Disclosure duties of the customer¹

A • •	88 16 ff VersVG: Pre-contractual disclosure
Austria	§§ 16 ff VersVG: Pre-contractual disclosure — concerns every fact of importance for the decision of the insurer to take a risk — If violated: Right to rescind the contract; if insurer rescinds (and only then!) it will be freed from paying insurance money for insured events which were caused by the circumstance which was not disclosed or misrepresented ("all or nothing").
	 In practice, insurers use questionnaires at least in mass risk insurance Insurer's right to avoid the contract in case of fraud (see § 870 ABGB/Civil Code) remains untouched (see § 22 VersVG)
Bulgaria	Articles 188-191 Code for the Insurance: The Insured is obliged when concluding the contract, to provide accurate and comprehensive information on all substantive circumstances that are relevant to the risk. Those are circumstances on which the insurer has made an enquiry in writing. The insured has the obligation to inform the insurer for those circumstances when they occur while the contract is in force. Intentional inaccuracy or reticence results in the right of the insurer to either terminate the contract or to demand modification of the contract. In any case it can retain the part of the premium paid. If an insured even occurs the insurer can refuse payment or reduce it.
	Art.243 is a special rule with regard to life insurance: Before signing of a life insurance or accident insurance contract and during the term of the contract the insurer has the right to receive information about the age, sex and health status of the person whose life, health or corporal integrity of the object of the insurance. When the insured event occurs the insurer has the right to access to the entire medical documentation in connection with the health status of the person whose life is insured, and may demand it from all persons who keep such information.
Croatia	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.
Estonia	§ 440 LOA - obligation of the policyholder to notify the insurer of relevant circumstances
	<u>Upon entering into a contract</u> , the policyholder shall inform the insurer of all circumstances known to the policyholder which, due to their nature, may influence the insurer's decision to enter into the contract or to enter into the contract on the agreed terms.
	Relevant circumstances are presumed to be circumstances concerning which the insurer has directly requested information in a format which can be reproduced in writing.
	The policyholder is under no obligation to inform the insurer of circumstances which are

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.

already known to the insurer or which the policyholder may reasonably assume to be known to the insurer.

Insurer has the right to withdraw upon violation of notification obligation (see limitations in § 441 LOA though, in which case insurer can demand higher insurance premiums from the policyholder, additionally look at § 460 LOA)

Aggravation of risk

§ 443 LOA - a policyholder shall immediately notify the insurer of an increase in the probability of the insured risk, unless the increase in the probability of the insured risk is caused by circumstances which are common knowledge and which do not affect the insured risk of this policyholder alone.

§ 445 LOA - in case of breach of the notification duty, the insurer will be released from obligation to perform (see limitations though)

§ 446 (2) If the probability of the insured risk increased due to a change effected by the policyholder without the consent of the insurer and the policyholder failed to give notice of the increase in the probability of the insured risk in time, the insurer may cancel the insurance contract without prior notice. If the policyholder was not responsible for the violation of the prohibition on increasing the probability of the insured risk, the insurer may cancel the contract by giving one month's advance notice.

Finland

Section 22 of the Act lays down the obligations of the policyholder prior to the conclusion of the contract: "Before the issuance of an insurance contract, the policyholder and the insured shall give true and complete answers to the insurer's questions which may be of importance for the assessment of the liability of the insurer.

Moreover, throughout the insurance period, the policyholder and the insured shall without undue delay rectify any errors or deficiencies that they may discover in the information given to the insurer.

Failure to disclose information may cause a variety of consequences depending upon the type of policy. If the policyholder or the insured acted fraudulently in the field of life insurance, the insurance contract is not binding on the insurer.

The insurer is entitled to retain the premiums paid, even if the insurance lapses. If the policyholder or the insured has intentionally or through negligence failed their duty to inform the insurer, compensation may be reduced or denied, if the said negligence cannot be regarded as minor.

See also sections 23 and 24 for consequences of non-compliance and section 72 on misrepresentation after occurrence of insured event: "If after the occurrence of an insured event the claimant has in bad faith given the insurer incorrect or incomplete information of importance for the assessment of the insurer's liability, compensation or benefit may be reduced or refused as considered reasonable in the circumstances.

France

The insured is not obliged to any disclosure beyond his answers to the questions of the insurer. Circumstances which are not material to the risk are outside the duty of disclosure.

Article L113-2 (2,3) Insurance Code:

Modifié par Loi n°89-1014 du 31 décembre 1989 - art. 10 JORF 3 janvier 1990 en vigueur le 1er mai 1990

The insured is obliged to:

[...]

2) answer exactly all the insurer's questions; especially those related to the risk declaration to be done filling the specific form before the conclusion of the contract and those related to circumstances which are essential for the insurer to understand the nature of the risk he is going to take;

The insured is allowed to answer the insurer's general questions (especially those contained in the declaration note about the nature of the risk) in a general way.

3) to declare, during the life of the contract, all the new circumstances which may aggravate the risk or create a new risk, thus making the answers given to the insurers in the "risk evaluation form" inexact or incomplete.

The insured should declare those circumstances sending the insurer a registered mail not later than 15 days after he is aware of the existence of such circumstances.

In case of breach it must be differentiated between fraudulent and negligent breaches. In particular, in case of fraudulent breach no need of protection is felt.

Article L113-9 Insurance Code:

The insured's omission or his inexact declarations, where it cannot be demonstrate his bad faith; do not imply the nullity of the insurance contract.

If the insured's bad faith is demonstrated before the insured event to happen, the insurer may decide to maintain the contract asking for a higher premium (which the insured must accept) or to terminate the contract. In this latter case the termination shall be effective 10 days after being communicated to insured by registered mail and the part of the premium exceeding the period covered shall be given back to the insured.

If the insured's bad faith is discovered after the insured event happened, the reparation is reduced in relation to the ratio amongst the tax of the paid premiums and the tax of premiums which would have to be paid, if the risks would have had completely and exactly declared.

Article L113-8 Insurance Code:

Modifié par Loi n°81-5 du 7 janvier 1981 - art. 32 JORF 8 janvier 1981 rectificatif JORF 8 février 1981

Independently of the all the normal causes of invalidity, the insurance contract is void in case of the insured's reticence or false intentional declarations, when thus behaviour results in changing or reducing the nature of the risk on the insurer's perception, even if the latter did not have any relevance for the specific insured event.

(ONLY NON-LIFE) All the premiums paid do not have to be given back. All the remaining premiums shall be paid to the insurer as damages and interests.

Germany

§ 19 (1) VVG: The policyholder shall disclose to the insurer the risk factors known to him which are relevant to the insurer's decision to conclude the contract with the agreed

content and which the insurer has requested in writing.

Sanction: in the case of a grossly negligent or intentional breach the insurer may avoid the contract with *ex tunc* effect.

(Order of presentation: Aggravation of risk should be kept separate from the precontractual disclosure duty; the latter helps to establish the contractual balance, the latter changes it.)

- § 23 (2) VVG If the policyholder recognises after the fact that he has aggravated or permitted an aggravation of the risk insured without the consent of the insurer, he must disclose the aggravation of the risk insured to the insurer without undue delay.
- (3) If, after the policyholder has submitted his contractual acceptance, an aggravation of the risk insured occurs notwithstanding his intention, he must disclose the aggravation to the insurer without undue delay as soon as he has learned thereof.

The insurer may increase the premiums or terminate the contract according to §§ 24, 25 VVG.

- § 26 (1) VVG: if the insured event occurs after an aggravation of the risk insured, the insurer is not liable if the policyholder intentionally breached his duty under section 23 (1). In case of a grossly negligent breach, the insurer can reduce his benefits payable commensurate with the severity of the policyholder's fault; the burden of proof that there was no gross negligence is on the policyholder.
- (2) In the cases of aggravation of insured risk the insurer is not obliged to effect payment if the insured event occurs later than one month after the time when the insurer should have received notification, unless the insurer was aware of the aggravation of the risk insured at that point in time. He shall be liable if the breach of the duty of disclosure in accordance with section 23 (2) and (3) was not intentional; in the event of a grossly negligent breach, subsection (1), second sentence, shall apply.
- (3) The insurer has to effect payment
- 1. if the aggravation of the risk insured was not the cause of the occurrence of the insured event or of the extent of the liability, or
- 2. if at the time of the occurrence of the insured event the insurer's termination period had expired and the contract was not terminated.

According to § 27 VVG §§ 23 to 26 do not apply if the aggravation of the risk is only immaterial or if, based on the circumstances, it can be deemed to have been agreed that the aggravation is also to be covered.

§§ 19 and 23 - 27 VVG are semi-mandatory, § 32 VVG.

Greece

Art.3 of law 2496/97 in regard to insurance contract:

The policyholder is obliged to disclose to the insurer <u>prior to the conclusion of the contract</u> any information or event of which he is aware and which is material for the assessment of the risk. To this end, he answers every question posed by the insurer usually in terms of the application form (see above section –conclusion & form of the contract).

If the insurer concludes the contract upon written questions, he cannot invoke ex post that:

- a. specific questions were not replied
- b. information that were not subject of query, were not disclosed
- c. an evidently inadequate answer was provided to a general question (except in case that the insured acted intentionally).

In case of non-compliance, sanctions vary depending on the grade of fault of the insured.

For example in case of <u>intentional breach</u>, the insurer is entitled to terminate the contract within one month from the date on which he got aware of the breach. If the insured event occurs within the above period, he will not pay the insurance indemnity/ amount. The insured will be liable for any loss suffered by the insurer. In regard to health and life insurance, the insured is punished only in case of intentional breach (not when he acted by negligence or with no fault at all).

Art 4 of law 2496/97 in regard to insurance contract:

<u>During the contract period</u>, the insured is obliged to state to the insurer, within 14 days, any information that may entail a significant aggravation of risk.

In such case, the insurer is entitled to terminate the contract or to request its modification. The above-mentioned provisions regarding sanctions apply also in case of risk aggravation. Life and health insurance are excluded from the scope of this Article.

Art 5 of law 2496/97 in regard to insurance contract:

In case of significant reduction of risk <u>during the contract period</u>, the insured can request the proportionate reduction of premium. If the insurer refuses to proceed to the reduction of premium or fails to answer the relevant request within one month, the insured is entitled to terminate the contract. Life and health insurance are excluded from the scope of this Article.

Art 7 of law 2496/97 in regard to insurance contract:

The insured is obliged to notify relatively the insurer within 8 days as from the date he got aware of the occurrence of the risk/ insured event. He is also obliged to provide the insurer with all necessary information, data and documents that concern the conditions and the consequences of the occurrence of the risk. In case of intentional breach, the insurer can claim damages he suffered.

Hungary

(Ptk. 6:452)²

[Obligation of disclosure and notification of changes]

(1) At the time of conclusion of the contract, the contracting party shall disclose to the

² The text below refers to the following Hungarian laws

[■] Ptk. – Hungarian Civil Code; Act of V of 2013.

[■] Bit. – Act on Insurance Institutions and Insurance Business; Act of LX of 2003.

insurance company all circumstances of which he is or should be aware and which are important in terms of providing the insurance coverage. The contracting party shall satisfy his disclosure obligation by truthfully filling out the questionnaire furnished by the insurance company. Leaving the questions unanswered shall not in itself constitute a violation of the disclosure obligation.

- (2) The contracting party shall be liable to notify the insurance company in writing of any changes in the material conditions.
- (3) In the event of any breach of the obligation of disclosure and notification of changes, the obligation of the insurance company shall not take effect, unless the contracting party is able to prove that the insurance company was aware of the concealed or undisclosed circumstance when the contract was concluded or that such circumstance had no influence on the occurrence of the insurance event.
- (4) If the contract covers more than one asset or more than one person concurrently, and the breach of the obligation of disclosure and notification of changes pertains to some of them, the insurance company shall not be able to allege the breach of the obligation of disclosure and notification of changes with respect to the remaining assets or persons.
- (5) The obligation of disclosure and notification of changes applies to the contracting party and the insured person both. Neither of them shall be entitled to refer to any circumstance that either one had neglected to disclose or report to the insurance company though he must have known about it and should have disclosed or reported it.

(Ptk. 6:453)

[Obligation of reporting the occurrence of an insured event]

The insurance company's obligation shall not take effect if the contracting party or the insured person fails to report to the insurance company the occurrence of an insured event within the time limit specified in the contract, fails to provide the information necessary, or fails to facilitate verification of the information provided, and, as a consequence, circumstances which are considered material from the point of view of the obligation of the insurance company become undetectable.

Ptk 6:482

[Consequences of any breach of the obligation of disclosure and notification of changes for the life assurance]

- (1) The insurance company, if it gains knowledge after the time of conclusion of the contract of any material circumstance that existed at the time the contract was concluded, shall be entitled to exercise the rights arising therefrom only during the first five years of the life of the contract.
- (2) The insurance company's obligation shall take effect notwithstanding an infringement of the disclosure obligation, if the insurance event occurs more than five years after the conclusion of the contract.
- (3) The provisions set out in Subsections (1) and (2) shall apply mutatis mutandis to the legal consequences on the infringement of the disclosure obligation relating to changes in the material circumstances provided for in the contract. The five-year period available for the insurance company to exercise its related rights shall commence on the day following the disclosure deadline.

Italy

Art. 1892; 1893 Civil Code:

Duty for the insured to disclose any material information on his own initiative.

If the insured does not comply, possibility for the insurer to ask for the termination of the

contract.

Art. 1897 Civil Code:

The insured must communicate the insurer any risks' reduction; if the reduction is a major one³ the insurer gains the right of terminating the contract within two months after he has received notice of the reduced risk which leads to a reduction of the premium.

Art. 1898 Civil Code:

The insured must immediately communicate the insurer any aggravation of the risk. The insurer has the right to terminate the contract as a consequence⁴.

Portugal

Articles 24 to 26 of the Legal Regime state:

Subsection II

Duty of the policyholder or the insured to provide information

Article 24

Initial disclosure of risk

- 1. Before entering into the contract, the policyholder or the insured shall be bound to accurately disclose all the circumstances of which they are aware and should reasonably deem significant in relation to assessment by the insurer of the risk.
- 2. The provisions of the preceding paragraph shall also apply to circumstances that have not been required to be mentioned in any questionnaire that may have been provided by the insurer for that purpose.
- 3. Any insurer having accepted the contract, save where there is fraud on the part of the policyholder or the insured with a view to obtaining an advantage, may not rely on:
- (a) failure to respond to a question on the questionnaire;
- (b) any inaccurate response to a question formulated in overly general terms;
- (c) clear inconsistency or contradiction in the responses to the questionnaire;
- (d) the fact that the representative, upon entering into the contract, knew it to be inaccurate or, in the case of an omission, was aware of such omission; and
- (e) circumstances known to the insurer, in particular when such circumstances are in the public domain and widely known.
- 4. Before entering into the contract, the insurer must inform the potential policyholder or

³ According to Art. 1897, it is a reduction that if know at the moment of the conclusion of the contract would have automatically brought to a different agreement on the amount of the premium

⁴ The termination can be immediate if the risks' aggravation is of the size that the insurer would not have concluded the contract under those conditions. The termination of the contract is effective only 15 days later if the aggravation is such that the insurer would have asked for a major premium.

insured as regards the duty referred to in para.1 and the regime covering non-fulfilment, or risk being held publicly liable in general terms.

Article 25

Fraudulent omissions or misstatements

- 1. In the event of intentional non-performance of the duty referred to in para. 1 of the preceding article, the contract may be cancelled by means of a declaration sent by the insurer to the policyholder.
- 2. Where no loss has occurred, the declaration referred to in the preceding paragraph must be sent within a period of three months of the date on which such non-performance became known.
- 3. The insurer shall not be obliged to cover any loss occurring before it became aware of the fraudulent non-performance referred to in para. 1 or during the period referred to in the preceding paragraph, and the general terms and conditions for cancellation shall be followed.
- 4. The insurer shall be entitled to the premium payable up to the end of the period referred to in para.2, save where there has also been fraud or gross negligence on the part of the insurer or the insurer's representative.
- 5. In the event of fraud on the part of the policyholder or the insured with a view to obtaining an advantage, the premium shall be payable until expiry of the contract.

Article 26

Negligent omissions or inaccuracies

- 1. In the event of negligent non-performance of the duty referred to in art.24(I), the insurer may, by means of a declaration to be sent to the policyholder within a period of three months as of the date on which it became aware of it:
- (a) Propose an amendment to the contract, fixing a term which may not be less than 14 days for dispatch of acceptance or, if admitted, the counter proposal.
- (b) Terminate the contract, evidencing that in no circumstances does it enter into contracts covering risks relating to the fact that has been omitted or inaccurately disclosed.
- 2. The contract shall cease to produce its effects 30 days after dispatch of the declaration of termination or 20 days after receipt by the policyholder of the proposed amendment, in the event of failure to respond or rejection thereby.
- 3. In the case referred to in the preceding paragraph, the premium shall be returned pro rata temporis of the cover provided.
- 4. If a loss should occur before the contract is terminated or amended, the occurrence or

consequences of which have been influenced by a fact in relation to which there have been omissions or negligent inaccuracies:

- (a) The insurer shall cover the loss in proportion to the difference between the premium paid and the premium that would have been payable, if, upon entering into the contract, the omitted or inaccurately declared fact had been known.
- (b) The insurer, where it is able to prove that under no circumstances would it have entered into the contract had it been aware of the omitted or inaccurately declared fact, shall not cover the loss and shall only be bound to return the premium.

Romania

Article 2.203 of Civil Code states that the insured person is required to respond in writing to questions from the insurer, and to declare its conclusion, any information or circumstances that you know and also are essential for risk assessment. If the essential circumstances of risk changes during the execution of the contract, the insured is required to notify the insurer in writing of the change. The same obligation rests and ensure that the contractor is aware of the change.

Article 2204 of Civil Code states that in addition to the general causes of contract nullity (error, violence, fraud), the insurance contract is void in case of reluctance misstatement or made in bad faith by the insurer or the policyholders on the circumstances, if it were known to the insurer, would have led him to not give consent or not to give the same conditions, even if the statement or reluctance had no influence on the occurrence of the insured risk.

The misstatement or reluctance of the insured or the insurance contractor whose bad faith could not be established will not void the insurance contract. If the failure or reluctance misstatements is previous the moment that the insured risk occurs, the insurer is entitled to keep the contract, requiring premium increase, or to terminate the contract at the end of a period of 10 days calculated from the notification received by the insured, return latter's share of the premiums paid for the period in which the insurance does not work. When finding misstatements or unwillingness of the insured risk is later, the allowance is reduced in relation to the proportion of the premiums paid and the premiums that would have been payable.

Slovakia

§793 of CC

Pre-contractual duties of person interested in concluding an insurance contract

Such a person is obliged when concluding the contract, to provide faithful and
comprehensive answers on all questions which the insurer has requested in writing. The
insured has the obligation to inform the insurer about any circumstances when they occur

Law connects with conscious disclosure of false and incomplete information the sanctions and insurer

a) can reduce the premium §798 of CC

while the contract is in force.

- b) has the right to withdraw 802 art.1 of CC
- c) reject the premium 802 art. 2 of CC

Spain

The policyholder must declare to the insurer, before the conclusion of the insurance contract and in accordance with the questionnaire which the insurer sent him, <u>all</u>

circumstances of which he was aware at the time he received the questionnaire likely to have an effect on the evaluation of the risk.

The policyholder is however exempt if the insurer does not submit the <u>questionnaire</u> or if it does not refer to certain circumstances which may affect the evaluation of the risk (article 10 LCS).

In addition, the policyholder's obligation to declare is limited to the questionnaire submitted by the insurer (closed questionnaire) It is therefore up to the insurer to include in it all questions he considers relevant for the assessment of the risk because he may not consequently invoke a circumstance concerning the declared risk if it was not covered in the questionnaire. The questionnaire must therefore include clearly and precisely questions on the objective characteristics of the risk and "subjective" questions covering the policyholder vis-à vis the risk to be insured.

Errors or omissions in good faith

The insurer is entitled to cancel the contract in writing within a month with effect from the time he became aware of the omission or error. The contract, thus become invalid and the insurer is not bound by any obligation in the event of a claim. If a claim occurs before the insurer cancels the contract, compensation is reduced according to the ratio between the premium paid and the premium which would have been paid if the insurer had been correctly informed of the risk.

Errors or omissions in bad faith or resulting from negligence by the policyholder

The insurer is entitled to cancel the contract in writing within one month with effect from the moment he became aware of the error or omission. The contract is therefore invalid and any obligation on the insurer to compensate disappears if there is a claim, providing that the latter demonstrates, on the one hand, the bad faith or negligence of the policyholder and, on the other that he did not know of the policyholder's error or omission.

The Insurance Contract Act establishes upon the policyholder or the insured the obligation, during the course of the contract, to notify the insurer, as soon as possible, about all circumstances aggravating the risk.

Sweden

According to Chapter 4, article 1(1), the Insurance Contract Act, a person who wishes to acquire consumer insurance is obligated, upon request of the insurance company, to provide information which may be material to the Company's decision to issue insurance. The same applies where the policyholder requests extension of the coverage or renewal of the insurance. The policyholder shall provide true and complete answers to the insurance company's questions.

According to *Chapter 4, article 3 (1), the Insurance Contract Act (2005:104)* the insurance company may provide in the insurance contract that the policyholder shall, without unreasonable delay, report to the company any change in a circumstance specified in the contract which is of material significance to the risk.

United Kingdom

The duty of utmost good faith

The duty applies to all non-consumer insureds (and to consumers of some life insurance contracts for a certain period of time). The duty is breached in case of fraud,

misrepresentations of fact (whether the proposer acted negligently or innocently) or non-disclosure of material facts before the contract is entered into (Birds, p.113).

Disclosure duty

(For remedies for breach of duty of disclosure, see post.)

B2C

<u>The Consumer Insurance (Disclosure and Representations) Act 2012 Section 2</u> abolishes the consumer's duty to volunteer information. Thus, insurers should from now on ask questions about what they want to know (Law Commission and Scottish Law Commission, LAW COM No 319, SCOT LAW COM No 219, p.38).

B₂B

Marine Insurance Act 1906, Section 18:

The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.

MacDonald Eggers 41-030; Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (1995) 1 AC 501: The scope of the duty to disclose is however limited. The insured needs not to disclose facts which: (a) are either known to the insurer or presumed to be known by him as common knowledge or for the ordinary course of business; (b) are facts which diminish the risk for the insurer (Principles of European Insurance Contract Law, p. 80 N2-N3).

Garnat Trading/Shipping (Singapore) Pte Ltd v Baminh Insurance Corporation (2011)

A minute disclosure of every material circumstance is not required. The assured complies with the duty if he discloses sufficient information to call the attention of the underwriter to the relevant facts and matters in such a way that if the latter desired further information, he can ask for it (Birds, p.121).

Duty not to misrepresent

B₂C

<u>The Consumer Insurance (Disclosure and Representations) Act</u> 2012 Section 2 establishes a duty of the customer to take reasonable care not to make a misrepresentation to the insurer. <u>Section 3</u> defines reasonable care and sets out the circumstances which need to be taken into account in the assessment whether the customer has taken reasonable care. <u>Section 4</u> defines a "qualifying misrepresentation":

A "qualifying misrepresentation" has to meet the following criteria:

- it should have induced the insurer to enter the contract or variation or do so on different terms and
- it should be deliberate or reckless; or careless.

B₂E

In addition to the duty to disclose, the policyholder is under a duty not to misrepresent material facts. (Law Commission, consultation paper 204 and The Scottish Law Commission

Discussion Paper No 155, p.23)

Section 20(1) of the Marine Insurance Act 1906 states:

"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."

Section 20(3) of the 1906 Act states:

"A representation may be either a representation as to a matter of fact or as to a matter of expectation or belief."

The two types of misrepresentations receive different treatment, with a strict liability standard applicable to misrepresentations of fact. Thus, the insured cannot rely on the defence that the misrepresentation of fact was innocent. (Law Commission, consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.23:

Section 20(4) of the Marine Insurance Act 1906 applies to factual representations:

"A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer."

<u>Section 20(5) of the Marine Insurance Act 1906 applies to representations of expectation or belief:</u> "A representation as to a matter of expectation or belief is true if it be_made in good faith."

Duty not to misrepresent in relation to variations of a contract

B2C

Consumer Insurance (Disclosure and Representations Act) 1906, Schedule 1, part 2

Where there is a qualifying misrepresentation in relation to a variation of the contract, and that variation can reasonably be treated separately from the insurance policy, the remedy should only apply to the subject matter of the variation. However, if the variation cannot be treated separately, if the consumer made a deliberate or reckless misrepresentation, the insurer may

avoid the whole policy. (Law Commission and Scottish Law Commission , LAW COM No 319, SCOT LAW COM No 219, p.85)

Warranties and basis of the contract clauses

B2C

The effect of basis of the contract clauses has been abolished for consumer insurance contracts.

(Law Commission and Scottish Law Commission , LAW COM No 319, SCOT LAW COM No 219,p.43)

<u>The Consumer Insurance (Disclosure and Representations) Act 2012 Section 6</u> states that "a representation is not capable of being converted into a warranty by means of any provision of the consumer insurance contract".

B2B

In insurance, a warranty is a particularly important contractual term. If breached, it leads to an automatic discharge of the insurer's liability. (The Law Commission, Consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.141)

The use of "basis of the contract" clauses reinforces the importance of warranties. If an insured signs a statement on a proposal form stating that the answers given form the basis

of the contract, this has the effect of converting all the answers into warranties. Thus, the insurer could avoid the contract for any misrepresentation or inaccuracy, even if it is not "material" (The Law Commission, Consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.135)

The Marine Insurance Act 1906, Section 33(3) states that a warranty "must be complied with, whether material to the risk or not". <u>Under Section 34(2)</u> once a warranty is broken the policy holder "cannot avail himself of the defence that the breach has been remedied and the warranty complied with before the loss". These provisions apply to all types of insurance, not only marine. (The Law Commission, Consultation paper204, The Scottish Law Commission

Discussion Paper No 155, p.135)

De Hahn v Hartley (1786)

In case of a breach of a warranty the insurer may refuse any claims for subsequent losses, even if the breach was minor (The Law Commission, Consultation paper 204, The Scottish Law Commission Discussion Paper No 155, p.135).

Disclosure of risk aggravation

A duty of the insured to disclose an increase in the risk during the duration of the contract may be introduced in a contract. A term imposing such a duty is usually a promissory warranty, since it provides that upon failure the insurer may avoid the policy. (Birds, p.150)

However, case-law has led to a restrictive interpretation of this duty:

Shaw v Robberds (1837)

The increase in the risk should be permanent and habitual and not merely temporary (Birds, p.151).

Glen v Lewis (1853)

If an insurer wishes to be notified of merely temporary increases in risk, it must insert express clauses to that effect. Otherwise, it may not be expected that the insured would inform the insurer on their own initiative (Birds, p. 151).