Law and Ethics in the Malaysian Insurance Industry – A Review of Selected Practices

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Introduction

The insurance industry, especially insurers, is one of the most regulated commercial entities. This is due to its unique role and impact on society. The very nature of its business is *sui generis* as insurance is in a class of its own. Thus, although it is a profit motivated industry like any other business, the health of the industry is determined to a certain extent by the ethical practices or lack of them in the daily running of the industry.

What has ethics to do with the insurance industry? This article explores the co-relations between law, ethics and practice in the insurance industry. The doctrine of *ubberimae fidei* and the principle of indemnity set a contract of insurance apart from other types of commercial contracts. Several examples of insurance industry practices which may fulfill the legal principles and requirements but may be ethically suspect will be discussed. These are practices in the formation of contract, the practices of insurance agents, the practice of inserting unfair terms in the form of the basis of contract clause and limiting the time frame to submit a claim, the practice of avoiding claims on the basis of absence of insurable interest, and the practice of prolonging delays unreasonably in the settling of claims.

Formation of Contract

Under the Contracts Act 1950,[1] a contract is formed when there is unconditional acceptance of the offer. The basic elements of a valid

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[1] Act 136 (Revised 1974).

contract are offer, acceptance, consideration, the intention to create legal relations and the legal capacity to enter into a contract. The basic principle governing contract law is the freedom to contract which presupposes equal bargaining power of both parties to the contract.

For insurance contracts, although the insurer is the party which formulates the proposal form, once the form is filled by the potential insured or proposer and submitted to the insurer, the proposer is said to have made an application to the insurer. It is considered as an offer made to the insurer. That being the case, the final decision lies with the insurer on whether to accept the said offer. The application is then evaluated by the insurer via the underwriting process. The contract of insurance is formed upon the unconditional acceptance of the said offer. In the life insurance sector, it is an industry practice to provide for immediate coverage for accidental death upon the receipt of the completed proposal form and premium payment of at least two months.

The questions that arise revolve around the acceptance of the offer. Is oral acceptance sufficient? Is there acceptance upon receiving the completed proposal form and premium? Must there be a letter of acceptance? Is acceptance to be upon the issuance of the policy? Can the coming into force of the contract be postponed arbitrarily by the insurer?

A case relating to the above matters is *Borhanuddin bin Haji Jantara v American International Assurance Co Ltd.*[2] The deceased in this case was an air stewardess who perished when the airplane crashed. Prior to the accident, she had submitted a completed proposal form for life insurance and made the necessary payment of RM118 just two days before the fateful flight. Her father submitted a claim to the insurer who promptly rejected the claim on the basis that there was no contract of insurance as there was no acceptance as yet of the proposal.

The High Court held there was no contract of insurance. On appeal to the Supreme Court, it was held that a contract had been

[2] [1987] 1 MLJ 22.

formed when the insurer received the first payment. The Court held that the receipt of the payment amounted to acceptance. It was also stated by the Court that the deceased had done all that she could do on her part. There was evidence that a policy number had already been assigned to the said application but there was a directive to the employee not to issue the policy. Despite the existence of a clause at the back of the receipt to the effect that the policy will only come into force upon the issuance and delivery of the policy, the Court held the clause to be inapplicable on the ground that it only applies if and when the submission of the completed proposal form and the payment of the said premium were made simultaneously. In the instant case, the completed proposal form was submitted first. Payment of the RM118 was made later. The appeal by the deceased's father was allowed.

Although the final decision was in favour of the appellant, it is to be noted that the rationale was not on strong grounds. The industry's practice of providing immediate coverage for accidental death upon receipt of the proposal form and premium was not brought to the attention of the Court. The clause postponing the coming into force of the contract of insurance was not held invalid, merely inapplicable due to the fact that the proposal form and the payment were not made simultaneously. Should such a clause be allowed in the insurance industry which prides itself in providing coverage and service to its policy owners when they need it most? It is not uncommon to still find a clause postponing the coming into effect of a contract of insurance to the time when a letter of acceptance is issued or even to the time when the policy is issued and delivered. This is especially true for life policies. Such clauses are contrary to industry practice and cause hardship to the insured persons. Such unfair terms, which are arbitrarily imposed by the insurers, ought to be recognised for what they truly are and be held void to that extent, as they violate the very basic principle of freedom to contract which presupposes equal bargaining power of both parties.

Insurance Agents

An insurance agent generally acts on behalf of the insurer to solicit new business, negotiates with potential clients and services the policy-

holders.[3] Insurance agents are agents of the insurer even though in reality the agents often act on behalf of the policy owners. The lack of understanding and appreciation of this point in the law of agency often results in an unjust situation where the insured is denied coverage as a result of the actions or omissions of the said agent.

Under section 151 of the Insurance Act 1996,[4] an insurance agent is, for the purpose of the formation of the contract, deemed to be the agent of the insurer. The agent's knowledge is deemed to be the knowledge of the insurer's. The agent's actions or omissions are deemed to be that of the insurer's.

Agents are still used extensively by insurers to procure new business and to service the existing policy owners. In the year 2003, the distribution channel of life insurance products via agents accounted for 56.3 per cent of the total compared to 76 per cent of the total in the year 2002.[5] Unfortunately, an agent who approaches and subsequently assists a proposer may intentionally or unintentionally act in such a way as to deprive the proposer of coverage.

In the case of *Madam Loh Sai Nyah v American International Assurance Co Ltd*,[6] the deceased had paid the premium for a personal accident policy via a cheque to an insurance agent. Two days later, he died in an accident. The insurer rejected the claim of the widow on the ground that no contract of insurance existed at the time of death as the premium was received one day after the accident and the proposal form was received four days after the accident. The Court of Appeal affirmed the decision of the High Court in dismissing the claim. The case of *Borhanuddin* was distinguished and it was held that there was no contract of insurance at the time of death in this case. It was further held that the agent was not authorised to accept the proposal form.

[3] Insurance Act 1996, s 2.

[4] Act 553.

[5] Insurance Annual Report 2003, Bank Negara Malaysia.

[6] [1998] 2 MLJ 310.

The Court's finding ignored the role and function of an insurance agent in practice and in law. An agent solicits and negotiates for new contracts of insurance for the insurer and accepts the proposal forms on behalf of the insurer. There is no necessity for a special authority as stipulated by the Court. In fact, in situations where an agent acts as if he has the authority to act on behalf of the insurer and his actions are accepted or are not denied by the insurer, the insurer is bound by the agent's actions as the insurer is deemed to have ratified the said actions. The agent is said to have apparent authority from the insurer. Unfortunately, the pertinent issue of the agent's inaction or failure to submit the proposal form and the cheque was not raised at all in *Madam Loh Sai Nyah.*

In *Tang Tung Thian & Anor v United Oriental Assurance Sdn Bhd,*[7] a comprehensive policy was obtained via a sub-agent of the insurer's authorised agent. The vehicle was subsequently stolen. There were serious misrepresentations in the proposal form which was filled by the sub-agent. The insurer rejected the claim. The High Court held that as the sub-agent was not an authorised agent, the knowledge of the said agent could not be said to be the knowledge of the insurer. This decision failed to take into account the industry practice of allowing the use of sub-agents, particularly in motor insurance.

Clearly this raises the point of whether an insurer who accepts the employment of sub-agents by its authorised agent can subsequently raise the issue of a sub-agent being an unauthorised agent. Under section 141 of the Insurance Act 1996 (which deals with general insurance), the receipt of premium by a person on behalf of the insurer is deemed to be the receipt by the insurer. The onus of proving that the premium was received by a person who was not authorised to receive the premium lies with the insurer. The insurer has to prove that the agent is not so authorised. Mere allegation is not enough. The law of agency is fairly clear on this point. Where innocent third parties are involved, even when there is no express agency, there is an implied or apparent agency. The insurer should be estopped from pleading the point of unauthorised agents in such circumstances. In resorting to

[7] [2000] 5 MLJ 696.

equitable estoppel, a fairer position is achieved. It is also one way of infusing ethics into law. The practice of insurers who rely on and accept the agents' procurement of new business and then subsequently reject claims on the basis that the agents were not authorised is ethically objectionable.

Unfair Term - Basis of Contract Clause

A contract of insurance is grounded on the doctrine of *ubberimae fidei* or utmost good faith.[8] It requires both parties to disclose honestly and truthfully all that they know to be material to the acceptance or rejection of the application. This was first established in the case of *Carter v Boehm.*[9] A breach of this duty by one party entitles the other party to avoid the contract. The contract becomes voidable upon the non-disclosure or misrepresentation of a material fact.[10] However, insurers have inserted a basis of contract clause at the end of proposal forms. This converts all the answers in the form into warranties. They automatically become material facts even though some may in actual fact be immaterial. A breach of a warranty results in the contract of insurance being void *ab initio*. The insertion of the basis of contract clause therefore negates the requirement of materiality. It automatically results in the contract of insurance being void *ab initio* regardless of whether the non-disclosure or misrepresentation involved an immaterial fact.

In the case of *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan*,[11] the High Court on appeal held that there was non-disclosure of fact[12] in the proposal form by the insured. As there was a basis of contract clause, the inaccurate answer amounted to a breach of warranty. The contract of insurance was thus void and the insurer was not liable to pay.

[8] Marine Insurance Act 1906, s 17.

[9] (1766) 3 Burr 1905.

[10] As reflected in s 149(4) of the Insurance Act 1996.

[11] [2001] 1 MLJ 227.

[12] It was actually a misrepresentation.

The insertion of the said clause is highly objectionable from an ethical point of view. It is ethically objectionable from a contractual point of view as it is an arbitrary act by the insurer and the proposer is not in the position to bargain and agree on the said matter. The parties are not on equal footing in coming to the agreement.

A relevant provision to look at is section 147(4) of the Insurance Act 1996, which applies to life policies. This provision is a legislative intervention against the practice of inserting unfair terms in the form of a basis of contract clause as discussed above, but only as regards life policies. Section 147(4) provides:

> A licensed life insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected on the ground that a statement made or omitted to be made in the proposal for insurance or in a report of a doctor, referee, or other person, or in a document leading to the issue of the life policy, was inaccurate or false or misleading unless the licensed life insurer shows that the statement was on a material matter or suppressed a material fact and that it was fraudulently made or omitted to be made by the policy owner.

It seeks to neutralise the harsh effect of the basis of contract clause by limiting it to policies which are below two years only. For policies above two years, if the insurer wishes to avoid the policy, besides proving materiality of the omitted or misrepresented fact, it must additionally prove that the material fact not disclosed or misrepresented was fraudulently omitted or made by the insured.

It is submitted that the basis of contract clause can be additionally challenged on the basis that it is an unfair term in the contract. Although there is no specific legislative provision on unfair contract terms in Malaysia, the proposition that an unfair term is unenforceable can be supported by the basic principle of freedom to contract. The basic principle presupposes equal bargaining power on both parties. In reality, a contract of insurance often involves the insurer, who is in a position of determining almost all the terms of the contract, and the insured, who is left with the choice of either accepting all the terms or be left

with no coverage at all. The insertion of an unfair contract term such as the basis of contract clause undermines the very basis of the contract. It should therefore be made unenforceable, even for life polices which are below two years. There is no legitimate basis in allowing the basis of contract clause to prevail, particularly in life policies which involve individuals. Alternatively, public policy consideration should demand that an unfair contract term such as the basis of contract clause be deemed unenforceable.

Insurable Interest

One of the basic legal principles in insurance law is the requirement of insurable interest. A person is said to have insurable interest in the life or property insured if he stands to benefit by its safety or its continued existence, or he stands to be prejudiced by its loss or damage, or may incur liability in respect thereof.[13] The interest goes beyond the legal or equitable relations between the person insuring and the subject matter being insured. As was eloquently stated by Lawrence J in *Lucena v Craufurd*,[14] to be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefited from its existence and prejudice from its destruction.

The requirement of insurable interest evolved over a period of time to ensure contracts of insurance do not descend to the level of gaming or wagering. The first legislative attempt to achieve this in England was in the passing of the Marine Insurance Act in 1745. The said Act attempted to prevent the issuance of policies which did not require proof of interest or policies in the form of wagering or gambling. Wagering and gambling contracts were declared illegal in the English Gaming Act 1845.

Section 1 of the English Life Assurance Act 1774 provides that no insurance shall be made by any person on the life of any person or on any other event wherein the person for whose use, benefit or on whose account such policy shall be made, shall have no interest, or by way

[13] Marine Insurance Act 1906, s 5.

[14] 127 ER 630 at p 642.

of gaming or wagering. Every insurance contract contrary to the true intent and meaning of the Act is null and void. The Act exempts marine or goods insurance. The Act probably does not cover liability insurance as well, as was declared by the Court of Appeal in *Mark Rowlands Ltd v Berni Inns Ltd.*[15] This position was subsequently affirmed by the Privy Council in *Siu Yin Kwan v Eastern Insurance Co Ltd.*[16]

A contract of insurance where the person insuring has no insurable interest in the subject matter insured or is a wager is a void contract. This is stated in section 4(2) of the English Marine Insurance Act 1906. Similar provisions in relation to wagering contracts are found in our local statutes, namely section 31(1) of the Contracts Act 1950 and section 26 of the Civil Law Act 1956.[17] Section 31(1) of the Contracts Act 1950 declares:

> Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Section 26 of the Civil Law Act 1956 similarly declares all wagering contracts to be void and illegal.[18]

Contracts of insurance are essential in ensuring the smooth running of commercial activities as they take over the identified risks. Thus, although the very concept of insurable interest has faced challenges as to its exact meaning under the various types of insurance, the requirement of insurable interest in a contract of insurance remains firmly entrenched in insurance law.

For life policies, the requirement of insurable interest is stated in section 152 of the Insurance Act 1996. There is a legal presumption

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[15] [1986] 1 QB 211.

[16] [1994] 2 AC 199.

[17] Act 67 (Revised 1972).

[18] Exceptions are as stated in the same section.

of insurable interest in one's own life, the life of one's spouse, the life of a child or ward being under the age of majority at the time the insurance is effected, the lives of employees, and the life of a person on whom one is wholly or partly dependent, at the time the insurance is effected.

Other than falling into the above categories, insurable interest must be proved at the time the contract of insurance is formed. The extent of insurable interest must again be proven at the time the risk occurs to determine the amount payable by the insurer.[19]

The requirement of insurable interest in an indemnity policy is at the time the risk occurs. The insured must prove that he has insurable interest at the time of loss. If there is no insurable interest at the time of loss, the claim will not be paid. The application of the principle of indemnity ensures that the person is indemnified to the extent of his actual loss, subject to the sum insured and a variety of other clauses. It aims to put the person back to his original position, as far as is practically possible. If the person has no insurable interest at the time of loss, even if at the time of obtaining the policy he has such interest, in reality, he has not suffered any loss. Thus the principle of indemnity ensures that only those who had suffered loss are indemnified.

In practice, however, there are instances when an insurer enters into a contract of insurance even though there may be an absence or lack of insurable interest on the part of the proposed insured. Does it not fall upon the insurer to ensure that the applicant has insurable interest before accepting the offer and sealing the contract of insurance? Although the law requires that insurable interest be present at the time of loss, this is to determine the extent of the loss. It is not meant to facilitate the avoiding of claims by insurers on the basis of the lack of insurable interest, thus establishing that the contract is void. Therefore, the question that may arise is whether an insurer who knew that there was no such insurable interest is estopped from subsequently utilising that fact in avoiding a claim?

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[19] Insurance Act 1996, s 152(1).

There may be instances where the policy owner may not have any insurable interest on the lives insured. Section 186(3) of the Insurance Act 1996 covers situations where the group policy owner has no insurable interest in the lives of the persons insured. A group policy involves a policy owner who insures the lives of a group of people with an insurer. This can be seen in the employment sector where the employer insures the lives of his employees. Other situations include the bank insuring its account-holders with personal accident coverage or a club insuring its members against accidental death and injuries. Section 186(3) provides that the insurer shall be liable to the person insured. This is so even where the premium is not paid by the group policy owner. According to section 186(4), the insurer is to pay the moneys due to the persons insured or any persons entitled through him. Therefore, section 186(3) and section 186(4) are the exceptions to the general rule that the lack or absence of insurable interest would result in the contract of insurance being void.

With the exception of group policies under section 186 as discussed above, a contract of insurance is void if there is no insurable interest. There is nothing to prevent an insurer from accepting proposals and premiums from parties who have no insurable interest in the subject matter insured and then subsequently avoiding the claims on the basis that there is no insurable interest. This practice is objectionable from an ethical point of view as the insurer willingly accepts the proposal despite the absence or lack of insurable interest but subsequently relies on that very fact to avoid paying any claim. This is ethically unacceptable as the insurer is allowed to benefit at the expense of the insured. If there is no claim, the contract would have been allowed to exist by the insurer who stands to gain in the form of the premium collected. If there is a claim, the insurer can avoid the payment of claim on the ground that there is no insurable interest. In such a situation, the insurer should be estopped from avoiding the claim on the basis that there is no insurable interest as the insurer had willingly accepted the proposal despite the absence or lack of insurable interest.

The requirement of insurable interest is merely to ensure that insurance is not abused for the purpose of speculation, wagering or gambling. The test utilised to determine whether or not there is insur-

able interest seems to vary according to the types of insurance. Insurable interest is defined in section 5 of the Marine Insurance Act 1906 which states:

> (1) Every person has an insurable interest who is interested in a marine adventure.
> (2) In particular a person is interested in a marine adventure when he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein; in consequence of which he may benefit by the safety or due arrival of the insured property, or he may be prejudiced by its loss or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

In *Lucena v Craufurd*[20] the term insurable interest was given a broad definition. Lawrence J elaborated on this point:[21]

> A man is interested in a thing to whom advantage may arise, or prejudice happen from the circumstances which may attend to it... [I]nterest does not necessarily imply a right to the whole, or part of the thing, nor necessarily or exclusively that which may be subject of privation, but having some relationship to, or concern in the subject of insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce damage, detriment or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit ... To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction.

Subsequent cases have, however, developed a stringent test when compared with the broad requirement of economic interest as stated in *Lucena v Craufurd.*[22] In *Macaura v Northern Assurance,*[23] the

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[20] *Supra,* n 14.

[21] *Ibid* at p 642.

[22] *Ibid.*

[23] [1925] AC 619.

House of Lords held that as the sole shareholder and creditor of the company had no legal or equitable interest in the timber, he had no insurable interest in the timber owned by the company. *Macaura* has not been followed in other Commonwealth jurisdictions. In *Kosmopoulos v Constitution Insurance*,[24] the Supreme Court of Canada rejected the narrowness of the *Macaura* approach and held that the insured who was the sole shareholder, director and lessee of a limited company had insurable interest in the business premise. Many jurisdictions in the United States have abandoned the restrictive definition of insurable interest in favor of the "factual expectancy test".[25] The Australian position is clearly stated in the Australian Insurance Contracts Act 1984. Section 17 of the said Act lays down a broader scope of insurable interest in general insurance. The insured is only required to have suffered a pecuniary or economic loss by reason that the insured property has been damaged or destroyed. The insurer is not relieved of liability by reason only that the insured did not have an interest in law or in equity in the property at the time of the loss. This statutory position is more in line with the position laid down in *Lucena* by Lawrence J.

Nevertheless, the Malaysian High Court in *Chung Kuo Ping @ Richard v Malaysian Assurance Alliance Berhad*[26] referred to *Macaura* and adopted the proposition that being a major shareholder in the company was no indication of insurable interest in the property insured. The evidence adduced in this case revolved around the legal ownership of the insured trucks. This case illustrates the uphill task that a claimant may face in proving that he has insurable interest in the property insured. It was held that the burden remains with the claimant to show that there was insurable interest.

It is an established evidential rule that he who alleges must prove the fact. In *Chung Kuo Ping @ Richard*, it was the insurer who alleged the insured's lack of insurable interest in the insured trucks.

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[24] [1983] 149 DLR (3rd) 77.

[25] Hodgin, R, *Insurance Law Text and Material*, (London: Cavendish Publishing Ltd, 1998) at p 65.

[26] [2003] 2 AMR 47.

The burden to prove the lack of insurable interest should therefore fall on the insurer and not the claimant as was required by the Court in the case. It is submitted that the case was decided on its facts. There were inconsistencies on the point of ownership. The Court dismissed the claimant's evidence due to the inconsistencies. It is perhaps timely to refer to the dictum of Brett MR in *Stock v Inglis*[27] that:

> It is the duty of a court always to lean in favour of an insurable interest [because] after the underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer.

In *Chung Kuo Ping @ Richard*, the court was embroiled in the task of determining the legal ownership and did not consider whether or not the insurer should be allowed to raise the issue of insurable interest at all. The court also misplaced the burden of proving insurable interest on the insured. It is submitted that the adoption of *Macaura* in this case can be set aside as the case was decided *per incuriam.*

It is to be emphasised that the definition of insurable interest is not rigid and is still evolving as can be seen in the various jurisdictions. Restricting the definition of insurable interest to one of ownership goes against the grain of industry practice and the development in the insurance industry. There are many instances where insurance coverage is provided to persons who have no legal ownership of the property. This includes situations where there is bailment or even tenancy. These are accepted practices in the insurance industry. There are several types of insurances, besides life polices, which are issued based on presumed insurable interest or commercial convenience and expediency. These include cases like *Sharp v Sphere Drake Insurance (The Moonacre),*[28] *Glengate-KG Properties Ltd v Norwich Union Fire*

[27] [1884] 12 QBD 564 at p 571.

[28] [1992] 2 Lloyd's Rep 501.

Insurance Society Ltd,[29] *Petrofina (UK) Ltd v Magnaload Ltd*[30] and *Cooperative Retail Services Ltd v Taylor Young Partnership.*[31]

It is interesting to note that section 16(1) of the Australian Contracts Act 1984 declares that a contract of general insurance is not void by reason only that the insured did not, at the time the contract was entered into, have an interest in the subject matter of the contract. This provision takes into account the widespread practice in the general insurance industry to provide coverage, at times immediate coverage, when requested by the insured, without questioning the existence of legal ownership of the property or any other interest for that matter.

In fact, in the interlocking cases of *Feasey v Sun Life Assurance Co of Canada* and *Steamship Mutual Underwriting (Bermuda) Ltd v Feasey*[32] where a "hybrid" insurance was created, the Court of Appeal held that there was insurable interest even though the existence of insurable interest in the case was questionable. The parties actually created the said policy to get around the difficulty caused by the Lloyd's announced changes to its risk codes for the 1995 year of account pertaining to the classification of Personal Accident Insurance. It was held at first instance that because the parties acted in good faith, there was no need to scrutinise the issue of insurable interest. The Court of Appeal affirmed the decision. The Court was perhaps swayed by the fact the policy was created specially by the insurer for the benefit of the insured. It would be unbecoming of the insurer to then cry foul by holding the placard of no insurable interest.

The law on insurable interest is still evolving. The industry needs to take note of this fact. There are many instances where insurable interest is presumed to exist and both parties proceed to enter into a contract of insurance. This is particularly true in a variety of general insurances involving commercial entities and adventures. The courts must take into account the development in this area and also the

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[29] [1996] 1 Lloyd's Rep 614.

[30] [1984] QB 127.

[31] [2002] 2 All ER 865, CA; [2002] 1 WLR 1419, HL.

[32] [2003] EWCA Civ 885.

industry practice. If insurable interest had been presumed to exist at the beginning, then the purpose of ascertaining insurable interest when a claim is made must be to determine the quantum of loss, not to avoid the claim altogether.

Claims – Time Bar

As the insurer is the party who prepares the documents, from proposal form to the actual policy itself, it is not surprising that we find certain terms which are clearly for the benefit of the insurer, at the expense of the insured. One of these terms is the limitation on the time for claims to be submitted under the policy. It is common to find a condition in a policy clearly stating that any action on the claim is to be taken within 12 months from the happening of the event. This clause is clearly in violation of section 29 of the Contracts Act 1950 and section 6 of the Limitation Act 1953.[33] Section 29 of the Contracts Act 1950 provides that:

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Under section 6 of the Limitation Act 1953, a person is entitled to take an action in contract within six years from the date the cause of action arises. Thus, a condition in a policy limiting the time for the insured to submit his claim to 12 months from the time of loss would be void.

The position was clarified in the case of *New Zealand Insurance Co Ltd* v *Ong Choon Lin (t/a Syarikat Federal Motor Trading)*.[34] The Supreme Court rightly held that such a condition in the policy which limited the time for the insured to submit his claim had breached section 29 of the Contracts Act 1950 and was void to that extent.

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[33] Act 254 (Revised 1981).

[34] [1992] 1 MLJ 185.

It is to be noted that in practice, there are practical problems in obtaining the necessary documents for submission to the insurer. The obtaining of death certificates, police reports, adjuster's reports, medical reports, post mortem reports, loss assessment reports and a variety of other documents often involve various parties. Delays are inevitable under the present system. It is crucial that the limitation period is taken note of by the claimants as the filing of a legal action after the time frame will be time-barred.

In the case of *Tan Boon Yen dan lain lain lwn Mayban General Assurance Bhd*,[35] the action against the insurer was filed after the statutory limitation period. The delay was due to the fact that negotiations were ongoing and the fact that the inquest was ordered only after three years of the event. The inquest was only carried out after more than 6 years from the said order. The insurer had initially rejected the claim on the basis that the death was a result of suicide (suicide being an excluded risk under the said policy). The inquest resulted in the finding that the cause of death was murder. Unfortunately for the applicants, they had not filed the action in time and the action failed on that ground.

Questions can be raised with regard to the practice of prolonging negotiations and delaying the processing of claims. If such delays are unavoidable, the parties concerned must take note of the delays. However, if delays are intended to defeat the claim, they amount to unethical practices.

It is perhaps appropriate at this juncture to highlight the importance of utmost good faith even at the late stage of the processing of claims. In fact, it is especially crucial for utmost good faith to be exercised by both parties in the claims process. After all, a contract of insurance is a promise to pay the policy money upon the occurrence of the risk insured. It is at this stage that in practice one cannot help but notice that both parties may be viewing each other suspiciously.

There are insurers who approach the matter with great caution and process claims by discounting the possibility of fraud, breach of war-

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[35] [2003] 5 MLJ 315.

ranty, non-disclosure, misrepresentation, excluded risks and even the very existence of the contract itself! No doubt these are valid legal grounds for which claims can be and are denied once they are proven. Nevertheless, the practice of resorting to these grounds to avoid legitimate claims reflects the lack of utmost good faith on the part of the insurers, and is unethical.

Claims – Unreasonable Delay

Deliberate delays in the processing of claims may amount to a breach of utmost good faith on the part of the insurer. It may also amount to a breach of contract on the part of the insurer who is to indemnify the insured as soon as the risk insured occurs. Deliberate and unreasonable delays also amount to unethical practices.

In the case of *Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min,*[36] the Federal Court affirmed the decision of the arbitrator that the insured was entitled to the indemnity over the additional loss which resulted from unreasonable delay by the insurer over the processing and approval of the claim. There was a disagreement as to the cost of repair of the said vehicle. The car was left in the open for six months resulting in it being irreparable. It was found that there was failure and neglect on the part of the insurer to take alternative steps to repair the said vehicle at another place.

Under section 11 of the Civil Law Act 1956, the court has the discretion to award interest in addition to indemnity. This is to compensate the insured over delay caused by the insurer in paying the claim.[37] The said provision was utilised in the case of *Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd*[38] where the court took into account the inaction and questionable behavior of the insurer. The awarding of interest is to compensate the insured in circumstances where the insurer has unreasonably delayed the processing of the

[36] [1980] 1 MLJ 291.

[37] *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 CLJ 44, SC.

[38] [1998] 3 MLJ 724.

claim. Unfortunately this remains a discretionary power of the court and is not automatically imposed.

On the other hand, there have been instances of abuse on the part of the claimant or insured who may collude with the intermediaries or other parties so as to obtain coverage when in fact they are not entitled to one. A case on point is *Syarikat Pembinaan Lida Sdn Bhd v Talasco Insurance Sdn Bhd.*[39] A cover note was issued to cover the said premise retrospectively when in actual fact the premise had been burnt down and was no longer in existence.

Conclusion

The above are some instances where the law, ethics and practice may be at variance with one another. It is to be noted that many of the insurance industry practices are based on commercial convenience and motivated by profit at the expense of good ethical practices. It is humbly submitted that law and ethics must be the bedrock upon which the insurance industry practices are based. The insurance industry must take cognizance of the law and ethics in molding the practice to an acceptable level if the industry is to grow and remain healthy, especially with the impending opening up of the insurance market to the world.

Unethical practices which are resorted to in avoiding liability under insurance policies may work in the immediate and short term to reduce the number of claims payable, however, such practices undermine the confidence insured persons may have had in the integrity of the insurer, and would inevitably bring about adverse effects on the reputation and performance of the industry in the medium and long term. It must not be forgotten that a contract of insurance is ultimately a promise to pay upon the occurrence of the risk insured. If the promise is not honoured, it is only a matter of time before the insured turns elsewhere for a more reliable and reputable insurer or find other solutions like resorting to captive insurance. Utmost good faith demands that both parties act frankly and honestly with one another at every stage of the contract. Good governance of the insurance industry requires the incorporation

[39] [1993] 2 MLJ 121.

of ethical practices to complement the demands of the law.

The Distribution (Amendment) Act 1997 – Amendments to Section 6 of the Distribution Act 1958

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I. Introduction

In 1984, two academic staff of the Faculty of Law of the University of Malaya, namely Associate Professors P Balan and Rafiah Salim (as they then were), published a comprehensive article on the law of intestate distribution of non-Muslims under the Distribution Act 1958[1] (hereinafter also referred to as the "principal Act") in the present Journal.[2] In that article, the said writers provided an informative and critical account of the scheme of intestate distribution provided by the Distribution Act 1958 as it stood in 1984. Since then, the Distribution Act 1958 has undergone some important changes. These changes were brought about by the amendments set out in the Distribution (Amendment) Act 1997 (hereinafter referred to as "Act A1004"), which came into force on 31 August 1997.

The major changes brought about by Act A1004 to the scheme of intestate distribution for non-Muslims are by the amendments to section 6 of the Distribution Act 1958. The purpose of the present article is to set out these changes by highlighting the differences in the law before and after the enforcement of Act A1004. It is hoped that this article will serve as a supplement to the above mentioned well researched and detailed work of Associate Professors P Balan and Rafiah Salim (as they then were). That article is still valid today

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[1] Act 300 (Revised 1983).

[2] Balan, P & Rafiah Salim, "Akta Pembahagian" [1984] *JMCL* 179.