurer in the decision as to 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 an agent or in any other capacity).

An insurer ought to know something only if:

- an employee/agent of the insurer knows it and ought reasonably to have passed on the relevant information to the individual making the decision whether to take the risk; or
- the relevant information is held by the insurer and is readily available to an individual making the decision whether to take the risk.

An insurer is presumed to know:

- things which are common knowledge; and
- things which an insurer offering insurance of the class in question in the field of the relevant activity would reasonably be expected to know in the ordinary course of business.

Knowledge of both the insured and insurer includes matters that an insured or insurer suspects and about which they would have had actual knowledge but for deliberately refraining from confirming them or enquiring about them.

B2D Agent's duty

In non-consumer (business) insurance the insurer can seek remedy for the breach of the fair presentation of the risk if the insured's agent breaches the duty. Section 4 of IA 2015 regulates this principle in its provision that what is known to the person who is responsible for the insured's insurance is attributed to the insured.

In common law, a person is responsible for the acts of their agent and so a careless or reckless misrepresentation by an agent is treated as if it had been made by the principal. This principle is maintained in consumer insurance by CIDRA, which states:

> Nothing in this Act affects the circumstances in which a person is bound by the acts or omissions of the person's agent (s.12(5)).

Under CIDRA, an intermediary is considered to be the **insurer's agent** if the intermediary:

- is the appointed representative of the insurer;
- collects information from the consumer with express authority from the insurer to do so; or
- has authority to bind the insurer to cover and does so.

In all other cases it is presumed that the agent is the **consumer's agent** unless, in light of the relevant circumstances, the consumer proves otherwise.

B3 Insurer's duty of disclosure – non-consumer insurance

The insurer also has a duty of disclosure to the insured. In order to fulfil this duty, the insurer must also behave with good faith, by, for example:

- notifying an insured of a possible entitlement to a premium discount resulting from a good previous insurance history;
- only taking on risks which the insurer is registered to accept (avoiding unenforceable contracts); and
- ensuring that statements made are true: misleading an insured about policy cover is a breach of good faith, shown in ***Kettlewell v. Refuge Assurance Company*** (**1909**).

Question 5.1

To whom does the duty of disclosure apply in contracts of insurance?

a. The proposer only. ☐

b. The insurer only. ☐

c. Both the proposer and insurer. ☐

d. An interested party. ☐

B4 Effect of FCA rules

Financial Conduct Authority (FCA) rules require insurers and intermediaries to provide sufficient information about the contract before its conclusion so that a prospective customer can make an informed decision about whether to buy it or not.

One element of the information that must be disclosed to a client or prospective client is a statement of their demands and needs. There is flexibility in the way that this may be done, but the responsibility lies with the adviser to show how the demands and needs are met by the product(s) offered. The fulfilling of this requirement implies that there is a comprehensive fact gathering exercise that must be undertaken, placing the onus for establishing the facts upon the adviser.

The FCA imposes restrictions on rejecting claims where consumers have failed to disclose information to insurers or have misrepresented facts. For this reason, the FCA requires firms to ensure a customer knows what they must disclose by:

1. explaining to the customer the responsibility of consumers to take reasonable care not to make a misrepresentation and the possible consequences if a consumer is careless in answering the insurer's questions or if a consumer recklessly or deliberately makes a representation;
2. explaining to a commercial customer the duty to disclose all circumstances material to a policy, what needs to be disclosed and the consequences of any failure to make such a disclosure;
3. ensuring that the commercial customer is asked clear questions about any matter material to the insurance undertaking; and
4. asking the customer clear and specific questions about the information relevant to the policy being arranged or varied.

The rules are generally more onerous on insurers of personal and private policies, but what about commercial insurers and their duty of disclosure? Insurers of commercial risks have the option of applying these more rigorous standards in their dealings with commercial clients, though there is no obligation upon them to do so, providing they can demonstrate that they are treating their customers fairly. In some areas, such as gathering information material to the risk, it is clearly in their best interests, for example, to ensure that they ask appropriate questions on the proposal form and provide clear details of the policy cover being provided.

B5 Disclosure post-contract

B5A At inception

Under both common law and recent law reforms, the duty of disclosure starts when negotiations begin and ends when the contract is formed (at inception). From that point until renewal negotiations take place there is no requirement for the insured to declare material circumstances, unless these affect the policy cover.

For example, if the value of property increases or a car is sold and another purchased it is clear that the insurer must be advised because the policy requires a specific endorsement to accommodate the change in risk. However, a policyholder does not need to disclose a conviction for fraud (which would be a material fact for all general insurance policies) until the following renewal. The exception would be if there was a specific policy condition which extended the duty so that it became a continuing requirement.

Consider this...
A motor policy was taken out for a small van. While the policy was in force, the insured joined an amateur band and the van was then used to transport equipment and some band members. Do you think that the insured should notify the insurers of this change, and if so, when and why?

Once the insurance starts from that point until renewal negotiations take place there is no requirement for the insured to declare material information, unless this affects the policy cover. For example, if a vehicle changes under a motor policy the new vehicle must be declared and noted on the policy. In this case the new occupation would not need to be declared until renewal unless the policy contains a condition which extends the duty so that it becomes a continuing requirement.

B5B At renewal

At the renewal of a policy, the insured's duty of disclosure is revived for general insurance policies.

All general insurance policies, such as fire, theft, liability and certain marine and aviation policies, are contracts that are renewable, usually after twelve months. When the contract ends it is customary to offer renewal terms. If accepted, a new contract is formed. The duty of disclosure is revived during the period of negotiation and applies as for new contracts.

It is important that you distinguish between the requirements for short-term policies and those for long-term policies (such as life and pensions). Once the requirements for disclosure have been met in the negotiations leading up to the inception of a long-term contract, the duty of disclosure ceases. Once the policy is in force, even if a material circumstance, such as the life insured's health, changes, it does not need to be declared. The only requirement for the policy to continue is that the insured pays the premiums when they fall due.

B5C Continuing requirement

Insurers are often concerned that their rights at common law are limited because they do not need to be advised of certain material mid-term changes to a risk that they insure. They deal with this situation in different ways for different classes of insurance. Not all insurers adopt the same approach, but the following will illustrate some of the issues.

Commercial property insurance	A policy condition requires continuing disclosure of removal to another location, or circumstances that increase the risk of damage.
Motor insurances	There is usually an onerous policy condition that requires continuing disclosure of all material changes by the insured, during the currency of the policy.
Public liability insurance	The continuing requirement for disclosure for this class of business arises from the fact that insurers tightly define 'the business' of the insured in the policy. This means that the insured must notify any extension of activities for cover to apply. A condition requiring ongoing disclosure of material circumstances may be coupled with this.

B5D On alteration

During the term of a general (non-life) policy, it may be necessary to change the policy terms. The insured may wish to increase the sum insured, change the description of the property or add another driver to a motor policy. Where a change results in the need for an endorsement to the policy, the duty of disclosure is revived in relation to that particular change.

B5E Limitation of an insurer's right to information

In many cases it is the completion of a proposal form by the proposer that brings about insurance. The insurer constructs the proposal form with the intention that it will draw out all the relevant information relating to the risk. However, even if a specific question is not asked, the duty of disclosure means that the proposer must still disclose any information that is material unless they are a 'consumer' as defined under CIDRA.

Following the implementation of IA 2015, non-consumer customers are only under a duty to make a fair presentation of the risk (unless the insured and the insurer have contracted out of this provision of the Act). If the parties have contracted out of this provision then all

material circumstances must be disclosed whatever questions are posed by the insurer as the duty of good faith still applies.

Refer to
Duty of fair presentation explained in *Duty to make a fair presentation* on page 5/4.

If a question is asked, but the proposer only provides partial information in response and the insurer does not seek further details, then the insurer is deemed to have waived its rights regarding this information. The proposer is not considered to have failed to disclose a material fact in these circumstances. This applies to answers left blank on proposal forms or a vague description of a business. It is up to the insurer to follow up with suitable additional questions.

Consider this...
A question on a proposal form asks the proposer for details of previous losses within the last five years. The proposer answers the question by saying 'see your records'. Would the insurers have a right to decline to pay a claim if the records, which they had not consulted, subsequently revealed a claim within the five-year period?

Even though such losses might well be material information, the insurer has limited what it regards as material information and thus waived its right to the information.

If an insurer clarifies what they mean by a 'material circumstance' by defining exactly what is required in answer to a question on a proposal form, they are unable at a later date to claim that they required wider or further disclosure. In effect, they cannot claim that there has been a failure to disclose something material. This will be the case in any situation where the insurer has requested what they regard as relevant information relating to a defined period.

When there has been a breach of the duty of good faith by the insured (subject to the exceptions noted above), the insurer will generally have the right to avoid the policy. Timing will vary depending upon the circumstances. If an insurer chooses not to invoke the right to avoid the policy, they may simply waive their right and treat the policy as remaining in force.

However, insurers must exercise care because their conduct may prevent them from claiming that a breach of the disclosure duty has occurred. For example, if an insurer knows that the insured failed to disclose a material circumstance in discussions leading up to inception of the policy, the insurer has the option to avoid the contract *ab initio* (from the beginning). However, the insurer must not act in a way that suggests that they have waived their right to avoid the contract.

For example, an insurer could be writing to the insured, invoking a seven-day cancellation clause. It is clear that in doing this the insurer accepts that the policy is in force up to the date of cancellation. The insurer has thus waived its right to avoid the policy on grounds of ***non-disclosure*** at a later date. The effect of this would be that, should a claim occur between inception and the cancellation date, the insurer could not avoid payment of the claim on the grounds of non-disclosure.

The remedies available to insurers for misrepresentation or a breach of the duty to make a fair presentation are described in *Remedies available to insurers under CIDRA* on page 5/12 and *Remedies available to insurers under IA 2015* on page 5/13 of this chapter.

C Material circumstances

The **Insurance Act 2015 (IA 2015)** states that 'a circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms'.

Examples include:

- special or unusual information relevant to the risk;
- any particular concerns which lead the insured to request insurance to cover the risk; and