

Remedies for non-performance¹

Austria	<p><u>§ 7 VersVG:</u> Liability ends at noon of last day of contract period = termination of cover which depends on termination of insurance contract (see § 8 VersVG)</p>
Bulgaria	<p>As to <u>obligation for notifying</u> (Art.206 Code for the Insurance): The policyholder has to notify the insurer for the occurrence of the insured event within 7days. The insurer can refuse payment if that obligation is not fulfilled with the aim of hindering the insurer in establishing the circumstances of the event or where such non-fulfilment has made it impossible for the insurer to establish those circumstances.</p> <p>As to <u>obligation to prevent and/or limit the damages</u> (Art. 207): The policyholder is obliged to take measures for the protection of the insured property from damages, to follow the instructions of the insurer and the competent authorities for elimination of the sources of risk, and to allow the insurer to make inspections. Non fulfilment of that obligation gives the insurer the right to terminate the insurance contract if no insured event has occurred, or to reduce the insurance indemnity accordingly. In case the occurrence of the insured event ensues from non-fulfilment of that obligation the insurer may refuse payment, provided that this has been explicitly stipulated in the contract.</p> <p><u>Right to refuse payment of insurance indemnity</u> (art. 211)</p> <ul style="list-style-type: none"> -In case of deliberate causation of the insured event by the insured person or by a third benefiting party, or -Upon non-fulfilment of a contractual obligation, which is substantial with regard to the insurer's interest and has been provided for in the law or in the contract; <p><u>Regressive claim of the insurer</u> (Art. 227): The insurer has the right to file a regressive claim for payment of interest for the period of default of the policyholder to notify certain circumstances.</p> <p><u>In contracts for life insurance and accident insurance on a third party</u> (Art.233): The insurer shall not pay any insurance amounts if the policyholder deliberately causes the insurable event.</p> <p><u>In cases of third party motor insurance</u> (Art.271): The insurer is obliged to decide on the claim within three months from the date on which the claim is filed. The damaged party is entitled to the interest over the amount of compensation, starting from the date of expiry of that deadline.</p>

¹ The information in this table is provided by insurance experts or insurance organisations from respective country. It does not contain a thorough review of all Member States' insurance contract laws and does not reflect the official opinion of the Commission.

	<p><u>General rules</u> on the Law on Obligations and Contracts are also applicable:</p> <p>In cases of non-performance the creditor can ask for performance and compensation for the delay, or to claim damages. In cases of non-performance of monetary obligations the creditor is entitled to interest. The creditor can terminate the contract because of non-performance.</p>
<p>Croatia</p>	<p><u>Intentional Misrepresentation or Concealment</u></p> <p>Pursuant to Article 931 of the Civil Obligations Act on the conclusion of the contract, the policyholder shall report to the insurer all the circumstances that are material for assessing the risk, of which he is aware or of which he should have been aware. In the case a policyholder has intentionally misrepresented or has intentionally concealed a circumstance the nature of which is such that the insurer would not have entered into the contract had he been aware of the true state of affairs, the insurer may, pursuant to Article 932 of the Civil Obligations Act ask for a cancellation of the contract.</p> <p>In the case of contract cancellation, as quoted above, the insurer shall have a right to retain and collect the premiums until the date when the application for the contract cancellation is submitted. However, the insurer shall be liable to pay the indemnity if the insured event has occurred prior to that date.</p> <p>The insurer's right to demand the insurance contract cancellation shall expire, if he has failed to communicate to the policyholder, within three months following the day he has become aware of misrepresentation or concealment that he intends to exercise this right.</p> <p><u>Consequences of Failure to Pay the Premium</u></p> <p>Pursuant Article 937 of the Civil Obligations Act if a policyholder, or any other interested party, fails to pay the premium due after the conclusion of the contract on the due date, the insurance contract shall terminate, by operation of law, upon the lapse of thirty days following a delivery of the registered letter to the policyholder informing him of the premium due date. However, this time limit cannot lapse before the expiry of thirty days from the premium due date.</p> <p>In any case, the insurance contract shall terminate by operation of law, if the premium is not paid within one year following its due date.</p> <p>The provisions of this Article shall not apply to life insurance and accident insurance.</p> <p><u>Obligation to Report on the Occurrence of the Insured Event</u></p> <p>Pursuant to Article 941 of the Civil Obligations Act the insured person shall, except in the case of life insurance, report to the insurer on the occurrence of the insured event within three days from the date he has become aware of that fact. If the insured person fails to meet his obligation within the prescribed time limit, he shall compensate the insurer for the damage that the latter might have as a result of that.</p> <p><u>Payment of Indemnity</u></p> <p>Pursuant to Article 943 of the Civil Obligations Act in the case the insured event has occurred, the insurer shall pay the indemnity stipulated in the contract within the agreed time limit, which may not be longer than fourteen days, counting from the date when the</p>

	<p>insurer has received a notice of the occurrence of the insured event. If the insurer fails to settle his liability within the time limits prescribed in this Article, he shall pay default interest to the insured person, starting from the date of receipt of the notice of the insured event, as well as a compensation for an injury the latter sustains therefrom.</p> <p><u>Exclusion of Insurer's Liability for Damage Caused Intentionally or Deceitfully</u> Pursuant to Article 944 of the Civil Obligations Act if a policyholder, insured person or beneficiary has caused the occurrence of the insured event intentionally or deceitfully, the insurer shall be released from any performance obligations. Any provision which derogates there from shall have no legal effect.</p> <p><u>Insured Event Prevention and Salvage</u> Pursuant to Article 950 of the Civil Obligations Act the insured person shall take the prescribed, agreed and any other reasonable measures necessary to prevent the occurrence of the insured event, and if the insured event does occur, he shall take all the reasonable measures in his power to restrain its injurious effects. If the insured person fails to meet his obligation of forestalling the insured event or obligation of salvage, for no justified reason, the insurer's liability shall be reduced proportionate to the increase in damage inflicted as a result of this failure.</p> <p><u>Overinsurance</u> Pursuant to Article 956 of the of the Civil Obligations Act where, on entering into contract, one party has fraudulently contracted an amount of insurance which exceeds the actual value of the insured property, the other party may request the cancellation of the contract. In the case of contract cancellation, the insurer shall have a right to retain and collect premiums until the date of submitting the application for the contract cancellation, but he shall be liable to pay the indemnity up to the actual value of the insured property, if the insured event has occurred prior to that date.</p> <p><u>Consequences of Failure to Pay the Premium for Personal insurance (Life insurance and Accident insurance)</u> Pursuant to Article 969 of the Civil Obligations Act where a life insurance or accident insurance policyholder has failed to pay a premium on its due date, the insurer <u>shall not have</u> a right to require its collection in court proceedings. However, if a policyholder, upon an invitation by the insurer which must be served by registered mail, fails to pay the due premium within the time limit indicated in that letter, which may not be shorter than one month counting from the date when the letter has been served, the insurer may only communicate to the policyholder that the insured amount is reduced to the amount of the surrender value, provided that at least three annual premiums have been paid until that time, or, otherwise, that the contract is cancelled.</p>
Estonia	<p>For remedies applicable in case of non-payment of the premium, violation of pre-contractual and contractual disclosure duties of the policyholder, see above.</p> <p>General legal remedies in case of non-performance which stem from the General Part of the Law of Obligations (see § 101) are applicable as well.</p>

<p>Finland</p>	<p>If the policy holder does not pay the premium under the terms of the insurance policy, the insurer may terminate the policy. On late payment on there are termination grounds specified in the law.</p> <p>However, if the non-performance occurs on the side of the insurer, the policy holder may rely on the remedies granted in the Finnish law, such as initiating a civil procedure against defaulted insurer.</p> <p>There are some remedies for a situation where the insurer breaches a policy. Obviously, the assured can claim the benefits of insurance and recover damages for any loss or damage suffered by him and based on the insurers' conduct. If the insurer or its representative, when marketing the insurance, failed to provide necessary information or gave incorrect or misleading information to the policyholder, the insurance contract is considered to apply as understood by the policyholder on the basis of the information he received (<i>section 7, Insurance Contracts Act</i>). This also applies where incomplete, incorrect or misleading information is given to the policyholder during the period of the insurance's validity and affects the policyholder's actions. It does not, however, apply to information given by the insurer or its representative on compensation or benefits payable after the occurrence of an insured event.</p>
<p>France</p>	<p><u>Punitive interest rates:</u></p> <p>- <u>twice the legal interest rate in motor liability insurance:</u> <u>Article L 211-13 Insurance Code:</u> Cr��e par D��cret n��88-260 du 18 mars 1988 - art. 2 JORF 20 mars 1988</p> <p>When the offer has not been within the time limit prescribed by Article L211-9, the amount of the compensation offered by the insurer or awarded by the court to the victim shall bear interest ipso jure at double the legal interest rate as from the expiry of the time limit and until the date of the offer or the final judgement. This penalty can be reduced by the court for circumstances not attributable to the insurer.</p> <p>- <u>twice the legal interest rate in compulsory construction insurance:</u> <u>Article L 242-1 Insurance Code:</u> Modifi�� par LOI n��2008-735 du 28 juillet 2008 - art. 45</p> <p>[...]</p> <p>(5) When the insurer fails to comply within the time-limits provided for in the two paragraphs above or proposes a compensation offer that is clearly inadequate, the insured may, after it has notified the insurer, incur the expenses necessary to repair the damage. In such event, an interest double the legal interest rate shall be applied ipso jure to the compensation to be paid by the insurer.</p>
<p>Germany</p>	<p>Concerning the non-payment of the premium, §§ 37, 38 VVG apply (s. above). Concerning the breach of the policyholder's incidental duties (Obliegenheit), § 28 VVG applies:</p> <p>-(1) As the non-observance of an incidental duty which the policyholder must fulfil prior to the occurrence of an insured event, the insurer may terminate the contract without prior notice within one month after learning of the non-observance, unless the non-observance was not intentional or based on gross negligence.</p>

	<p>(2) Where the contract provides that the insurer is not obliged to pay in case of breach of an incidental duty by the policyholder, he is released from the liability if the policyholder intentionally breached the obligation. In the case of grossly negligent non-observance of the obligation, the insurer is entitled to reduce any benefits payable commensurate with the severity of the policyholder's fault; the policyholder has the burden of proof that there was no gross negligence.</p> <p>(3) However the insurer has to effect performance, insofar as the breach of the duty neither caused the occurrence or the assessment of the insured event nor the assessment or the extent of the insurer's obligation to effect payment. This does not apply if the policyholder fraudulently breached the duty.</p> <p>(4) The insurer can only be exempt from his payment obligation, where the policyholder has breached a duty to provide information or a duty of disclosure after the occurrence of an insured event, when he notified the policyholder in separate correspondence and in writing of this legal consequence.</p> <p>(5) An agreement based on which the insurer is entitled to withdraw from the contract in the event of the non-observance of an incidental duty is void.</p> <p>§ 28 (1) to (4) are semi-mandatory.</p> <p>Concerning the late performance of the insurer to pay the money, the general rules on §§ 286 seq Civil Code apply: The policyholder is entitled to interests.</p> <p>§ 14 (2) VVG: if the enquiries necessary to establish the occurrence of the insured event and the extent of the insurer's liability have not been concluded.</p> <p>one month after notification, the policyholder may ask for part payment, § 14 (2) VVG which is semi-mandatory, § 18 VVG</p>
	<p>Attribution of the action of a third party to the insurance company (not yet filled in) § 69 VVG:</p> <p>(1) The insurance agent shall be deemed to have power of attorney in respect of</p> <ol style="list-style-type: none"> 1. taking receipt of applications for the purposes of concluding a contract of insurance and its revocation, as well as declarations made prior to the making of a contract and other declarations made by the policyholder, 2. taking receipt of applications for the renewal of or amendment to a contract of insurance and its revocation, termination, rescission and other declarations relating to the insurance agreement, as well as any information to be provided by the policyholder throughout the policy period, and 3. passing on to the policyholder any insurance policies or renewal policies drawn up by the insurer. <p>(2) The insurance agent shall be deemed to have power of attorney to accept payments which the policyholder makes in connection with the arranging or conclusion of a contract of insurance. The policyholder shall only accept a restriction to this power of attorney to his detriment if he was aware of the restriction when making the payment or was not aware of it as a consequence of gross negligence.</p> <p>§ 70 VVG:</p> <p>If the knowledge of the insurer is of relevance in accordance with this Act, the knowledge of the insurance agent shall be equivalent to the knowledge of the insurer. This shall not apply to the knowledge of the insurance agent gained when not engaged in his activity as agent and not connected in any manner to the contract of insurance in question.</p> <p>§ 71 VVG:</p>

	<p>If the insurance agent is authorised to acquire contracts of insurance, he shall also be authorised to agree amendments or extensions to such contracts and to make declarations of termination and withdrawal.</p> <p>§ 72 VVG: Any restriction of the power of agency to which the insurance agent is entitled in accordance with section 69 and section 71 based on the general terms and conditions of insurance shall be void vis-à-vis the policyholder and third parties.</p> <p>§ 73 VVG: §§ 69 to 72 apply mutatis mutandis to an insurer's employees who are contracted to arrange or conclude contracts of insurance and to persons working independently as agents in the arranging or concluding contracts of insurance but not on a commercial basis.</p>
Greece	<p><u>- non – performance of the insurer:</u></p> <ul style="list-style-type: none"> a) Complaints to the supervisory authority (Bank of Greece) / or to the General Secretariat for Consumers / or to the Consumer Ombudsman b) Recourse to civil justice. <p><u>- non – performance of the policyholder or the insured:</u></p> <ul style="list-style-type: none"> a) In case of non - payment of premium: Art. 6 of law 2496/1997 (see above “Payment of premiums and consequence of non – payment) b) In case of non – disclosure: Articles 3, 4, 5 and 7 of law 2496/1997 (see above “Disclosure duties of the customer)
Hungary	<p>Detailed terms of insurer’s performance are stipulated in the contract. The insured person is required to prove/justify the occurrence of the insurance event. Necessary documents, required by the insurance company are typically listed in the contract terms.</p> <p>Afterwards the insurer examines the legal ground of payment in line with the contracting terms. The outcome of this process can be following:</p> <ul style="list-style-type: none"> - The insurer performs in due time. (Deadline of payment is tied by the decision about the legal ground of payment.) - In case of default (late) payment, client is entitled to receive default interest. - If the performance is refused by the insurer, client is entitled to go to court or to make use of an out-of-court relief (Conciliatory Body that is working in the frame of the Supervisory Authority.)
Italy	<p>- Non-performance of the insurer: non-payment of indemnity or restitution of insured sums or undue premiums 1) complaints to control authority (IVASS); recourse to civil justice (no mediation procedure if not the general one, now not compulsory); 2) payment of damages/payment over maximum limit of coverage where bad faith is proven.</p> <p>- non-performance of the insured:</p> <ul style="list-style-type: none"> a) in case of non-payment of premium: art.1901 Civ. Cod. b) in case of non-disclosure: articles 1892-1893 Civ. Code. c) in case of non-performance of duty of salvage: articles 11913-1914-1915 Civ. Cod.

Portugal	missing
Romania	<p>Remedies for non-performance of the insurer: - the insured can go to the court of justice for the claim settlement. If he wins in the court, the court can oblige the insurer to pay the insurance indemnity, and also legal interest/penalties.</p> <p>Remedies for non-performance of the insured: - the insurer can terminate the insurance contract or it can renegotiate the contractual terms</p>
Slovakia	<p>§ 799 of CC The person entitle to the insurance benefit is obliged to inform insurer in writing without undue delay that the insured event occurred, to provide the insurer with truthful explanation of its occurrence and submit the necessary documents. Knowing breach of the obligations with significant effect to the insurance event, the insurer is entitled to reduce the payment of claims.</p> <p>§ 809 of CC The insured shall ensure that the insured event doesn't occur, in particular, the insured shall not breach the obligation to alert or reduce danger. The insurer is entitled to reduce the claim payment adequately if the insured breach obligation knowingly, or as result of drinking alcohol or taking drugs.</p>
Spain	<p><u>Art. 20 LCS:</u> In the event of a delay in paying the claim, the insurer must pay default interest to the policyholder and insured and, where appropriate, to the injured third party in liability insurance or the beneficiary in life insurance (Art. 20).</p> <p>A delay is said to have occurred when the insurer has not paid the claim within three months with effect from the occurrence of the claim or when he was not settled the minimum amount of the claim within forty days from receipt of the claim declaration.</p> <p>The insurer is therefore automatically obliged to pay default interest corresponding annually to the legal interest at the time of the event increased by 50%.</p> <p>However, if two years or more have elapsed since the claim, the annual interest may not be less than 20%.</p> <p>Interest runs from the date of occurrence of the claim or the date of communication of the claim to the insurer when neither the policyholder, nor the insured and nor the beneficiary has reported the claim within the deadline envisaged in the policy.</p>
Sweden	<p>Chapter 4, Article 2(1), the Insurance Contract Act (2005:104) Where the policyholder has acted fraudulently or contrary to good faith and fair dealings, when fulfilling his duty to inform when acquiring the insurance, the contract is void pursuant to the Contracts Act (1915:218) and the insurance company is relieved from all liability in re of insured events occurring thereafter.</p> <p>Chapter 4, Article 2(2), the Insurance Contract Act (2005:104) Where the policyholder otherwise intentionally or negligently has disregarded his obligation to inform pursuant to Article 2(1), the indemnification may be reduced in respect of each insured in accordance with what is reasonable taking into consideration the significance the</p>

fact would have had for the insurance company's risk assessment, whether the disregard was intentional or negligent and other circumstances.

Chapter 4, Article 3(1), the Insurance Contract Act (2005:104)

The insurance company may stipulate in the insurance contract that the policyholder shall report to the company, without unreasonable delay, any change in a circumstance specified in the contract, which is of material significance in respect of the risk.

Where the policyholder fails to notify the insurance company, indemnification may be reduced in respect of each insured as follows from **Chapter 4, Article 2(2) the Insurance Contract Act (2005:104)**.

It should be noted that **Chapter 2, Article 8, the Insurance Contract Act (2005:104)** provides that in some cases the insurance company may not rely on a policy provision regarding reporting obligations pursuant to **Chapter 4, Article 3(1)**.

According to **Chapter 4, Article 4, the Insurance Contract Act (2005:104)** the indemnification may not be reduced, where the insurance company knew or should have known that the information was incorrect or incomplete. The same applies where the incorrect or incomplete information was not, or later ceased to be, material to the content of the contract.

Chapter 4, Article 5(1), the Insurance Contract Act (2005:104) stipulates that where the insured has *intentionally* caused an insured event, the insurance policy shall not provide indemnity to the insured himself. Where the insured event was caused or exacerbated by *gross negligence* the indemnity may, according to Chapter 4, Article 5(2) the Insurance Contract Act (2005:104) be reduced taking into consideration what is reasonable considering the insured's personal circumstances and other conditions.

Chapter 4, Article 6, the Insurance Contract Act (2005:104) regulates the insured's failure to take measures to prevent or minimise the loss. Where the disregard was intentional, his right to indemnification may be reduced to an extent which is reasonable taking into consideration his personal situation and other circumstances. This applies also where the insured has disregarded his obligations knowing that the act or omission meant a significant risk for loss/damage.

Exceptions to the provisions listed above are regulated in **Chapter 4, Article 9(1), the Insurance Contract Act (2005:104)**.

Indemnification may not be reduced pursuant to Chapter 4 due to:

1. Insignificant negligence;
2. Acts of a person who was severely psychologically disturbed or had not reached 12 years of age; or
3. Acts that were intended to prevent injury to person or damage to property in an emergency situation which rendered the acts defensible.

Article 9(2), the Insurance Contract Act (2005:104) deals with **Third Party Liability Insurance**. The provisions regarding reduction of indemnity set forth in Article 5(2), Articles 6 and 7, shall not apply in respect of the party suffering an injury/loss. Where the insured is not legally obligated to maintain liability insurance covering the loss, the insurance company is obligated to provide indemnification only to the extent it cannot be provided by the insured.

<p>United Kingdom</p>	<p>A. Remedies of the insurer</p> <p>1. B2C</p> <p>Under English law, consumers have access to a number of recourses in order to exercise and enforce their insurance contract rights. Consumers can exercise their rights under the common law in the courts and this system is supplemented by the ability for consumers to make complaints to the FCA and the Financial Ombudsman Service (FOS).</p> <p>The FOS is able to consider complaints from consumers (including small businesses) and the FOS has a statutory "fair and reasonable" discretion to develop an alternative approach to the law in resolving disputes. (The Law Commission and The Scottish Law Commission: A Joint Scoping Paper on Insurance Contract Law; pg5-6).</p> <p>1.1 Remedies for misrepresentations</p> <p><u>The Consumer Insurance (Disclosure and Representations) Act 2012</u> The Act only applied to contracts entered into or renewed after 6 April 2013 (and therefore will never apply to most life insurance contracts entered into before this date as ordinary life insurance contracts are entire and run until death or an earlier insured event). The Act was the product of a long period of consultation and effectively enacts the approach that the FCA and the FOS have taken, in respect of the ICOBS rules and the approach of the Ombudsman in relevant disputes. It is important to note that the Act abolished the device of the basis of contract clause, discussed above.</p> <p><u>Section 2:</u> abolishes the pure duty of disclosure and the application of ss.18 and 20 of the Marine Insurance Act 1906 as far as consumer contracts are concerned. Instead, the Act imposes a duty on a consumer to take reasonable care not to make a misrepresentation.</p> <p><u>Section 4 and Schedule 1</u> set out the insurer's remedies against a consumer who has made a qualifying misrepresentation before the conclusion of the contract or varying the contract and breached the duty of reasonable care. The insurer would have to prove that they would not have entered into the contract or would have done so on different terms, had the misrepresentation not taken place.</p> <p><u>Section 5:</u></p> <p>Qualifying misrepresentations are defined as deliberate or reckless or alternatively careless. Deliberate or reckless representations are those where the consumer knows that a statement is untrue or misleading or does not care whether a statement is untrue or misleading, or, knows that the matter to which the misrepresentation relates is relevant to the insurer, or, does not care whether the matter to which the misrepresentation relates is relevant to the insurer.</p> <p>Schedule 1: The insurer's remedies for the "qualifying misrepresentations" vary depending on whether the misrepresentation was (a)deliberate or reckless; or (b) careless. The Act does not capture innocent misrepresentations.</p> <p>(i) Avoidance with no return of premiums: (a) In the case of deliberate or reckless representations, the insurer may: avoid the contract, refuse all claims and retain the premiums, except to the extent (if any) that it would be unfair to the consumer to retain</p>
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them.

(ii) Avoidance with return of premiums:

(b) In the case of careless misrepresentations, if the insurer would not have entered into a contract but for the misrepresentation, the insurer may avoid the contract and refuse all claims, but must return the premiums.

(iii) Change of terms or premium:

(b) In the case of careless misrepresentations, if the insurer would have entered in the contract, (except as regards the amount of premium) the contract is to be treated on those terms. The insurer may reduce the amount to be paid on a claim proportionately to the higher premium they would have charged.

(iv) Termination:

The insurer may terminate the contract by giving reasonable notice to the consumer (except in contracts for life insurance). This is an alternative remedy for the situations when the insurer would have entered into the contract only based on different terms. Termination, rather than avoidance, is clearly used as the remedy here so that it is prospective and the insurer is still liable for the prior claim.

2. B2B

As mentioned above, a warranty is a particularly important contractual term as a breach of a warranty leads to an automatic discharge of the insurer's liability. If an insured makes a misrepresentation or inaccuracy in relation to a warranty, even if it is not 'material' and even if the breach is unconnected with the loss that occurs, the insurer can avoid the contract. This is in contrast to a breach of a condition, which is actionable only if it causes the loss.

Insurers traditionally have the right in law to avoid a contract of insurance if the insured was guilty of fraud, non-disclosure or misrepresentation before the contract was entered into. It may also have a remedy for breach of utmost good faith during the contract. (Birds: pg 113)

2.1 The insurer's remedies for fraud:

If the insured is found guilty of fraud, the insurer can avoid the contract and the insurer may have the right to claim damages in the tort of deceit, and can in addition retain any premium paid (*Chapman and others, assignees of Keeney v Fraser B R Trin.*)

2.2 The insurer's remedies for breach of the principle of good faith, non-disclosure and misrepresentation:

Avoidance of the contract: the contract is treated as if it never existed and the insurer may refuse all claims.

Section 17 of the Marine Insurance Act 1906 (MIA 2006), which is said to represent the law applicable to all insurance contracts in this respect, imposes the duty of utmost good faith on both parties to the contract. The remedy for breach of this duty is contract avoidance.

Section 18(1) of the MIA 1906 : Disclosure by assured

"The assured must disclose to the insurer, every material circumstance which is known to the assured. If the assured fails to make such disclosure, the insurer may avoid the contract."

Section 20(1) of the MIA 1906: Representations

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

The key question to determine is the 'materiality' of the non-disclosure or the misrepresentation.

Section.18(2) of the 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.

Section.18(3) of the MIA 1906:

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

- (a) Any circumstance which diminishes the risk;
- (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
- (c) Any circumstance as to which information is waived by the insurer;
- (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty. *Lambert v Co-operative Insurance Society Ltd* (1975)

The Court of Appeal held that the statutory formulation in Section18 of the MIA 1906 was a codification of the common law which applied to all insurance contracts.

A fact is considered material for the purposes of both non-disclosure and misrepresentation if it is one that would influence the judgment of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premium to charge (Birds, p.113-125,128).The policyholder may request a return of the premium paid, but not in case of fraudulent misrepresentation (for marine insurance – Section 84(3)(a) of the MIA 1906).

For other types of insurance the matter is governed by general contract law rules of unjustified enrichment (Law Commission, consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.24).

2.3 The insurer's remedies for breach of utmost good faith during the contract

Section 17 of the MIA 1906 provides the remedy of avoidance for breach of the principle of good faith, however, there is a question mark as to whether the remedy for a breach of a continuing duty of good faith is also avoidance. This uncertainty has arisen because avoidance would put the parties back to the position they were in at the beginning of the contract, however, if the breach of the principle occurs part way through the life of the contract, arguably the contract should only be avoided at the date of the breach.

In the leading case of '*The Star Sea*' (2001), the House of Lords confirmed the existence of the continuing duty but stated that the nature of the duty fluctuated during the course of the contract. However, the case left open the question of exactly when the remedy of avoidance would be available.

In the later Court of Appeal case of '*The Mercandian Continent*', the court held that the duty

	<p>was confined to cases where there is an express contractual obligation to provide information. If this duty is breached in such a serious way that the breach would entitle the insurer to repudiate the contract, then, assuming the breach is fraudulent, the insurer will be granted the remedy of avoidance.</p> <p>This is an alternative remedy to the insurer from treating the contract as terminated at the date of the breach. (Birds, pg147-150).</p> <p>2.4 Damages:</p> <p><u>(i) No damages for non-disclosure:</u> <i>HIH Casualty & General Insurance Ltd v Chase Manhattan Bank (2003)</i> Even deliberate non-disclosure does not give rise to liability in damages, as deceit or fraud requires a positive misrepresentation (Law Commission, consultation paper 204, The Scottish Law Commission Discussion Paper No 155 p.25)</p> <p><u>(ii) Possible damages for misrepresentation:</u> In England and Wales, the victim of a fraudulent misrepresentation is entitled to claim damages for deceit (Law Commission, consultation paper 204, The Scottish Law Commission Discussion Paper No 155 p.25).</p> <p>For negligent or innocent misrepresentations, the Misrepresentation Act 1967 provides that a party who makes a non-fraudulent misrepresentation will be liable in damages “as if he were fraudulent” unless he proves that he had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true. (Law Commission, consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.25)</p> <p>However, in practice, the right to damages appears to be unimportant in insurance, as the main potential loss for the insurer can be prevented by the remedy of avoidance: A leading authority on English insurance writes that there are no known cases in which an insurer has claimed damages from a policyholder(M A Clarke, The Law of Insurance Contracts Vol 2, Chap 23, para 23-15.) (Law Commission, consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.24)</p> <p>2.5 Exclusion clauses: excluding remedies for breach: The law will uphold, except in the case of fraud, clauses that exclude the remedies for misrepresentation or exclude the duty of disclosure or the remedies for breach. <i>HIH Casualty & General Insurance Ltd v Chase Manhattan Bank (2003):</i> A contract included a clause which provided that the insured would not have an obligation to make a representation or warranty of any nature and non-disclosure would not be a ground for avoidance of the insurer's obligations. The court held that such a clause was valid. (Birds, p.143)</p>
	<p>B. Remedies of the insured</p> <p>1. Insured's remedies for breach of the principle of good faith:</p> <p>Section 17 of the Marine Insurance Act 1906 imposes the duty of utmost good faith on both parties to the contract. The remedy for breach of this duty is contract avoidance.</p>

Banque Financiere de la Cite SA v Westgate Insurance Co Ltd (1987)

The insurer has a pre-contractual duty of disclosure to the insured, but only in respect of matters which are material to the risk or to the recoverability of a claim. The only remedy of the insured is avoidance of the contract and return of the premium. The decision of the first instance court to award damages to the insured was not upheld by the Court of Appeal and House of Lords.

(Birds, p.155)

It is the insurer's duty to disclose all facts known to the insurer which are material either to the nature of the risk sought to be covered or the recoverability of a claim under a policy which a prudent insured would take into account when deciding where or not to place a risk for which he has sought cover with that insurer.

(Birds, p.157)

2. Damages for failure to pay a claim under an insurance policy

Such failure can result in damages for breach of contract, but under English law any damages payable are limited to the policy claim, plus interest. There is currently no concept of aggravated damages on account of the insurer's conduct in handling the claim.

(Anthony Menzies, Peter Kempe and Jonathan Rogers, Taylor Wessing LLP, http://uk.practicallaw.com/4-501-3670?qaq=W_q23&qaq=W_q27&qaid=0-501-2031)