

CHAPTER 24 INSURANCE LAW

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SECTION 1 INTRODUCTION: INSURANCE AND THE LAW

Aim of Insurance

24.1.1 Insurance, which involves the allocation and spread of risk, is an extremely important part of a country's financial sector. It transfers the risk undertaken by an individual or an organisation in a particular activity onto a company that is paid to assume that risk (known as the insurer). By taking out an insurance policy on that activity, the individual or organisation (known as the insured) is able to pass on the risk of an adverse event occurring. The risk of future losses appears to be borne by the insurer, but by charging a fee or premium for this service, the insurer is effectively spreading the loss amongst all those who pay for the privilege. Nevertheless, the aim of insurance would be achieved – no individual has to bear the risk of loss himself.

Origins

24.1.2 It is generally agreed that marine insurance is probably the oldest form of insurance. Other types of insurance developed in due course, like fire insurance and life insurance, together with the legal principles governing insurance.

Types of Insurance

24.1.3 It is helpful to identify the various types of insurance that exist in order to distinguish their features, purpose, and the application of legal principles. The classifications seek to compare and contrast the types of insurance commonly found today.

Marine and Non-marine Insurance

24.1.4 Marine insurance refers to all the types of insurance that deal with maritime risks. This is a very specialised category which is usually governed by the marine insurance legislation of the relevant country. Non-marine insurance refers to all other types of insurance that do not involve maritime risks.

Life and Non-life Insurance

24.1.5 This is a very crucial distinction in insurance law as the legal principles governing the two categories differ in many respects. Indeed, the application of certain common law principles and statutes depends specifically on whether it is a life or a non-life policy. Most insurance statutes separate insurance business into life business and general business.

24.1.6 Life policies may be obtained on one's own life, or on another's, subject to the need for an insurable interest. Where the policy insures the life of another, the term used to describe that person is "life insured". Of course, with an own-life policy, the insured and the life insured are the same person.

24.1.7 Non-life insurance denotes all types of insurance that do not have a life as the subject matter of the policy. These range from fire insurance over property to motor insurance to insurance against legal liability. However, personal accident policies are categorised together with life insurance, as they are seen to be related to or incidental to the latter. The insurance statutes would refer to non-life insurance as general insurance business.

24.1.8 An important characteristic is the indemnity nature of non-life insurance. Non-life insurance is meant to indemnify (protect) the insured from any loss he may suffer; as such, he may not recover more than that amount. Life insurance, on the other hand, is contingent on death and the insurer simply pays out the agreed sum. As the value of life cannot be easily measured, there is no legal limit to the amount of the sum insured.

First Party and Third Party Insurance

24.1.9 First party insurance refers to insurance that is taken up by an insured on his own life or property, and under which he, or his beneficiaries, will make a claim for loss suffered. Third party insurance insures against one's potential liability to make payment to a third party who succeeds in a legal action. It is also known as liability insurance. Third party insurance is, thus, non-life in nature, as the subject matter of the contract is one's legal liability.

Sources of Insurance Law

24.1.10 Insurance law has its roots in the law of contract since we are largely concerned with the obligations and liabilities between the two contracting parties in the insurance relationship, namely, the insured and the insurer. In addition to the common law, various statutes like the Insurance Act (Cap 142, 2002 Rev Ed) and the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) govern the law in this area.

Regulation of Insurance

24.1.11 The Singapore Government closely regulates the carrying on of insurance business. The actual regulatory authority appointed to oversee the insurance industry is the Monetary Authority of Singapore. The Insurance Act lays down the various provisions which regulate insurance business and seeks primarily to protect the insuring public from being left without insurance coverage by failed companies and unscrupulous businesses.

24.1.12 The regulation of insurance is thus important to instil confidence in the public and to ensure that minimum standards are met in this industry. In that way, the regulation of insurance refers to the authorities' control over the actions and activities of insurers, whereas the legal principles derived from the different sources of law govern the insurance relationship between the parties to the insurance contract.

Scope of the Insurance Contract

24.1.13 The insurance relationship is formed between the insured and insurer when the parties enter into a contract with each other. It may not be easy to decide on the exact nature of the contract of insurance. The relevant statutes on insurance do not provide us with an all-encompassing and clear definition. A distinction may also have to be made between an insurance policy and an insurance contract, as the two may not necessarily be the same.

24.1.14 Without knowing what constitutes an insurance contract, it would be difficult to decide whether a certain contract falls within the ambit of the statutory and common law principles governing insurance. On the other hand, some laws may not apply to insurance contracts and we should thus exclude their application accordingly. A good example is the Unfair Contract Terms Act, which specifically excludes a contract of insurance from its operation. In addition, it is important to clarify which contracts ought to be regulated as insurance business by our regulatory authority. If a contract has the characteristics of an insurance contract as legally defined, then it is subject to regulatory control.

A Legal Definition of Insurance

24.1.15 The attempt at a legal definition should take into account the major characteristics of insurance and, consequently, the contract of insurance should comprise the following features. These features are by no means exhaustive but the following five features are minimum requirements without which the transaction cannot be defined as a contract of insurance – see *Medical Defence Union v Department of Trade* (1979) 2 WLR 686.

24.1.16 The assumption of risk is central to insurance since it is the reason why insurance was created in the first place. This risk is borne by the party that is paid to assume it and the type and extent of risk actually borne would depend on what the parties have agreed to.

24.1.17 There must be an uncertain future event as no one knows when, or if, the event insured against will occur. Nevertheless, the party paying for insurance is essentially paying for peace of mind, with the security of being able to transfer any loss that does in fact occur onto the party bearing the risk.

24.1.18 The insured must have an insurable interest in the subject matter of the insurance, whether this is the life or the property in question. Without insurable interest, the contract would be regarded as a gaming or wagering contract and would, therefore, be invalid.

24.1.19 In order for any contract to be enforceable, it must first be legally binding on the parties. In the case of insurance, the insurer must be under a legal obligation to pay the other party when the uncertain event occurs.

24.1.20 A contract of insurance must pay money or money's worth to the insured as compensation for his loss when the insured event occurs. After all, that is the point of taking up insurance in the first place.

24.1.21 Other features which are invariably part of any commercial insurance contract would include a premium and a policy. However, the First Schedule to the Insurance Act states that "'Policy' includes any contract of insurance whether or not embodied in or evidenced by an instrument in the form of a policy, and references to issuing a policy shall be construed accordingly."

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SECTION 2 FORMATION AND CONSTRUCTION OF INSURANCE CONTRACT

Formation of Contract

24.2.1 The general principles of contract law apply to the insurance contract with respect to its formation. For example, the contract need not be in writing and oral contracts are acceptable. However, there are statutory requirements of writing for certain types of insurance contracts such as motor insurance, marine insurance and life insurance. It is also standard practice amongst insurers to issue a policy document with the result that oral insurance contracts are seldom found.

Elements of a Contract

24.2.2 Given that the ordinary legal rules apply, the four legal elements that are essential to create a binding contract are offer, acceptance, consideration, and intention to create legal relations.

24.2.3 The offer may be made by either the insured or the insurer, although it is usually the insured who makes it. Acceptance can be in the form of the insurer's act in issuing the insurance policy, or in receiving and retaining the premium. This would usually constitute unconditional acceptance.

24.2.4 Once agreement has been established, consideration must be shown to support the agreement. For the insured, he provides consideration through the payment of premiums or through a promise to pay. Actual payment of the premium is not a legal pre-requisite to the validity of the insurance contract, unless otherwise stipulated. The insurer provides consideration through its undertaking to bear the risk insured against, and to satisfy the insured's claims in the event of loss.

24.2.5 Lastly, there must be the intention to create legal relations. The law presumes that there is the necessary intention to create legal relations where the parties enter into a commercial agreement. This intention can be safely presumed given the nature of the insurance contract.

24.2.6 Once these four elements can be shown, the contract is legally binding and may be enforced against the party in breach of the contract.

The Proposal Form

24.2.7 The proposal form is a standard document prepared by the insurer which usually contains questions on the insured's personal particulars, and requires him to provide information relevant to the proposed insurance cover. Although an offer may be made by either party, in practice, it is usually made by the proposed insured when he completes the proposal form and returns it to the insurer. If the insurer accepts the proposal, a contract is formed. Sometimes, the insurer may qualify its acceptance in which case it becomes a counter-offer, leading to different outcomes.

Counter-offer by Insurer

24.2.8 The insurer may qualify its acceptance of the proposer's offer by stating that acceptance is subject to payment of the first premium. As it is now up to the proposer to accept the insurer's counter-offer, it appears that his act of making payment should then become his acceptance. However, the insurer would be bound by its counter-offer only if the risk remained the same. If the risk changes, the insurer's counter-offer is no longer a continuing offer which the proposer is entitled to accept. In addition, if the insurer had accepted the premium tendered without knowing about the change in risk, it could have avoided liability anyway on the ground of non-disclosure.

Capacity of Parties

24.2.9 Under the Insurance Act (Cap 142, 2002 Rev Ed), the insurer must be a registered company or a society registered under the Co-operative Societies Act (Cap 62, 1985 Rev Ed). Under company law, a company's capacity to contract is limited by its memorandum and articles of association. If it acts beyond its powers, the contract is void, subject to statutory exceptions to protect the innocent insured who has unknowingly entered into a contract with the errant insurer.

24.2.10 In general, an insured who lacks capacity to contract may be a minor, or a person who was mentally unsound or intoxicated at the time of contracting. The problem that an insurer faces should it contract with a minor is that the contract may be unenforceable against the minor. In most cases, this involves the non-payment of premiums by the under-aged insured, which the insurer would be unable to enforce. The common law age of majority in Singapore is 21 years. Despite this, section 58 of the Insurance Act states that anyone above the age of ten shall be treated as a contracting party with full capacity, subject to the proviso that a person under 16 years of age needs the written consent of his parent or guardian. This provision enables minors to enter into insurance contracts without the problems of minority hanging over them.

Temporary Cover

24.2.11 In various types of insurance, insurers commonly provide the proposer with temporary insurance cover before deciding whether to accept the risk proposed and thus issue a policy. Despite the fact that the parties are still in the negotiation process, such cover-notes are valid contracts which usually include the insurer's standard terms and conditions found in the policy. As per the usual rules of contract, the insured must communicate his acceptance to the insurer, because if he does not do so, the temporary cover will not be effected.

Standard Terms in Insurance Contract

24.2.12 Certain essential matters must be agreed upon by the parties before a proper insurance contract can be formed. The material terms found in any insurance contract include: parties to the contract, subject matter of the insurance, nature of the risk insured against, duration of the insurance, amount of insurance (sum insured), and amount of the premium. It is also standard practice for the insurer to state in the proposal form that the proposer's offer is subject to the insurer's usual terms and conditions.

Construction of Contract

24.2.13 There is no legal requirement that insurance documents be drafted in a certain way. To construe the insurance contract, we have to look at the principles of construction that are applicable to all written contracts. The objective of construction is to give effect to the intention of the parties as expressed by the words used in the contract. This issue usually arises when the insured wishes to make a claim and the question is whether a particular loss falls within the ambit of the policy.

Principles of Construction

24.2.14 Since the question of construction is a question of law, once a particular word or phrase has been ascertained by any prior court ruling, that judicial decision must be followed according to the doctrine of precedent.

24.2.15 The intention of the parties, as determined objectively from the whole of the policy, prevails. The court should not construe a term in isolation from the rest of

the policy. Thus, we should not refer only to the particular clause under scrutiny, but must look to the entire policy for guidance.

24.2.16 Being standard form documents, insurance policies are invariably printed by the issuing insurer. Sometimes, in order to tailor the contract more specifically to the insured's purposes, type-written or hand-written words may be inserted into the policy by the parties. The inserted words will then prevail over the printed standard words as they represent the immediate language and terms selected by the parties themselves to express their intention.

24.2.17 The contracting parties are presumed to intend, as reasonable people, to use words and phrases in their commonly understood and accepted sense. It will therefore be presumed that the ordinary meaning applies in any given situation, unless circumstances suggest otherwise.

24.2.18 The ordinary meaning will not be used where the word has acquired a legal, technical or business meaning. This happens when the word describes a criminal offence, is a term of art in a particular profession, or has acquired a particular meaning after long usage in that trade or business (i.e. jargon).

24.2.19 The ordinary meaning will also be modified if the context in which the words appear show that the parties cannot have intended them to be read in their usual sense. For example, a household policy may insure against loss from "storm, tempest or flood". Should water seep in up to a level of three inches and cause damage, the insured may try to argue that his house was "flooded" and thus covered by the policy. However, if we take the words in context, "storm" and "tempest" both describe a much stronger movement of water than a natural seepage up to three inches. Thus, the word "flood" in this context, would not cover the insured.

24.2.20 The contra proferentem rule applies where words are ambiguous and capable of more than one meaning. This means that any ambiguities are to be construed against the party that drafted the words, invariably the insurer. As such, they will be resolved in favour of the insured.

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SECTION 3 INSURABLE INTEREST

The Need for Insurable Interest

24.3.1 Insurable interest is a key concept in insurance law. Without it, there is no contract of insurance to speak of. This important concept is even codified in many, if not all, common law countries. Wagering or gambling contracts are void and illegal as they are against the public interest. However, such wagers can be easily disguised as insurance contracts, whereby the insured becomes entitled to something (a gain) upon the happening of some event that is uncertain at present, a characteristic shared with wagers. In order to prevent this, the legislators decided that the insured had to have some interest in the subject matter of the insurance. Wagering would

hopefully cease if the insurance proceeds were no longer the sole reason for such policies.

24.3.2 Insurable interest thus refers to the relationship that must exist between the insured and the subject matter of the insurance, whether a life or an inanimate object. This relationship is measured in the form of a financial interest. Therefore, if you do not have insurable interest in a particular life, or object, you cannot take up a valid insurance contract on it, and you will not be able to enforce it later to obtain the proceeds.

Insurable Interest in Life Insurance - Nature of Insurable Interest

24.3.3 At common law, a person is presumed to have an insurable interest in his/her own life and in the life of his/her spouse. One may enforce such contracts without further proof of interest. Other than these two instances, insurable interest must be proved in all other lives in order to effect a valid contract.

24.3.4 Singapore follows the English position where insurable interest need not be shown in one's own life and that of one's spouse. However, the number of exceptions has been expanded by statute. Section 57 of the Insurance Act (Cap 142, 2002 Rev Ed) adds two instances, namely, the insured's child or ward who is under the age of majority at the time the insurance is effected, and anyone on whom the insured is at that time wholly or partly dependent. As the latter phrase can be construed very widely, this may lead to many cases where interest is presumed.

24.3.5 The scope of the law is further reinforced by two other requirements in section 62 of the Insurance Act. First, it is not enough that the insured must have an insurable interest in the life insured. Interest is also required from a person interested in or benefited by the policy (a person "for whose use or benefit or on whose account" the policy is made). The second requirement is that the name(s) of the benefited person(s) must be inserted in the policy. The aim of both requirements is to ensure that the law is not avoided by simply disguising the lack of insurable interest through the life insured effecting a policy on his own life. So, a woman may effect an own-life policy with the sole intention that her husband is to benefit from it upon her death. The husband would then be required to have the necessary interest and his name must also be inserted in the policy.

Meaning of Insurable Interest

24.3.6 In the absence of a statutory definition, the meaning of insurable interest is derived largely from case law. It is generally accepted that the insured must show that he would suffer financially by the loss of a legal right or the assumption of a legal obligation/liability on the death of the life insured. So a creditor has insurable interest in his debtor's life because the creditor loses his right of action against the debtor on the latter's death.

24.3.7 A mere expectation or hope of future financial benefit from the life insured's continued existence is insufficient. There must be an existing interest. If the life insured owes moral, as opposed to legal, obligations to the insured, this is not recognised either. So a dependent parent who takes up a policy on an adult

child's life would not have insurable interest unless he can show the loss of some legal, as opposed to moral, obligation on the death of the child.

Value of Insurable Interest

24.3.8 Section 57 of the Insurance Act further states that the insured cannot recover more than the amount of the value of his interest. The policy money paid out cannot exceed the amount of the insurable interest present at the time the policy was effected. Given that insurable interest is measured in financial terms, the extent of the interest depends on the contractual terms, the nature of the relationship between the parties, and the life in question.

24.3.9 This restriction on the value applies only to life contracts other than those within the exempted categories. For the latter, the law does not place a fixed value on them. One may therefore insure these lives for an unlimited amount since insurable interest is presumed.

Time for Insurable Interest

24.3.10 The Insurance Act states that insurable interest must be present at the time the policy is effected. Life policies are not contracts of indemnity because the amount recoverable under such policies is not limited by reference to the loss suffered by the insured. Thus, the insured must have insurable interest at the time the policy is effected but need not have insurable interest at the time of the loss (ie, the death of the life insured).

Insurable Interest in Non-life Insurance - Nature of Insurable Interest

24.3.11 Non-life insurance refers to the insurance of goods or real property (ie, land and houses). Unlike life insurance, there is no statutory requirement of insurable interest for non-life insurance. Nevertheless, interest is still required because non-life insurance contracts are contracts of indemnity, and wagering or gaming contracts are disallowed by statute.

24.3.12 Insurances of property are contracts to indemnify the insured against a loss that he actually suffers, and only to the extent of that loss. The law thus requires the insured in a non-life insurance contract to have an interest in the insured property, otherwise it would simply mean that no loss is suffered if the property is destroyed. The presence of insurable interest shows that the insurance contract is not a gaming contract. That is why insurable interest must also be shown for non-life insurance, despite the lack of specific legislation requiring it.

Meaning of Insurable Interest

24.3.13 Insurable interest in non-life insurance means a right in the property, or a contractual right, which may be lost upon the happening of an adverse event which affects the insured's possession or enjoyment of the property. In other words, a person would have insurable interest in a thing if he would be prejudiced by its loss because he has a legal, equitable or contractual right to the thing insured. A legal or equitable right over property refers to one's extent of ownership in that property. A

person with a contingent or future interest would not have insurable interest, namely, a mere expectation of loss should property be destroyed. Moral certainty of loss - a real economic interest in the well-being of the insured property but with otherwise no legal, equitable or other contractual right in it - is also not recognised.

Value of Insurable Interest

24.3.14 Under the principle of indemnity, the insured may not recover more than the amount of his loss. As non-life contracts are essentially contracts of indemnity, the insured may only recover to the extent of the loss actually suffered. If he has over-insured the property, only its actual value may be recovered at the time of the loss.

Time for Insurable Interest

24.3.15 The principle of indemnity again requires insurable interest at the time of loss. Unlike life insurance which is governed by statute, non-life insurance is governed by common law principles. The point of time at which we determine the amount recoverable to the value of the insured's interest is the time when the loss is actually suffered.

Effect of no Insurable Interest

24.3.16 The Insurance Act will regard a life policy without insurable interest as illegal and void. Without insurable interest, the insured will not be able to recover anything under the policy as the courts will refuse to enforce the contract.

24.3.17 Unlike life insurance, there is no statutory prohibition of non-life contracts that lack insurable interest. They would however be covered by section 5 of the Civil Law Act (Cap 43, 1999 Rev Ed) which strikes down a goods policy that is actually a wager. Apart from this, there is nothing else which is more specifically related to insurance contracts. Nevertheless, the Act and the principle of indemnity would together enforce the requirement of insurable interest in non-life insurance as an implied term. If so, such a contractual implication may be waived if the construction of the contract allows this interpretation.

Return of Premiums Paid

24.3.18 The insured is usually entitled to recover his premiums where there has been a total failure of consideration on the contract. Illegal contracts are one such category of contracts but the general rule is that the courts will not entertain any action to enforce such contracts. Thus, any premiums paid under an illegal contract cannot be recovered. This would affect insurance contracts due to the position of both the Insurance Act and section 5 of the Civil Law Act on illegality due to lack of insurable interest.

24.3.19 An exception is where the parties to the insurance contract are not in pari delicto (or, not equally at fault). An insured who is trying to recover the premium may be less blameworthy than the insurer if the insurance agent acted fraudulently

and induced the insured to enter into a contract which he knew to be illegal for lack of insurable interest. The premiums paid would then be recoverable by the insured.

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SECTION 4 DUTY OF GOOD FAITH

The Doctrine of Non-disclosure

24.4.1 Contracts uberrimae fidei (meaning “utmost good faith”) are an entire class of contracts of which the insurance contract is a well-known example. The duty of good faith in insurance refers to both the insured’s and the insurer’s duty to act in the utmost good faith towards each other before the contract is concluded. The doctrine of non-disclosure is a unique aspect of uberrimae fidei contracts, since an omission to do something is usually not a legal liability in the course of normal contracting. However, the omission of a material fact by the parties to an insurance contract may significantly affect the contract. The law thus requires one party to reveal to the other every fact and circumstance which is material.

Reason for the Doctrine

24.4.2 The early English case of *Carter v Boehm* (1766) 3 Burr 1905, is often cited as follows: “Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.”

24.4.3 Clearly, if the law did not impose this duty on the parties, one may be tempted to leave out information which may result in the contract being less favourable to oneself. However, if an insured were to keep back such material information, the insurers would be prejudiced. They would mistakenly set a lower premium, or accept the application thinking that the insured is fine, only to have his estate file a death claim shortly. Hence, the law requires that all material facts are revealed, otherwise the policy is voidable.

Role of the Proposal Form

24.4.4 The importance of the proposal form in the duty of good faith is seen in two ways: when the proposer is filling in the form, he has to ensure that he answers the questions correctly and carefully, without making any misrepresentations. He is further obliged to fully disclose all material facts relating to the risk, even though the insurer has not asked any specific questions about these facts.

24.4.5 Section 24(4) of the Insurance Act (Cap 142, 2002 Rev Ed) ensures that the duty of good faith is kept by stating: “No Singapore insurer shall use in the course of carrying on insurance business in Singapore a form of proposal which does not 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." An insurer that contravenes this provision commits an offence and the penalty on conviction is a fine not exceeding \$5,000. The insurer is thus obliged to alert the insured of his duty to disclose on pain of legal sanctions.

Duration of the Duty

24.4.6 Even at the early stage of completing the proposal form, the insured has to disclose all material facts even if such facts are not specifically asked for in the form. The insured's duty to disclose ends when the contract is made as a continuing duty of disclosure on the insured would be unfair and oppressive.

24.4.7 Certain types of insurance contracts (eg, fire policies) commonly require the insured to disclose material facts after the conclusion of the contract by means of an increase of risk clause. This term requires the insured to disclose all subsequent facts that materially increase the risk. However, an increase of risk clause requiring disclosure after the contract takes effect only when the increase is permanent and habitual.

The Test of Materiality

24.4.8 Not all facts must be disclosed by the parties under the duty of good faith: only material non-disclosures and material misrepresentations will result in the contract being avoided.

24.4.9 A material fact is one which would influence the judgement of a prudent (or reasonable) insurer in fixing the premium or determining whether he will take the risk. The test clearly implies that it would be irrelevant if a specific insurer considered a fact to be material, if the prudent insurer thought otherwise. It is therefore an objective test.

24.4.10 The House of Lords in *Pan Atlantic Insurance Co Ltd & Anor v Pine Top Insurance Co Ltd* (1994) 3 All ER 581, held that the undisclosed facts must have been taken into account by the prudent insurer when assessing the risk, or made an impact on decision-making. The undisclosed facts need not bring about decisive action on the part of the insurer in raising premiums or rejecting the risk. However, even if the undisclosed facts are material, the particular insurer (rather than the hypothetical prudent insurer) can avoid the policy only if the non-disclosure induced it to make the existing contract. In other words, if it had not been misled, it would have negotiated for a different contract.

Instances of Material Facts

24.4.11 Material facts usually relate to either the physical or moral hazard. The physical hazard refers to the physical condition or situation of the insured, or the subject matter of the insurance.

24.4.12 The moral hazard refers to the moral integrity of the insured. This commonly covers the insured's insurance history, including his claims record and his criminal history. The insured's insurance history includes previous refusals to insure

him. In particular, his negative insurance history could indicate that he cannot be trusted or that he is a high-risk client.

What the Insured Knows

24.4.13 It is irrelevant that the insured does not know he is under a duty to disclose. There is no difference between innocent non-disclosure and intentional non-disclosure. However, a person cannot disclose what he does not know, and the duty of good faith does not require this of him. The duty to disclose also applies to statements of fact, not statements of opinion.

Facts Outside the Duty

24.4.14 As the duty to disclose places a rather great burden on the insured, the law has allowed for certain instances whereby this duty is presumed to be discharged. The first involves facts which are matters of common knowledge and which the insurer already knows about or is presumed to know. Facts which diminish the risk and facts of which the insurer waives disclosure are likewise exempt from the duty.

The Insurer's Duty to Disclose

24.4.15 The insurer's duty to disclose is regarded as less significant in practice and has therefore not attracted as much attention as the insured's duty. Nevertheless, when things go wrong, the insured must be given a similar opportunity to rely on the doctrine of non-disclosure.

24.4.16 The House of Lords opined, albeit obiter, in *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* (1991) 2 AC 249, that an insurer owes a duty to disclose material facts to the insured. However, the only remedies available would be avoidance of the contract and recovery of premiums paid. Damages cannot be claimed for breach of the duty. The insurer's duty of disclosure was stated to be the disclosure of all facts known to the insurer that are material to the risk insured against, or to the chances of recovering a claim which a prudent insured would take into account when deciding whether to place the risk with the insurer.

Effect of Non-disclosure

24.4.17 The primary effect of non-disclosure is that the other party may elect to avoid the contract on discovering the full facts. The contract is said to be voidable ab initio, and the contract is treated as if it never existed. As such, premiums paid are recoverable by the insured on the ground of total failure of consideration, unless the insured was guilty of fraud. Monies paid out by the insurer are also recoverable as money paid out under a mistake of fact.

Misrepresentation by the Insured

24.4.18 An insurer may avoid the contract of insurance if it was induced to enter into it by a misrepresentation of a material fact, made by the insured before the contract was entered into. As such, misrepresentations are usually made by the

insured when completing the proposal form. Apart from the added element of materiality which arguably limits the insured's liability for his false statements, the legal principles here are similar to that under general contract law. As a means of avoiding the contract, it is usually considered less important than the doctrine of non-disclosure and has often been subsumed by it as a result. Nevertheless, it is different from non-disclosure as misrepresentation focuses on the untruth of statements made by the insured whereas non-disclosure deals with the insured's silence. It is usual for the insurer to plead both grounds of avoidance since the duty to answer questions correctly on a proposal form is also part of the insured's duty of good faith.

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SECTION 5 TERMS IN THE INSURANCE CONTRACT

Special Terms

24.5.1 Under a contract of insurance, the insurer will satisfy claims so long as the insured complies with the terms of the contract and breach of contract is usually the insured's breach. Two types of special terms are commonly found in insurance contracts: warranties and terms descriptive of the risk.

Nature of Warranties

24.5.2 A warranty in general contract law is a less important term of a contract, and the breach by one party of a warranty does not result in a discharge of the other's contractual obligations. In contrast, warranties in insurance contracts are important terms, breach of which automatically terminates the contract of insurance. A warranty in an insurance contract states that a particular state of affairs in the present or the future is a term of the contract and, if it is not made good, the contract is void.

Types of Warranties

24.5.3 A warranty as to a past or existing fact refers to facts as stated up to the time of contract. A continuing or promissory warranty promises that facts will remain true after the contract has been made, that is, during the contract or the insured may promise to do or not to do something. A warranty of intention expresses the intention of the insured at the time the contract was made. A warranty of opinion or belief states the insured's honest opinion or belief.

Creation of Warranties

24.5.4 A warranty in an insurance contract can be created in a number of ways. First, the contract of insurance can classify the term as a "warranty", although that alone is not conclusive that the term is a warranty. It is, however, not necessary for a warranty to be expressly classified as such in the contract. Alternatively, the construction of the wording of a particular term can give rise to a warranty. For a term in an insurance contract to be construed as a warranty, it must be indicated

clearly from the language used in the term that the parties intended it to be a warranty. It is sufficient to create a warranty if the term states that the effect of a breach is the termination of the contract. It is common for warranties to be created through the use of a "basis" clause. The basis clause typically states that the questions and answers and declarations in the proposal form the basis of the insurance contract, and provides that in the event of untruth, the policy is void. The effect of the basis clause is that the questions, answers and declarations in the proposal are made warranties of the contract of insurance.

Effects of Breach of Warranty

24.5.5 Breach of an insurance warranty terminates the insurance contract automatically, by operation of law, but does not give rise to a right to damages. Exact and strict compliance with a warranty is required. A breach of warranty terminates the insurance contract even if the breach is not relevant to the risk or if it did not cause the insured's loss. Section 33(3) of the Marine Insurance Act (Cap 387, 1994 Rev Ed) states that "a warranty, as defined, is a condition which must be exactly complied with, whether it be material to the risk or not; and if it is not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

24.5.6 A warranty as to existing or past facts terminates the contract ab initio because the breach occurred at the commencement of the contract. A breach of a warranty as to the future (also known as a continuing warranty or promissory warranty) terminates the contract from the date of the breach because it was valid up to that date. This means that the insurer will still be liable for a loss that occurred before the breach. A warranty as to opinion is breached if it is wilfully false, for example, where the insured dishonestly or recklessly supplies the wrong answer.

Waiver of Breach of Warranty

24.5.7 An insurer can waive the breach of a warranty. The insured must show that the insurer had proper and complete knowledge of the facts constituting the breach, and that there has been a waiver by express election to affirm the contract, or conduct indicating an intention not to repudiate liability, or a delay which prejudices the insured or the rights of third parties or the lapse of time being itself evidence of an intention to affirm the contract.

Terms Descriptive of the Risk

24.5.8 A term descriptive of the risk refers to a term that is concerned with the circumstances that give rise to a temporary increase in risk. The effect of a breach of a term descriptive of the risk is that the insurance cover is suspended while the term is not being complied with, but non-compliance does not result in a breach of the contract and hence does not entitle the insurer to repudiate the contract. The insurance cover re-attaches when the term is once again complied with.

Unfair Contract Terms Act

24.5.9 In general contract law, exclusion or exemption clauses are subject to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), which renders some terms ineffective and subjects other terms to a test of reasonableness in order to be effective. However, terms in insurance contracts are not subject to the Unfair Contract Terms Act (see First Schedule of the Act).

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SECTION 6 ILLEGALITY AND PUBLIC POLICY

Introduction and Classification of Illegality

24.6.1 The doctrine of illegality affects an insurance contract in the same way as it affects all contracts. Illegality can arise from the nature of the contract itself, or in the course of performance of the contract. The typical insurance contracts are generally not illegal contracts, but the performance of the contract can be affected by illegality. A contract can be illegal because it contravenes a statute or is contrary to public policy.

Statutory Illegality

24.6.2 A statute may expressly or impliedly prohibit the making of a particular contract. For example, section 57 of the Insurance Act (Cap 142, 2002 Rev Ed) provides that the insured in a life insurance contract is required to have insurable interest in the life insured (subject to specified exceptions) failing which the contract is void. Likewise, section 62 of the Insurance Act provides no insurance shall be made by any person on any event where the person for whose use or benefit or on whose account the policy is made has no interest, or by way of gaming or wagering; and every such assurance made shall be void. Hence, insurance contracts that are essentially gaming or wagering contracts in disguise are void and unenforceable.

24.6.3 Sometimes, however, a statute may prohibit a contract without making it void. An example is found in section 3 of the Insurance Act which provides that subject to the provisions of the Act, no person shall carry on any class of insurance business in Singapore as an insurer unless the person is registered by the Authority (Monetary Authority of Singapore) under the Act in respect of that class of business. Section 35, however, makes express provision for saving the validity of the contract of insurance with unregistered insurers as it states that contravention of the provision shall not invalidate any policy or contract of insurance.

Illegal Performance

24.6.4 An insurance contract that is legal at its inception may be affected by illegality if it is used by one of the parties for the furtherance of an illegal purpose. For example, a claim under an insurance contract is repugnant to public policy if the loss was caused by the insured's criminal conduct. The courts will not assist an insured in his illegal conduct and will not allow him to benefit from his crime by claiming an indemnity from his insurer.

Life Insurance

24.6.5 A person who murders the life insured cannot benefit from a contract of life insurance because a murderer should not be allowed to benefit from his crime. So a wife who murdered her husband was prevented from claiming the benefit of her husband's life insurance contract, even though the insurance policy was held in trust for her and she was the beneficiary.

24.6.6 If the insured dies by the unlawful act of another who has an interest in the policy, the latter as well as those claiming through that interest (such as assignees) will not be allowed to benefit from the crime. However, assignees who provided valuable consideration for the assignment will be allowed to recover.

24.6.7 Where an insured has committed suicide, the issue arises as to whether his estate can benefit from the proceeds of his life insurance contract. In Singapore, suicide is not an offence under the Penal Code (Cap 224, 1985 Rev Ed), although abetment of suicide and attempted suicide are offences. However, it is arguable that public policy will not allow recovery to the estate of the insured as public policy will discourage suicides since the abetment of suicides and attempted suicides are criminal offences.

24.6.8 Life insurance contracts commonly contain an "indisputability clause" which provides that after the expiry of a stipulated period, recovery by the insured's estate will not be denied by reason only of the insured's suicide. The enforceability of such indisputability clauses will still be subject to the application of public policy.

Motor Insurance

24.6.9 In Singapore, the Motor Vehicles (Third Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) makes it compulsory for motorists to insure against liability for causing death or personal injury to other road users. The injured victim is not a party to the insurance contract. But under the Motor Vehicles (Third Party Risks and Compensation) Act, he is granted an enforceable right to claim damages from the insurer if he first obtains judgment against the motorist. The issue arises as to whether the injured victim of a road accident is able to claim if the motorist had committed a traffic offence (such as drunken driving or causing death by a rash or negligent act). The objective of compulsory motor insurance is the protection of victims of road accidents and public policy tends to operate in favour of the injured victim because compensation of the injured victim is stronger policy consideration than deterrence. Hence, it is arguable that the injured victim's claim is not affected by the motorist's commission of traffic offences.

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SECTION 7 CAUSATION AND CLAIMS

Causation and the Doctrine of Proximate Cause

24.7.1 In order for the insured to claim a loss, he must show that the loss falls within the cover provided, as a matter of construction of the terms of the contract of insurance. The insured must also show that the loss was proximately caused by a peril or risk insured against. The application of the doctrine of proximate cause is most relevant where, on the facts, one cause of loss is specifically covered by the policy and the other is expressly excluded.

Definition of Proximate Cause

24.7.2 There is no clear definition of proximate cause, but it has been said to mean the dominant, effective or operative cause of loss.

Determining the Proximate Cause

24.7.3 Determining the proximate cause of loss is a question of fact and the courts have taken a common sense approach. As a general rule, the proximate cause of loss is the cause, which would naturally lead to the loss in the absence of any intervening cause to interrupt the flow of events. In other words, the original cause predominates, unless it was merely facilitating a subsequent cause which superseded the prior cause.

Two Proximate Causes

24.7.4 Where there are two effective causes which give rise to the loss, if one is covered by the policy and the other is excluded, the insurer will not be liable for the loss because the parties had intended to exclude the latter cause.

Loss by Preventive Action

24.7.5 If the peril insured against has happened and is so imminent that it is about to operate on the insured property, loss to the property caused by preventive measures necessarily taken to avert damage to it, is covered. On the other hand, if the loss was caused by a voluntary act done merely in apprehension that loss will result, then that loss is not covered by the policy.

Claims

24.7.6 The claims process in insurance is governed by the terms of the insurance contract. The usual terms include the time within which notice of loss must be given, how and where to give notice of loss and the documents that have to be provided in support of the claim. These terms are either conditions precedent to the insurer's liability, or conditions or warranties. The burden of proof of loss lies on the insured.

Fraudulent Claims

24.7.7 An insurance contract is based on good faith. This duty of good faith extends from the start of the contract, throughout its duration and until the claims stage. At the claims stage, the duty of good faith prohibits an insured from making a fraudulent claim.

24.7.8 A fraudulent claim is one where the insured had made a claim of loss dishonestly, with the intention to defraud the insurer. A fraudulent claim may arise where the insured deliberately causes the loss so as to receive a claim, or where he makes a claim knowing that no loss has been suffered or knowing that the loss had not been caused by the insured risk, or where he knowingly and willfully claims an amount that far exceeds the actual amount of the loss. It should be noted though, that the courts have made allowances for exaggerated claims where there was no wilful falsehood or fraud on the part of the insured. The burden of proving a fraudulent claim lies on the insurer who alleges fraud on the part of the insured.

24.7.9 If the insured makes a fraudulent claim, his breach of the duty of good faith avoids the policy. If the insurer had already paid a claim that turns out to have been a fraudulent one, the insurer is entitled to recover the sums paid.

Measurement of Loss

24.7.10 The principle of indemnity (which applies to contract of insurance other than life and personal accident policies) limits the amount of loss recoverable under an indemnity contract of insurance to the insured's actual loss. In addition, the terms of the insurance contract usually further subjects the amount recoverable to an expressly stated maximum sum.

24.7.11 There are essentially 3 basic measures of loss in an insurance contract. The contract may provide for payment of market value of the loss or damage at the time of the loss. Secondly, the contract may stipulate the payment of the cost of reinstatement. This means that the insurer will pay for repairs and re-building of the insured property back to its original state. Thirdly, the contract may provide for payment of the replacement value of the property. This means that the insured will be entitled to recover a sum for the replacement of the lost or damaged property with a new equivalent.

Valued and Unvalued Policies

24.7.12 A valued policy is one where the insurance contract provides for a specific sum to be payable in the event of loss. Payment under a valued policy is subject to the agreed contractual amount, regardless whether it actually represents the insured's actual loss. In the event of a total loss, the insured will recover the contractual sum. In the event of a partial loss, the insured will recover a proportion of the agreed sum.

24.7.13 An unvalued policy differs to the extent that there is no agreed sum payable in the event of loss, although there may be a maximum amount payable. The principle of indemnity applies to measure the insured's loss. If the property is over-insured, (that is, the maximum sum payable under the contract exceeds the maximum amount of the insured's actual loss) the insurer pays no more than the insured's actual loss. Conversely, if the property is under-insured, the insurer pays no more than the maximum sum insured. In the event of a partial loss where the insured is over-insured, the insurer pays up to the insured's actual loss, subject to the maximum sum insured. In the event of a partial loss where the insured is under-

insured, payment by the insurer may be further subject to the average clause or the excess clause.

Average Clause

24.7.14 The usual average clause provides that, in the event of under-insurance, the insured shall be considered as being his own insurer for the difference between the higher value of the property and the sum insured and shall bear a rateable proportion of the loss. For example, if the insured property is worth \$4,000 but was insured for \$3,000 subject to average, the insured can only recover three-quarters of his partial loss.

Excess Clause

24.7.15 The excess clause stipulates the amount (called the excess) that the insured must bear before the insurer becomes liable to pay. This means that the insured bears his own loss up to the amount of the excess and the insurer pays for losses exceeding that amount. For example, if the contract has an excess clause of \$1,000, and the insured's loss is \$3,000, the insurer pays \$2,000. If the insured's loss is less than \$1,000, there is no recovery under the insurance contract.

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SECTION 8 SUBROGATION AND CONTRIBUTION

Subrogation and the Principle of Indemnity

24.8.1 Subrogation is based on the principle of indemnity. This fundamental principle of indemnity was stated by Brett L.J. in *Castellain v Preston* (1883) 11 QBD 380:

"The contract of insurance....is a contract of indemnity.... and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified."

Application of Subrogation

24.8.2 Subrogation applies only to contracts of insurance, which are contracts of indemnity, and it is not applicable to life or personal accident insurance.

What is Subrogation?

24.8.3 Subrogation literally means the substitution of one person for another. The purpose of subrogation is to prevent the unjust enrichment of the insured. There are two aspects to subrogation.

24.8.4 First, the insured cannot make a profit from his loss and for any profit he does make, he is accountable to his insurer who has indemnified him. In this respect, the insured is considered to have been more than indemnified for a loss when he

recovers his loss from the insurer and receives payment of compensation from a third party as well.

24.8.5 Secondly, the insurer who has indemnified the insured has the right to step into the shoes of the insured and in his name enforce any legal right of recourse available to the insured, including a right of action against the third party who caused the loss. The insured's right of action usually involves suing a third party, who is liable to pay damages in tort or for breach of contract, for having caused the loss. The cause of action still belongs to the insured and the insurer is subject to any defences that the third party may have against the insured. The insured has a duty to assist the insurer in enforcing these claims.

Insurer's Right to Subrogation

24.8.6 The insurer must have paid all sums for which they are liable under the insurance contract to the insured before the insurer's right to subrogation arises. A question arises as to whether the insured must be fully indemnified for his loss before the insurer is subrogated. In *Lord Napier & Ettrick v Hunter* [1993] AC 713, in which the contract of insurance contained an excess clause, the House of Lords decided that the insurer was entitled to be subrogated before the insured was indemnified for the excess.

24.8.7 The insured must not prejudice the insurer's right to subrogation. If the insured does an act that limits or compromises or extinguishes the insurer's rights, the insurer can recover from the insured the amount by which the insurer's rights have been expended.

24.8.8 The insurer has the right to recover any sum of money received by the insured which was intended to reduce or diminish his insured loss. However, the insurer is not entitled to recover any money received by the insured that was intended purely as a gift or intended to benefit the insured over and above any insurance payment.

24.8.9 Similarly, if the insured recovers from a third party a sum in excess of what the insurer had paid, the insurer has no right of recovery and the insured can keep the excess.

Waiver of Subrogation Rights

24.8.10 Insurers can agree not to exercise their rights of subrogation. This waiver can take the following forms: It may be in the form of an agreement between the insured and insurer not to subrogate. It may also be an agreement among insurers not to exercise their subrogation rights against each other's insureds. It may also take the form of a general undertaking by a group of insurers not to take action against wrongdoers.

Denial of Subrogation Rights

24.8.11 The courts may restrain the insurer from exercising his subrogation rights, on the grounds of public policy, where it would not be just and equitable to do so.

Contribution

24.8.12 Contribution applies as between insurers, and not between an insured and his insurer, in a situation of double insurance. Double insurance occurs when the insured has entered into more than one contract of insurance on the same risk. This results in a situation where a loss is covered by more than one insurance contract.

What is Contribution?

24.8.13 Since the principle of indemnity allows an insured to recover no more than his actual loss, once the loss has been claimed from one insurer, the same loss cannot be recovered from the second insurer. In this event, the doctrine of contribution provides that the insurer, who has paid the insured's claim, is entitled to call upon the other insurer to contribute towards the amount paid.

Conditions for Double Insurance and Contribution

24.8.14 The policies must insure the same property (subject matter). The policies must insure against the same risk/peril. The policies must cover the same insurable interest. The policies must be valid and enforceable. Where two insureds have different insurable interests in the same property and each insures his own interest on his own behalf, there is no double insurance. However, sometimes a bailee, mortgagee or lessee may insure the owner's interest on his behalf. This gives rise to double insurance of the owner's interest if the owner had his own insurance contract covering the loss.

Contribution Excluded or Varied by Contract

24.8.15 Insurers commonly insert clauses to simplify the claims process and to change the rights of contribution among insurers. A Non-Contribution Clause excludes the insurer's liability if the insured is entitled to recover under any other insurance. A Rateable Proportion Clause limits the insurer's liability to his rateable proportion of the loss if there are other insurances covering the same risk. A Condition Precedent to Liability requires the satisfaction of a condition before the insurer is liable and, in the event of a breach, the insurer is entitled to avoid liability.

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SECTION 9 INSURANCE INTERMEDIARIES

24.9.1 The nature of the industry nowadays is such that insurance agents have a variety of roles to play on behalf of the insurer or the insured.

Agent Filling in Proposal Form

24.9.2 An insurance agent may be requested by an insured to assist in filling in the proposal form. This creates a potential source of contention between the insured and the insurer.

24.9.3 The courts have consistently held against the insured on the basis that as the insured had signed the proposal form it must be considered to be his document and the insurance agent the agent of the insured. The courts have departed from this position only in exceptional or unusual circumstances.

24.9.4 Once the answers given in a proposal form have been made part of the terms of the contract between the insured and the insurer, the Evidence Act provides that oral evidence could not be adduced to vary or contradict the written answers. However, it does not mean a court from finding in any particular case that the agent is the agent of the insurance company for the purpose of filling up a proposal form if this is evident from the circumstances of the case.

Duty of Agent in Filling in Proposal Form

24.9.5 Since an insurance agent who assists an insured in filling in the proposal form is normally regarded as the latter's agent, it necessarily follows that in carrying out this task the agent owes to the insured a duty to exercise care. The agent, however, will only be liable if there is a causal link between his breach of duty and the resulting loss.

24.9.6 Before an insured can successfully make an agent liable for the mistakes in the proposal form, he must show that the loss he had suffered flowed directly from the negligence of the agent and there was no intervening cause to break the chain of causation, such as his own failure to check the proposal form.

Duty to Recommend Fit and Proper Insurance Company

24.9.7 An agent has a duty to recommend a fit and proper insurance company to his principal. This would include ensuring that the financial standing of the insurance company with which the insured proposes to take out a policy is sound.

Duty to Ensure Adequate Cover

24.9.8 The duty of an insurance broker extends to ensuring that the insured is adequately or effectively covered by the policy taken out.

Fiduciary Relationship

24.9.9 The relationship between an insurance intermediary and the insured is fiduciary in nature and carries with it strict duties. In particular, the overriding duty is that the agent must not put himself in a position of conflict with his principal. This means, amongst other things, that he must not act for another in a matter relating to his principal without full disclosure to and the consent of his principal.

Regulatory Framework Governing Intermediaries

24.9.10 The regulatory framework for insurance intermediaries is now primarily prescribed by the Financial Advisors Act, Cap 110 Rev Ed 2002, under which stringent new rules have been introduced to improve the level of service and quality

of advice offered by such financial advisors, as they are now classified. The Act recognises that, in light of product innovation by the insurance industry, most products are no longer purely insurance products but are actually financial products.

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SECTION 10 THIRD-PARTY RIGHTS

Common Law

24.10.1 At common law, because of the doctrine of privity of contract, a third party has no direct right of recourse against an insurer, whether in respect of any wrong which has been done to him by the insured or where he is named as a beneficiary in the policy. The common law position has been altered by a number of statutes.

Motor Insurance

24.10.2 The first is the Motor Vehicles (Third-Party Risks and Compensation) Act, Cap 189, 2000 Rev Ed (the "MVA"), which provides for the following:-

- (a) the right of a third party to look to the tortfeasor's insurer under certain specified circumstances to satisfy a judgment against the tortfeasor if the latter does not do so himself; and
- (b) the vesting in a third party of the tortfeasor's rights against his insurer if the tortfeasor should become bankrupt so as to ensure that those rights pass on to the third party who has suffered at the hands of the insured tortfeasor.

24.10.3 The MVA only requires an insurer to satisfy judgments in respect of death or bodily injury and does not extend to judgments in respect of damage to property. (Section 9(1))

24.10.4 While the MVA curtails the rights of an insurer to avoid the policy on grounds of breach of certain conditions, it does not deprive an insurer of his right to avoid having to indemnify a third party if the policy had been obtained by misrepresentation or non-disclosure. (section 9(4))

24.10.5 Conditions precedent to liability and conditions subsequent avoiding liability cannot be used in respect of claims by a third party in respect of injury or death which has been caused by the insured tortfeasor. (section 7) Certain enumerated conditions which purport to restrict the insurance of the persons insured have also been rendered ineffective against third party claims. (section 8)

Direct Third Party Rights Against Insurer in Event of Insolvency of Insured

24.10.6 There are two sets of statutory provisions which deal with the transfer and vesting of the insured's rights against his insurer in the third party in the event of the insolvency of the insured, ie. section 10 of the MVA and the Third Parties (Rights Against Insurers) Act, Cap 395, 1994 Rev Ed (the "TPRAIA"). It should be

noted that section 10 of the MVA is substantially in pari materia with the TPRAIA, the difference being that the latter is of general application.

Prerequisites to Direct Right

24.10.7 Before a third party can rely on either of the abovementioned provisions, it is necessary that the insured has become bankrupt or is making a composition or arrangement with his creditors. The insured's liability to the third party should also be established, either by the insured's admission of liability or by judgment of the court or by an arbitral award.

24.10.8 A third party who sues an insurer under either statutory provision takes the benefits under the policy subject to the conditions appearing therein, provided that only those terms and conditions which concern the insured's liability to the third party are binding on the third party.

Difference between MVA and TPRAI

24.10.9 There is an important difference between the two statutory provisions in that, under the MVA, the third party is also entitled to the protection of the prohibitions contained therein (Sections 7 and 8)

Workmen's Compensation Act

24.10.10 The Workmen's Compensation Act, Cap 354, 1998 Rev Ed, also provides that in the event of the insolvency of an employer, the rights of the employer under the workmen's compensation policy are transferred to the injured workman if legal liability is established. An added protection for the workman is that the insurer is not entitled to rely, as against the workman, any failure of the employer to comply with the terms of the policy. (Section 19)

Life Policies

24.10.11 For life policies, where a person takes out a policy on his own life and expresses it to be for the benefit of his spouse or children, a statutory trust is imposed and the policy is protected from the creditors of the insured person. (Section 73, Conveyancing and Law of Property Act, Cap 61, 1994 Rev Ed)

24.10.12 Finally, under the Contracts (Right of Third Parties) Act, Cap 53B, 2002 Rev Ed, a third party to a policy, if it expressly confers a right to enforce the policy or if a term in the policy purports to confer a benefit on him, may enforce this contract. However, this may be expressly excluded by the parties.

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SECTION 11 MOTOR INSURANCE

Compulsory Motor Insurance

24.11.1 The Motor Vehicles (Third-Party Risks and Compensation) Act. Cap 189 2000 Rev Ed (the "MVA") establishes a regime of compulsory motor insurance with regard to some aspects of third party liability.

Third Party Risks

24.11.2 Under the MVA, it is unlawful for any person to use or cause or permit any other person to use a motor vehicle unless there is insurance cover in respect of third party risks covering such use. (Section 3(1)) The third party risks which are required to be covered under the MVA are personal injury and death. Property damage is not required to be covered. (Section 9(1))

Ambit of "Use" and "Cause or Permit the Use"

24.11.3 The ambit of the requirement is circumscribed by the meaning which have been attributed to the terms "use" and "cause or permit the use" which appear in Section 3(1) of the MVA.

24.11.4 The word "use" has a wider ambit than the word "drive". It implies an element of control, management or operation of the vehicle. But, the ambit of the word "use" is so wide that even an immobilised vehicle may be said to be used on the road under certain circumstances.

24.11.5 A person does not need to be the owner of a vehicle to cause or permit the use of a vehicle, especially where he has the care, management or control of the vehicle.

24.11.6 "Cause" connotes an express or positive mandate from the person causing the use of the vehicle, whereas the word "permit" has a wider ambit and may include an express or implied allowance to use the vehicle.

Breach of Statutory Duty

24.11.7 Any person who contravenes the MVA in respect of compulsory third party liability cover faces penalties which are imposed by the MVA. The failure to insure, and consequent commission of an offence under the MVA is a breach of statutory duty and anyone who suffers loss as a result can sue the person in tort for damages. The claim for breach of statutory duty may arise not only when there has been a failure to effect a policy of insurance but also in cases where the policy is not wide enough to cover the particular use of the vehicle.

Direct Right to Sue Insurer

24.11.8 In the event that an injured third party establishes the legal liability of an insured tortfeasor, either by way of court judgment, arbitration award or by an admission of liability, the MVA provides that the third party, although he is not privy to the contract of insurance, has the right to claim direct against the tortfeasor's insurer. (Section 9)

24.11.9 In the event of the insolvency of the tortfeasor, his rights against his insurers are statutorily vested in the third party so as to enable the third party to step into the shoes of the insured tortfeasor and claim against the policy. (Section 10)

24.11.10 Where such a claim is brought directly by a third party against the insurer, certain conditions cannot be used to defend such third party claims brought under the MVA. (Sections 7 and 8)

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SECTION 12 WORKMEN'S COMPENSATION INSURANCE

Compulsory Workmen's Compensation

24.12.1 Under the Workmen's Compensation Act, Cap 354, 1998 Rev Ed, (the "Act") it is compulsory for all employers to take out insurance for workmen's compensation. A failure by an employer to take out the necessary cover constitutes an offence. (Section 23) However, such failure does not give rise a claim for breach of statutory duty.

24.12.2 In addition, the right of an injured workman to claim workmen's compensation from his employer cannot be taken away under his contract of employment. (Section 21)

"Contract of Service"

24.12.3 The Act draws a distinction between a "contract of service" and a "contract for services". Only a person who is working under a contract of service or of apprenticeship is covered by the Act. (Section 2)

"Course of Employment"

24.12.4 An employer is only liable to pay compensation to the workman if it arises out of and in the course of the employment. (Section 3(1)) The Act sets out various situations under which it is deemed to be arising out of and in the course of employment (Section 3(2)-(4)). An employer is also liable to pay compensation where a workman contracts a disease related to that occupation (Section 4)

24.12.5 An injured workman employed by a sub-contractor is entitled to make a claim for workmen's compensation against the main contractor. (Section 17(1))

Legal Liability of Insurer

24.12.6 Under the Act, once an assessment of compensation is made by the Commissioner for Labour and an order made accordingly, the insurer comes under a legal liability to satisfy the order. (Section 32)

24.12.7 The compensation payable under the Act shall be paid to the workman, or paid to his dependents where death is caused. (Section 6)

Relationship between Common Law Claim and Claim for Workmen's Compensation

24.12.8 A workman who has commenced an action against his employers at common law is not entitled to claim for workmen's compensation under the Act. Any workman who has made a claim for workmen's compensation under the Act is similarly barred from making a claim for damages against his employer at common law. (Section 33(1)) However, a settlement by the employer not arising out of a legal suit shall not constitute a bar to a claim for workmen's compensation.

24.12.9 Any claim against a tortfeasor by the injured workman is also barred where he has received workmen's compensation for his injuries under the Act. (Section 18(a))

Subrogation of Workman's Rights

24.12.10 Any employer or insurer who has compensated an injured workman under the Act is entitled to bring an action by way of subrogation against the tortfeasor who caused the injury. (Section 18(b))

Direct Rights Against Insurer

24.12.11 In the event of the insolvency of the employer, the rights of the employer under the workmen's compensation policy are transferred to the injured workman if legal liability is established. An added protection for the workman is that the insurer is not entitled to rely, as against the workman, any failure of the employer to comply with the terms of the policy (Section 19). The workman may also rely on the provisions of the Third Party (Rights Against Insurers) Act, Cap 395, 1994 Rev Ed.

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