THE INSURANCE LAW OF MALAYSIA

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TO MY WIFE
Virginia

FOREWORD

I am very happy to write this foreword – to welcome yet another book by my old friend Albert Myint Soe who amidst a busy life has found time to contribute to the growing local legal literature. It is true that the Malaysian insurance law is very much based on the English and that our lawyers can find most of what they need in books published elsewhere. But this book should be of great value to those practising in this country – because it collects in a convenient volume local cases illustrating the application of the English-based insurance law to Malaysian conditions.

In the field of law Malaysia and Singapore are almost one country and the reader will find very helpful the inclusion by the author of some Singapore cases.

In these days when so many of us are motorists and home buyers who are required to take out insurance, there are but few who are not sooner or later affected by insurance law – and I am therefore pleased to see that the author has written this book in easy-to-understand language.

I commend this book to the public.

10th October, 1979.

TUN MOHAMED SUFFIAN
Lord President

PREFACE

This book was prompted by the recent changes made to the Malaysian Insurance Act, first in 1975 and then in 1978. These developments have made Insurance Law somewhat different from that prevailing in Singapore. A separate book on the Insurance Law of Malaysia was called for.

The approach I have taken in this book is essentially a practical one. I have tried to put into a nutshell the various areas of insurance law and practice. Insurance is a fascinating subject and insurance law is equally so as it highlights among other things, the eternal problems that arise from time to time between insurance companies and the insured. These problems are also in no small part due to the activities of a motley crowd of agents and brokers who may be described as "insurance intermediaries". This book makes a modest attempt to describe these problems and if possible to suggest their solutions.

It must be borne in mind that this book is complementary to any good English work on Insurance Law. Many English cases are cited and delved into. It should not be forgotten that the backbone of Malaysian and Singapore Insurance Law continues to be the law of England by virtue of the respective Civil Law Acts of both countries. At the same time, this book should be of use to those interested in Singapore Insurance Law as the general principles applicable are still the same. To this extent, several Singapore cases are also dealt with.

Readers will notice that decided cases are not voluminously put in. I have been somewhat selective in this respect and they are here aimed to give authority to propositions and lend illustrations to important issues.

In writing this book, I must confess that I found the task both challenging and interesting. Apart from having to comment on existing Malaysian decisions in their relevant contexts, there was the problem of dealing in gray areas of the law such as those concerning life policies coming under section 23 of the Civil Law Act, more commonly known as 's. 23 policies'. There was also the problem of dealing with certain new and far reaching provisions in the Insurance Act such as those relating to insurance agents and the doctrine of imputed notice. Recent legislation on these tends to put Malaysia ahead of both Singapore and the United Kingdom and little help

could be obtained from source materials relating to them.

It is hoped that this book will be of interest and use not only to members of the legal profession, but also to those belonging to the insurance industry and the world of business. In language, I have aimed at simplicity and I hope not at the expense of lucidity. Non-lawyers should therefore find this book both readable and comprehensible.

1st October, 1979.

Myint Soe

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CHAPTER I

INSURANCE LEGISLATION

A. THE INSURANCE ACT 1963

HISTORY & PURPOSE

Until 1963, Malaysia had no comprehensive legislation for the regulation of insurance business. The Banking Ordinance had been passed since 1958, and the banking industry was already under control.

The existing law on insurance in the then Federation of Malaya was drawn from legislation enacted in the United Kingdom in 1909. It comprised mainly of the Life Assurance Companies Ordinance, 1948 and the Fire Insurance Companies Ordinance, 1948. It was known to be inadequate and out-of-date. About the same time as the passing of the Banking Ordinance in 1958, the Malayan Government had begun to take action for remedying the aforesaid unsatisfactory state of affairs. The help of Mr. Caffin (Insurance Commissioner of Australia) was enlisted and a report by him was received in 1960. Thus, the Act of 1963 was mainly based on his recommendations; though they were modified in the light of experience.[1]

Before the Insurance Act, 1963 was enacted, "stop-gap" legislation was passed. Thus we have the Life Assurance Companies (Amendment) Act, 1961; the Life Assurance Act, 1961, and the Life Assurance Companies (Compulsory Liquidation) Act, 1962.

The Insurance Act came into force on 21 January 1963 for West Malaysia. It came into force for East Malaysia on 1st January, 1965.

The main purpose of the Act seems to be to control the growth of "mushroom" insurance companies. It was also meant to stop gamblers and speculators from taking out policies on others in the hope that they would live long enough for the policy holder to collect.[2] In other words, there was no local legislation to prohibit expressly the taking out of life policies unless there was an insurable interest. Apparently, insurers did not take much heed of the provisions of the

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1. See the speech of Mr. Tan Siew Sin at the 2nd reading of the Bill in Parliament; *Parliamentary Debates, Vol IV, (1962–1963)* Col. 492.
2. See also, *Far Eastern Economic Review*, February 3rd, 1978, p. 43.

English Life Assurance Act, 1774 which did prohibit the "gambling" on lives by laying down the requirement of insurable interest.[3] This Act would be applicable to Malaya by virtue of s. 5 of the Civil Law Ordinance, 1956. Moreover, they would be void as wagering contracts under the Contracts Act, 1950.[3A]

DIVISIONS

The Insurance Act of 1963 consisted of four Parts:-

1. Part I (Preliminary).
2. Part II (Conduct of Insurance Business).
   a) General restriction on insurers.
   b) Registration of Malayan insurers.
   c) Deposits, registers of policies and insurance funds.
   d) Miscellaneous requirements as to conduct of business.
   e) Subsidiary.
3. Part III (Returns, Investigations, Winding up and Transfers of Business)
   a) Returns.
   b) Investigations.
   c) Winding Up.
   d) Transfers of business.
4. Part IV (Miscellaneous and General)
   a) Administration and enforcement.
   b) Miscellaneous amendments of law.
   c) Supplementary.

It will be seen from the above division that the Act was mainly for the regulation of insurance business and very little of it dealt with substantive law. In fact the substantive portion is in the miscellaneous amendments to the law (ss. 40-44).

MAIN PROVISIONS

Application of

The Act applied to the Malayan Co-operative Insurance Society

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3. That Act was indeed known as the "Gambling Act".

3A. See the Indian case of *Alamai* v *Positive Govt: Security Life Assurance Co* (1898). 23 Bom. 191. It is based on s. 30 of the Indian Contract Act which is in *pari materia* with the Malaysian Ordinance.

as well as to Lloyds Underwriters. It does not apply to benevolent societies registered under the Societies Ordinance, and also private pension funds not conducted for profit. The Employees' Provident Fund is also not affected.

Registration of Insurers

Every insurer is to register under the Act quite apart from any other registration required of them. A substantial penalty was laid down for an unregistered insurer and the agent of such unregistered insurer. Existing insurers were to be registered automatically. New insurers would be granted registration only if they could demonstrate that their business would be conducted along sound lines. They must also have a surplus of assets over liabilities of $1,000,000; or $1,500,000 if they seek to carry on both life and general insurance.

Deposits

All insurers, new and old, were to deposit $300,000 with the Accountant General if they wished to carry on life insurance, and an additional $300,000 if they wished to carry on general insurance as well. Two years was allowed to bring these deposits up to the new levels. As some hardship might occur, the Act allows for the acceptance of bank guarantees in lieu of deposits.

Register of Policies

Insurers are to keep a register (or list) of policies of their busines in the Federation. Such registers are to be kept separately. Any policy may be placed on those registers, but those which are of a Malayan character, as laid down in the First Schedule, must be placed on them.

Insurance Fund

Separate accounts are to be kept for policies on Federation registers. Thus the Act created what is called an "insurance fund". The assets of that fund are to be held to secure the policies on its Federation Register, and only those policies. The purpose of the Fund is to ensure that there are assets sufficient to meet liabilities under them, regardless of what the insurer's position may be elsewhere.

Investments

As the amount of assets held in respect of Federation policies could now be ascertained, the Act provides that a proportion of it is

to be invested in the Federation. This proportion commences at 25% and rises by 10% per year until it reaches a maximum of 55%.

Assets in Foreign currencies

The Act takes into account the fact that some policies have been issued in foreign currencies. Thus, insurers are allowed to hold appropriate assets in foreign currencies. The Act also permits future life policies to be effected in foreign currencies and backed by assets in such currencies. However, such policies were limited to the lives of persons who are not citizens of the Federation.

Profits

For general insurance companies, the profits would be an excess of income over expenditure, after provision has been made on a basis to be set out in the regulations for liabilities under unexpired policies. However, the calculation of profit for a life insurance company was not so simple. One reason for the complication was that most life policies would receive bonus additions. The Act therefore provided that not less than 80% of the surplus of assets over liabilities was to be given to policy owners, and not more than 20% to shareholders.

Lloyds Underwriters

The Act recognised that Lloyds underwriters occupy a special position in the insurance world. Their accounts would be different from that of insurance companies. However, to put them on the same footing as insurance companies, the Act provides for such underwriters to deposit an appropriate amount with the Accountant General instead of maintaining a fund on their own.

Other aspects of supervision

One aspect of supervision provided by the Act was the depositing of accounts and statistics annually. Additionally, life insurance companies must have an actuarial valuation of their liabilities made not less frequently than once every three years. Details of such valuations are also to be deposited. An insurer may also be asked for information regarding its business and may, subject to an appeal to the Court, be given directions regarding the conduct of its business. Moreover, life insurance companies may not issue policies except where the premium has been approved by an actuary.

The machinery of supervision extends to the Insurance Commis-

sioner being able to inspect the business of an insurer, and for him to petition the Court for a winding-up.

Amalgamations and transfers

The Act provides for amalgamations and transfers of insurance business to be made only with the approval of the Court. Before it is submitted to the Court, the scheme for the amalgamation or transfer must be lodged with the Insurance Commissioner, and be available for public inspection. The Insurance Commissioner is also entitled to have the scheme investigated by an independent actuary.

Miscellaneous amendments to the law

This part of the Act deals with what might be called the "substantive law". The necessity of insurable interest in life insurance is specifically provided for. Exceptions would be life policies effected by one spouse on another spouse; parents on the life of their children; and guardians on the life of their wards.

Surrender value and paid-up policies

The Act provides for a surrender value to attach on an ordinary life policy after three years and on a "home service" policy after six years.[4] For both types of life insurance, the policy holder is allowed to have the policy paid-up after three years. In other words, the policy holder is freed from paying further premiums, and he will get a somewhat reduced amount after the policy becomes payable.

Maintenance of life policies

As it is normal for many life policy holders to discontinue payment of premiums, the Act provides for a policy to continue for a period of time. The unpaid premiums would be paid by way of a loan against the surrender value thus keeping the policy in force until such time as the surrender value is exhausted. The Act however allows flexibility in the arrangements used by different insurers. It is therefore required that the system used by an insurer shall be approved by the Insurance Commissioner.

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4. "Home service policies" are the equivalent of "industrial policies" in Australia and England. They are also known as "door to door policies" as collections are made from door to door. They are meant for the poorer people. Neither in Malaysia nor in Singapore have they been a success.

Payment without Probate or Letters of Administration

Provision was also made in the Act to alleviate the plight of small policy holders who would otherwise be forced to take out probate or letters of administration to recover the moneys in respect of a deceased life insured. Following the English pattern, the Act provided that policies of $10,000 or less may be paid without any legal formalities by the insurer concerned.

Payment without Estate Duty Certificate

Under the Estate Duty Act, a certificate from the Collector of Estate Duty would normally be required for an estate which exceeds $10,000.[5] However, it would not be prudent to allow payment by an insurer without a certificate as the insurer would not really know what the deceased has left behind. It was therefore provided in the Act that where the policies with an insurer do not exceed $10,000 ninety percent of the money due may be paid without a certificate from the Collector of Estate Duty, and the remaining ten percent when a certificate is produced. As it is possible that a deceased may have policies with different insurers, each insurer must give notice to the Collector of Estate Duty of its intention to make payment.

Repeal of other Insurance legislation

All specific insurance legislation except the Life Assurance Companies (Compulsory liquidation) Act, 1962, was repealed by the Act.

B AMENDMENTS TO THE INSURANCE ACT UP TO 1975

CONSEQUENTIAL AMENDMENTS

The first review of Insurance legislation was done by the Insurance (Amendment) Act, 1975. However, prior to that, there were two amending Acts. Moreover consequential amendments or minor amendments had to be made as the Federation of Malaya had emerged as the Federation of *Malaysia* in 1963. Thus the Act came to apply to Sabah, Sarawak and Singapore. After Singapore ceased to be part of Malaysia in 1965, the Act continued to apply to Singapore for some time, and was repealed and replaced by Act 46 of 1966.[6]

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5. Note that this figure applied in 1963. It is now $50,000–00.
6. Now reproduced as Cap. 193, *Singapore Statutes, Rev. Ed. 1970.*

That Act however continued to be more or less the same as the Malayan Act of 1963.[7]

AMENDMENT ACT Of 1965

Applications for Registration

By Amendment Act No. 89 of 1965, the Insurance Act, 1963 was amended in minor respects. A new section 4(5A) was introduced which required the Insurance Commissioner to refer an application for registration as an insurer to the Minister where the Commissioner is already satisfied that an applicant has complied with all the requirements of section 5. The Minister is then given the power to refuse such an application if he so wishes. In other words, an application for registration may be refused by the Commissioner where the requirements are not satisfied; but even if they are satisfied it is the Minister who decides whether a particular application for registration should be accepted or not.

Scope of securities for deposit further limited

A new section 7(7)(c) was added by further limiting the meaning of "securities" which could be deposited with the Accountant General. By this amendment securities authorised in paragraphs 3, 4, 5, 6 and 8 of the Second Schedule may be rejected if the Minister declares in writing that they are unsuitable for the purposes of deposit. The new section 7(7A) is consequential to the said amendment, and gives the insurer one calendar month to substitute for the securities which are declared unsuitable.

Assets of Insurance Fund for General Business

A new section 11(1A) made further provisions for the assets of an insurance fund established in respect of general business.

Definition of 'written premiums'

Section 47(1)(e) was added to define the words 'written premiums'. [8]

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7. Note that the present Malaysian legislation and Singapore legislation is significantly different. Major reviews where made by Malaysia in 1975 and 1978. Singapore is in the process of studying the changes necessary and it is expected that there will be a major review of insurance legislation in Singapore by 1980.
8. For other minor amendments see Act No. 89 of 1965.

AMENDMENT ACT of 1973

By Act A182 of 1973, some minor amendments to the principal Act of 1963 was made. The Amendments related to s. 44 of the Act which related to the payment of life policy claims without probate or letters of administration.

As originally enacted in 1963, the relaxation of the rule requiring probate or letters of administration was with regard to life policies where the moneys payable did not exceed $10,000–00. It was now extended to any policy regardless of the moneys payable, but stipulated that the payment that could be so made was not to exceed nine-tenths of the policy moneys or ten thousand dollars whichever is the lesser. Thus a person may have a policy for $200,000–00 and the whole sum may be payable. Formerly the section would not cover such a policy. After the Amendment, ten thousand would still be payable to the proper claimant, as that sum is less than nine-tenths of the amount.[8A]

Consequential amendments were also made with regard to the exclusion of those sums in the estate duty schedule or certificate.

C. AMENDMENT ACT of 1975

REVIEW

It was apparently thought necessary to review the existing Insurance Act and this was finalised in early 1975 after it had been given full consideration by a committee comprising representatives from the Attorney General's Chambers, Bank Negara and the Treasury. Various insurance associations were also consulted because of the comprehensive nature of the review. According to the Report of the Director-General for Insurance (formerly the Insurance Commissioner), these associations accepted the need for such amendments as being both timely and appropriate. Accordingly, Act A294 of 1975 was passed. It came into force with effect from 1st June, 1975.[9]

The main motives underlying the review have been ably stated in the report of the Director General as follows,[10]

8A. Note that the amount has been raised to $20,000/- after the Amendment Act of 1978.

9. Except for s. 12A which concerned insurance guarantee scheme funds.

10. *Thirteenth Annual Report* (for 1975) p. 41.

"These new provisions have been designed to safeguard further the interests of the insured as well as to gear the insurance industry to conduct and identify itself with national interests as insurance has a direct impact on the economic and social welfare of the community as a whole. The new provisions also facilitate restructuring of the insurance industry by encouraging the domestic incorporation of offices of foreign incorporated insurance companies in Malaysia. The preponderance of foreign insurers has made it necessary that a better balance between domestic and foreign insurance firms should be attained and satisfactory progress in this direction is already being made. . . . . ".

MAIN AMENDMENTS

The main features of the amendments have been briefly summarised by the Director General as follows in his Thirteenth Report:–

1. Amended section 3 requires a company or a society registered to carry on insurance business in Malaysia to maintain a surplus of assets over liabilities of not less than one million dollars for one class of business and not less than one and a half million dollars for both classes or such greater amount as may be specified by the Minister of Finance and in the case of a foreign company, that surplus is in respect of its assets in Malaysia over its liabilities in Malaysia.

2. New sections 3A, 3B, 3C make it an offence for a person to hold himself out to be a registered insurer, prohibit the use of the word "insurance", "assurance" or "underwriter" other than by a registered insurer, and give the Director General of Insurance power to call for or inspect the books, accounts and records of a person suspected to be carrying on insurance business without registration.

3. New section 6 re-enacted, empowers the Director General to cancel the registration of an insurer under the circumstances mentioned in the new section.

4. Amended section 11 seeks to increase the percentage of Malaysian assets in any insurance fund from 75 per cent to 80 per cent and to empower the Minister of Finance to require an insurer not to make investments of a specified class or description or to realise within a certain period investments of a specified class or description held by the insurer.

5. New section 12A provides for the establishment and maintenance of insurance guarantee scheme funds and payments of moneys out of the funds to meet the liabilities of any insolvent insurer to

policyholders in respect of any policy which has been validly registered under the Act up to but not exceeding 90 per cent of the lawful amount claimed by a policyholder or any other persons who are entitled to claim through him or any other proper claimant. (Brought into force on 15th July 1977).

6. Amended section 13 firstly provides a consequential change, the need for which has become apparent in order to extend the enforcement provision in the new section 12A and secondly, provides for reinsurance of liabilities in respect of risks insured or to be insured by the Malaysian insurer.

7. New sections 15A, 15B, 15C provide for proof of age of the life insured, procedure where the insurer declines to accept proof of age and non-avoidance of policy by reason of a mis-statement of the age of the life insured.

8. New section 17A provides for permission to be obtained from the Director General before any Malaysian insurer opens new branches, agencies or offices in any part of Malaysia.

9. Amended section 18 empowers the Director General to inspect under conditions of secrecy the books, accounts, and transactions of any Malaysian insurer, Malaysian insurance broker, Malaysian insurance agent and adjuster.

10. New section 18A requires a Malaysian insurer to report any proposed change in contracts of any insurance company or society; new sections 18B to 18G provide for the issue of Home Service policies and other matters related to such policies.

11. Amended section 20 provides that a person applying for a licence to carry on business as a Malaysian insurance agent for any individual (Lloyd's) must have a surplus of assets over liabilities of not less than one hundred thousand dollars, and that a person applying for a licence to carry on business as a Malaysian insurance broker in negotiating insurances with any individual must furnish a certificate of solvency signed by his auditor and must have a professional indemnity insurance policy of a value not less than five hundred thousand dollars.

12. New sections 20A, 20B, 20C require intermediaries in insurance transactions to give prescribed information with respect to their connection with the insurer to the person with whom he deals; licensing of brokers; and licensing of adjusters, respectively.

13. Amended section 27 in relation to investigations prevents any insurer from disposing their assets as generally defined in the amending provisions without the prior written approval from the Director General.

14. New Part IIIA requires an owner of a Malaysian ship or aircraft or of property (other than personal effects) located in Malaysia to insure the ship or aircraft or property only with Malaysian insurers and provides for premium chargeable under any policy issued in respect of such ship, aircraft or property to be paid in Malaysia.

15. New section 38A makes it an offence for an officer to disclose any information obtained by him in the course of his duties.

16. New section 39A empowers the Director General to compound offences under the Act.

17. New Section 41A requires every life policy to contain a statement setting forth whether or not the policy is a participating policy. There are also other amendments which are minor and consequential in nature.

SIGNIFICANCE OF THE AMENDMENTS

There is no doubt that the Amendments introduced by the amending Act of 1975 were significant.

From the supervision point of view, the introduction of the insurance guarantee scheme funds by the new s. 12A deserves mention. It should also be noted that the said provision was not put into force until 15th July 1977 when the government decided that tighter controls were required and indeed introduced further substantial amendments by the amending Act of 1978.

From the legal point of view, the introduction of new provisions as to proof of age are interesting. Bearing in mind that many older people in Malaysia (and other parts of Asia) do not have birth certificates or may have lost or misplaced them, the new sections 15A & 15B are welcome additions to the Act. It is also interesting to note that they are similar to the provisions of ss. 81 and 82 of the Australian Life Insurance Act, 1945-1973.

Similarly s. 15C, which makes a policy non-avoidable for misstatement as to age, is long overdue. It is also a copy of s. 83 of the Australian Life Insurance Act.

Sections 18B, 18C, 18D, 18E, 18F and 18G relate to Home Service policies. Further protection is now given to home-service policy holders. Here again, these new sections are similar to the provisions in ss. 123-129 of the Australian Life Insurance Act.

Lastly, one might mention the introduction of a licensing system of Malaysian insurance brokers and adjusters, and provisions to ensure their solvency. This is particularly important as brokers and adjusters require no prescribed formal training, and there is no law to prevent any person from calling himself as such. However, as what they do or do not do may have serious effects on the insuring public, greater control over them is to be welcomed.

D. AMENDMENT ACT of 1978

REASONS FOR FURTHER AMENDMENTS

The Director General of Insurance gives the following reasons for the introduction of further amendments by the amending Act of 1978[11]:—

> "Many developments in the insurance industry had warranted further amendments to the Act to improve the financial soundness, in particular, the solvency of insurers; to protect the interests of policy holders in their dealings with insurers, agents, brokers etc. and generally to promote a healthy and orderly growth of the industry."

The "developments" referred to by the Director General would probably cover the impending and ultimate collapse of the First General Insurance (FGI) in December 1977. It seems that the Malayan Insurance Association (MIA) had informed the Director General since 1976 that it was "seriously worried" over the company's situation. It was however only in August 1977 that the then Deputy Minister of Finance (Mr. Richard Ho) declared the company as insolvent, and in December 1977, a petition to wind up the company was presented.[12]

According to some observers, while the Government claims that the provisions of the 1978 Amending Act will be salutary, critics see it as an example of closing the stable door after the horse has bolted.[13] The situation is described as similar to that where the British Government introduced further legislative safeguards following the collapse of the Vehicle and General Insurance Company and of Nation Life Company a few years ago.[14]

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11. *Fifteenth Annual report* (for 1977) p.1. Act A432/78/.
12. See the *Far Eastern Economic Review*, Feb. 3rd, 1978 p. 37.
13. *Ibid.*
14. *Ibid.* See also the U.K. Insurance Companies Act, 1974.

MAIN AMENDMENTS

The main features of the amending Act of 1978 have been summarised by the Director General in his Fifteenth Annual Report as follows:[15]

1. The Government established in 1977 the Malaysia Export Credit Insurance Berhad in collaboration with commercial banks and insurance companies to guarantee local exporters against non-payment by importers in the other countries. In order to provide the necessary flexibility to this new company, amended section 2 exempts this company from the provisions of the Insurance Act, 1963.
2. Presently all insurers are required to maintain a solvency margin of $1 million or $1½ million of assets over liabilities depending on whether they do one or both classes of business, general or life, irrespective of the amount of premiums they write. Amended section 3 gives effect to the maintenance of a margin of solvency in the case of general insurers to the extent of 15% of their written premium income in the preceding financial year or $1 million.
3. Provision has been made for the formation of a single insurance association with more powers to discipline its members who violate the tariff and other rules of the association. Amended sections 3 and 20 make it mandatory for all general insurers and Lloyd's Underwriters represented in Malaysia to seek membership to this association.
4. Amended section 5 makes it mandatory for the Director General to refer all applications to operate insurance companies to the Minister for his approval.
5. New section 6B of the Act requires life insurers to obtain the approval of the Director General to transact investment-linked business. So far no life insurer is carrying on this type of business.
6. The present statutory requirement is for insurers to invest 20% of their total assets in domestically issued Federal Government securities. Amended section 11(2)(b) has increased the statutory requirement to hold such securities from 20% to 25%, by a 1% increase each year commencing year ended 31 December, 1978.
7. To keep a close tab on the investments of insurance companies, it is necessary to place restrictions on advances or loans to related companies, directors and director-related companies. The channelling of insurance funds to related companies include both "upstream" i.e. to a company which owns 20% or more of the voting shares of the insurer and "downstream" i.e. to a company in which the insurer owns

15. Pages 1 & 2.

20% or more of the voting shares. New sections 11A, 11B and 11C prohibit insurers to make loans to related companies and directors. However, if such loans are to be made, then approval of the Director General has to be obtained and who will satisfy himself, *inter alia*, that the loan is fully secured. This new section also places restrictions on insurers to mortgage or charge their assets or securities except with the permission of the Director General,

8. Amended section 12 empowers the Director General to require insurers who are under investigation or where he is satisfied that their affairs are being conducted in a manner detrimental to the interests of policyholders, to deposit all titles to their assets with him or any person approved by him. Furthermore, the person having custody of such documents on behalf of the insurer cannot release them except with the consent of the Director General.

9. Since the enforcement of section 12A – Insurance Guarantee Scheme Fund on 15th July, 1977 a number of problems have arisen which require further amendments to that section. Accordingly, the amendments to section 12A, *inter alia*, enable the payment of levy by general insurers to be based on "written premium" (i.e. net of local reinsurance) and not "gross premium" and discretion is also given to the Director General to allow insurers to pay the levy in instalments. Under the amendments the Minister can approve the investment of the Guarantee Funds in such a manner as he deems most appropriate and the Director General can appoint a suitable person to administer the fund on his behalf with the cost of administration to be met from the fund itself. A further amendment only allows claims of private policyholders and other proper claimants of insolvent companies to be met from the Guarantee Fund.

10. New section 14A makes it mandatory for general insurers to assume risks only on receipt of premiums. New section 14A will only apply to such classes of general business as may be prescribed. This new section will considerably improve the cash flow of insurers and eventually eliminate outstanding premiums.

11. Amended section 15C prohibits life insurers to contest a life policy after the expiry of two years from the date of issue of the policy except where the policyholder has fraudulently suppressed facts material to the issue of the policy.

12. New section 16A makes it an offence for any person who misleads another person to enter into a contract of insurance using false or deceptive information.

13. New sections 17B, 17C and 17D requires the appointments of directors, chief executives and principal officers to be approved by the Director General.

14. Amended section 27 enables the Director General to institute an investigation into the affairs of an insurer without an insurer having to show cause why an investigation should not be carried out. This amendment also empowers the Director General to appoint an independent auditor or actuary, who is qualified and experienced, to investigate a company and report the results to him. The costs of such an investigation are to be borne by the insurer concerned.

15. Amended section 28 will enable the Director General to issue directions to insurers who are conducting their affairs in a manner likely to be detrimental to policyholders' interests. These directions, *inter alia*, include appointment of suitable persons to manage the company, removal of directors, suspension of issue of new insurance policies, etc.

16. Through an appropriate amendment to section 35 of the Act, it is now mandatory for the Director General to consult the Minister before the exercise of the powers under certain sections which include opening of new branches, power to issue directions, approval of appointment of directors and managing directors, licensing of all brokers and adjusters and granting of loans to related companies and directors.

17. Amended section 44 enables the payment of life policy proceeds to proper claimants to be increased from $10,000 to $20,000 without probate or letters of administration.

18. Under new section 44A any person who claims to be an authorized representative of an insurer and who solicits or negotiates a contract of insurance will be deemed to be the agent of the insurer and any statement made by such person during the soliciting or negotiating shall be deemed to be a statement of the insurer.[16]

SIGNIFICANCE OF AMENDMENTS

It will be seen from the above summary that much tighter controls were sought to be imposed on the insurance industry. At the same time, there are certain amendments which deal with "insurance law" and will be of interest to the insuring public.

As has been noted above, the new section 16A now makes it an offence for any person to make a misleading statement, promise, or forecast inducing another person to enter into a contract of insurance. This, it is hoped, would deter agents from making misleading or reckless statements.[17] The new section 44A is another provision which

16. The Amendment Act received Royal Assent on 28th February 1978. Sections 3(2)(a)(ii) & 3(2)(a)(iii) have not yet been brought into force.

17. This section is in *pari materia* with s. 63 of the U.K. Insurance Companies Act, 1974. See also the other provisions of this Act with regard to regulation and control.

will cut down the damage done by agents and other insurance intermediaries to members of the public. It stipulates that the knowledge of a person holding out as agent of an insurer, or any statement made by him, shall be imputed to the insurer. The significance of this provision will be dealt with in detail later, but it may here be pointed out that this almost revolutionises the law of agency with regard to insurance. The Malayan legislature seems to have accepted the recommendation made by the English Law Reform Committee in their Fifth Report (1967).[18]

Lastly one might mention that the amount which may be given by the insurance company without probate or letters of administration has been increased from ten thousand to twenty thousand. This Amendment will help those families in immediate need of money on the death of the life insured, and is also in keeping with the rising tide of inflation.

E. OTHER INSURANCE LEGISLATION

By section 48 of the Insurance Act, 1963, the following legislation were repealed:

1) The Life Assurance Companies Ordinance, 1948.
2) The Fire Insurance Companies Ordinance, 1948.
3) The Life Assurance Companies (Amendment Act) 1961, and
4) The Life Assurance Act, 1961.

Accordingly, the Life Assurance Companies (Compulsory Liquidation) Act, 1962 remains on the statute book. The main purpose of the Act is to empower the "competent authority" to present a petition to a Court for winding-up of the company which have inadequate premium rates. The "competent authority" is defined in section 8 as a person acting under the authority of the Minister for Finance. "The Court" means the High Court.[19]

F. SUBORDINATE LEGISLATION

INSURANCE REGULATIONS

Every insurer or those in the insurance industry should be familiar with what is contained in the Insurance Regulations passed under the Insurance Act. These regulations have been amended from time to time, and therefore should be continually up-dated for accurate reference.

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18. See CII Tuition Service (No. 52), *Legal and Economic Aspects of Insurance* (4/75), 82.
19. Interested readers may look into the Act itself (Act 1 of 1962), and the regulations made thereunder.

OTHER REGULATIONS

Insurance Companies (Funds and Deposits) Regulations

These Regulations have also been made under the Insurance Act and have been amended from time to time since 1963. It is equally necessary to up-date them.

Insurance (Prescribed Financial Institutions) Regulations

These Regulations prescribe the financial institutions for the purpose of paragraph 7 of the Second Schedule to the Act. They are mainly merchant bankers.

CHAPTER II

OTHER SOURCES OF INSURANCE LAW

A. THE APPLICABILITY OF ENGLISH LAW

INTRODUCTION

It has been seen that there is local legislation (including subordinate legislation) which is directly applicable to insurance and the insurance industry in Malaysia. It has also been pointed out that some of the newer sections in the Insurance Act are in *pari materia* with certain English provisions. However, this is incorporation by express enactment. In the paragraphs following, an attempt will be made to explain how English Law is applicable to insurance matters in Malaysia because of what is known as "reception" of English law.

RECEPTION BY THE CIVIL LAW ACT OF MALAYSIA

The Civil Law Act, 1956, was revised in 1972, and is the legislation which is directly relevant to the reception of English law in Malaysia with regard to the law of insurance. [1]

The sections which are concerned with reception are sections 3 & 5, and the relevant parts are reproduced below:

> "3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia the Court shall:
>
> (a) In West Malaysia, or any part thereof, apply the common law of England the rules of Equity as administered in England on the 7th day of April, 1956.
>
> (b) In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951.
>
> (c) In Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to subsection (3) (ii).
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

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1. See Act 67, *Laws of Malaysia.*

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

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5(1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

(2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

It may be explained that section 3 deals with what is called the "general reception" of English law. It is therefore interesting to note that West Malaysia receives by virtue of s. 3(1)(a) only the Common Law and the rules of Equity as administered in England up to 7th April, 1956. In other words, English *statutes* are not received by section 3. Whereas for Sabah and Sarawak English statutes are also received. The cut off dates for them are 1st December 1951 and 12th December 1949 respectively.

It is therefore important for West Malaysia to use the provisions of s. 5(1) as English law (including statutes) which existed on 7th April 1956 would be applicable in the matters specified in that subsection. Certain types of insurance are specifically mentioned and in any event all mercantile matters are covered. Therefore all types of insurance would be covered by s. 5(1).[2]

2. Note that some controversy exists as to whether English statute law would also be received in West Malaysia by virtue of the proviso to s. 3(1) of the 1956 Ordinance. See G.W. Bartholomew, *The Commercial Law of Malaysia* pp. 27-28. For an opposite view see, Joseph Chia "The Reception of English law under sections 3 & 5 of the Civil Law Act 1956 (Revised 1972)," *J.M.C.L. Vol I. No. I.* pp. 42-47. However, for insurance, in view of s. 5(1), this controversy will be of little practical importance.

For Sabah and Sarawak there is no problem because English law (including statutes) would be received for insurance matters both under s. 3(1) as well as under s. 5(2). The effect of s. 5(2) is more far-reaching as English law "at the corresponding period" would be received. Thus there would be what is called a "continuing reception" of English law as far as Malacca, Penang, Sabah and Sarawak is concerned.

Although there is no continuing reception of English law even for insurance matters as far as West Malaysia is concerned, it makes little difference in practice as more or less the same English statutes dealing with insurance matters would still be received in the whole of Malaysia. This is because between 7th April 1956 (the date the Civil Law Ordinance came into force for West Malaysia) and 21st January, 1963 when the Insurance Act came into force for West Malaysia, there is hardly any English insurance legislation which was enacted.

It is therefore submitted that among others, the following Acts would be received or become applicable in all questions or issues which arise with respect to the law of insurance for the whole of Malaysia.

(1) The Life Assurance Act, 1774.
(2) The Life Policies Assurance Act, 1867.
(3) The Marine Insurance Act, 1906.
(4) The Marine Insurance (Gambling Policies) Act, 1909.

APPLICABILITY OF ENGLISH DECISIONS TO INSURANCE LAW

House of Lords Decisions

Sections 5(1) and (2) of the Civil Law Act refers to British "law". This, as has been pointed out, is wider than mere common law and equity. The question now is to what extent will House of Lords decisions apply to issues or questions arising out of insurance law to West Malaysia under s. 5(1) of the Civil Law Act; and to Malacca, Penang, Sabah and Sarawak under s. 5(2) of the Act.

(a) West Malaysia (excluding Penang and Malacca)

To West Malaysia, it seems that House of Lords decisions will be regarded as "binding" to the above issues and questions under s. 5(1) of the Act up to the 7th April, 1956 as House of Lords decisions constitute the final authority, and at one time the "infallible"

authority,[3] on points involving common law (including the law merchant) and equity. They would not be binding on West Malaysian Courts under the doctrine of precedent, as the House of Lords was never part of the "Malayan Curial Hierarchy".[4] However, these observations will apply only up to 7th April 1956.

The question which therefore arises is, what about the applicability of House of Lords decisions to issues or questions relating to insurance law after 7th April 1956, in West Malaysia?

The short answer seems to be that as far as West Malaysian Courts are concerned, House of Lords decisions after 7th April, 1956, will be treated as being merely of the highest persuasive authority, but not as binding.[5]

(b) Penang, Malacca, Sabah and Sarawak

Since s. 5(2) of the Civil Law Act refers to a "continuing reception" of English law to issues and questions relating to insurance law, it seems that House of Lords decisions will be regarded as "binding" as long as those provisions exist on the statute book.[6]

English Supreme Court Decisions

(a) West Malaysia (excluding Penang and Malacca)

The decisions of the English Court of Appeal, and the English High Court are apparently on a different footing with English House

3. Professor Bartholomew, in *The Commercial Law of Malaysia*, p. 107, refers to the House of Lords as the "final and infallible tribunal for the determination of English law". This view is now open to doubt. After the statement by Lord Gardner (then L.C.) in 1966 with regard to the binding effect of House of Lords decisions on themselves, the House of Lords no more constitute what has been known as the "infallible voices".

   In a note headed "Precedent in the Broome and Herrington cases", 88 L.Q.R. 1972 p. 305 at p. 315, Sir Arthur Goodhart comments that these two cases raises the most difficult question whether a lower Court is absolutely bound to follow a decision made by the House of Lords. This is because the House of Lords is no longer bound to follow its own decisions. He feels that if the Court of Appeal is convinced that the decision of the House of Lords has been decided on an **obvious misunderstanding**, then it might be allowed to reach a different conclusion. He also points out that in many other legal systems as in the United States and France, such a rule exists. In any case, there will be no chaos, as the House of Lords can reaffirm the conclusion it has reached in its first decision.

4. *Ibid.* p. 106.

5. *Ibid.* p. 115.

6. *Ibid.* p. 138.

of Lords decisions. This is because they cannot be regarded as the "final" expression of English law. This point has been well brought out by Lord Dunedin in the Privy Council case of *Robins* v *National Trusts Co.*,[7] where he stated:

> "when an appellate Court in a colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the Supreme Tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it."

The commonsense view however would be that English decisions made before 7th April 1956 should be followed if they correctly represent the law of England as of that date.[8]

(b) Penang, Malacca, Sabah and Sarawak

The same observations would apply. As in West Malaysia, they would certainly be regarded as of great persuasive authority.

Privy Council Decisions

Sections 5(1) and (2) of the Civil Law Act refer to the fact that the law to be administered in the specified matters (including insurance) "shall be the same as would be administered in England."

If one takes a strict view of this passage, then one would be faced with the awkward situation that not only local Malaysian decisions would not be binding, but also Privy Council decisions (especially those from Malaya or Malaysia) would also not be binding on Malaysian Courts for those specified matters.

Professor Bartholomew, in his book, takes the view that Privy Council decisions would not be "binding" as they are not part of the law administered in England. Therefore, where there is a conflict between House of Lords and Privy Council decisions regarding those specified matters, the Malayan Courts would be obliged to follow House of Lords decisions.[9]

It is however submitted that this view while admittedly logical, may be too narrow. In the first place, the above sections in stating

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7. [1972] A.C. 515.
8. A study of the Malaysian decisions on insurance law would show that these decisions are in fact followed, unless they do not seem to represent correctly the law of England at that date.
9. While this view has been expressed with regard to s. 5(2) of the Malaysian Act it would be applicable to s. 5(1) of the said Act (till 7th April 1956), and to Singapore even till now.

that English Law "shall be" administered, does not say that English law and English law only shall be administered. For example, what happens if there is no settled English law on a particular matter related to insurance law in Malaysia? Surely, would not Privy Council decisions (which are in fact made by the same law Lords) be applicable? In other words, it is submitted that what these sections say is that English law shall be applied as it is regarded as most suitable for these matters, but does not exclude the application of other laws, especially that applicable under the doctrine of *stare decisis.*

In the second place, the doctrine of *stare decisis* has been strongly enshrined in Malaysia, and the Privy Council until recently formed the highest court for Malaysia.[10] Professor Bartholomew himself admits that the Privy Council, when hearing a decision from Malaya, sits as a Malayan Court.[11]

In this connection, reference may also be made to the case of *Khalid Panjang* v *Public Prosecutor (no 2)*[12] where the Federal Court of Malaysia had held that the Privy Council case of *Mirza Akbar* v *The King*[13] (which was an appeal from India), was binding on the Federal Court and *a fortiori* on every High Court in Malaysia. Thus, even Privy Council decisions from other jurisdictions may be binding in Malaysia.[14]

Assuming that the views expressed by Professor Bartholomew and Professor Ahmad Abrahim are correct in that where English law is to be applied, Privy Council decisions cannot be binding on Malaysian Courts; then, pushed to its logical conclusion, all Malayan or Malaysian decisions on insurance which would normally be applicable under the doctrine of *stare decisis*, would not also be applicable. This would almost lead to absurd results and would in effect mean that until relevant sections in the Civil Law Acts are amended only

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10. Criminal appeals from Malaysia will no longer be heard by the Privy Council.
11. *The Commercial Law of Malaysia* p. 127. Note however, that Professor Ahmad Abrahim, Dean of the Law Faculty at Kuala Lumpur (Malaysia) has expressed the same view as Professor Bartholomew that as West Malaysian Courts are bound to apply English law before 7th April, 1956, decisions of the Judicial Committee given before that date cannot be binding on them. See, his article "Privy Council Decisions on Wakaf: Are they binding in Malaysia." *[1971] 2 M.L.J.* vii.
12. [1964] M.L.J. 108.
13. L.R. 67 I.A. 336.
14. In fact in *Ismail* v *Abdul Aziz* (1955) 3 M.C. 52, which concerned the notice of dishonour of a Bill of Exchange, the Federation of Malaya Court of Appeal followed the Privy Council decision (from Canada) of *Allen* v *Royal Bank of Canada* (1926) 95 L.J.P.C. 17, remarking that the said case "is binding on us". This remark was made though English Law had been officially received since 1951 in Kelantan, which was part of the Unfederated Malay States, by the extension of the Federated Malay States Civil Law Enactment of 1937.

English law will have a monopoly in the development of insurance law (and mercantile law generally) in Malaysia.

At any rate, this is one matter which should be clarified by statute, and it would seem that in the interest of the development of local insurance law and mercantile law generally (in a local setting), local decisions (including Privy Council decisions) should be given due weight. In fact, in another article[15] where Professor Ahmad Abrahim advocates the recognition of Muslim law as the law of the land in Malaysia, we find the following interesting passage:[16]

> "It is clear that as the law is developed in Malaysia through legislation and judicial decisions, there will be less and less need to rely on the English law to fill lacunae in the law."

In another passage he even advocates the repeal of the Civil Law Ordinance:[17]

> "The lack of a civil law enactment did not prevent the filling of lacunae in the law before 1937 and there is no reason why lacunae cannot be filled even if the provisions of the Civil Law Ordinance were repealed. The repeal would remove the monopoly in legal development which the English law holds in Malaysia and would enable the judges in Malaysia to consider the provisions of other systems of law."

B. APPLICABILITY OF MALAYSIAN DECISIONS TO INSURANCE LAW

The obligation to apply English law in issues or questions with respect to insurance law, extends only to 7th April, 1956, to West Malaysia (excluding Penang and Malacca) under s. 5(1) of the Civil Law Act. Therefore there can be no doubt that decisions passed after that date by Malaysian Courts would be applicable to such matters under the doctrine of *stare decisis*.

The general question however is why should not Malaysian decisions on insurance law be applicable to Malaysian Courts, whatever the period in which they may have been decided, inspite of s. 5(1) and (2) of the Civil Law Act? It is submitted that the same reasons stated above regarding the applicability of Privy Council decisions can also be used here.

At any rate, from the practical point of view, it is difficult to see how any judge of a High Court in Malaysia (or any lower Court) will disregard Federal Court rulings or rulings equivalent to it, on the ground that English law and English law only is to be applied in in-

15. "The Civil Law Ordinance in Malaysia", [1971] 2 M.L.J. vii.
16. [1971] 2 M.L.J. xi.
17. *Ibid*. These observations would equally apply to Singapore.

surance matters before 7th April, 1956.

What Courts are deemed to be the equivalent of the present Federal Court is explained in s. 88(3) of the Malaysia Act, 1963, which is as follows:

> "Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the Court of Appeal of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore, or the Court of Criminal Appeal of Singapore, shall on and after that day be of the like effect as if that Court were one and the same Court with the Federal Court."

The question which further arises is what is the effect of the decisions of other superior Courts of Malaya which existed before the Court of Appeal of the Federation of Malaya; for example, the Court of Appeal of the Federated Malay States.[18]

Mr. Harbajan Singh, in his article on the doctrine of *stare decisis* in Singapore and Malaysia, advances the view that the Federal Court should be bound by an applicable decision of the Federated Malay States Court of Appeal.[19] He futher points out that in *Hendry* v *De Cruz*[20] the Federation of Malaya Court of Appeal considered itself bound by an applicable decision of the Malayan Union Court of Appeal in *Butler Madden* v *Krishnasamy*.[21] Thus, he reasons that by the same application of the doctrine of *stare decisis*, the Federation of Malaya Court of Appeal should also be bound by applicable decisions of the Federated Malay States Court of Appeal. Therefore, when in 1964, the present Federal Court of Malaysia superseded the Federation of Malaya Court of Appeal, it would also be bound by an applicable decision of the Federated Malay States Court of Appeal.[22]

A view similar to that of Mr. Harbajan Singh was advanced by Lee Hun Hoe J. in the case of *Public Prosecutor* v *Joseph Chin Saiko*,[23] of the High Court in Borneo, which is one of the High Courts in Malaysia. He was considering the decision of the High Court of

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18. The Federated Malay States was formed in 1895, and was a loose Federation of four Malayan Sultanates which had accepted British protection-Negri Sembilan, Pahang, Perak and Selangor. It existed till 1946. The highest court was the Court of Appeal of the Federated Malay States. The other five Malay States-Johore, Kedah, Kelantan, Perlis and Trengganu, never joined the Federation and was known as the Unfederated Malay States. In 1946, the Malayan Union was formed comprising of the former Federated and Unfederated Malay States, and Penang and Malacca. In 1948, the Federation of Malaya was formed. Lastly, in 1963 the Federation of Malaysia was formed. "Malaysia Day" means 16th Sept. 1963.
19. [1971] 1 M.L.J. xvi.
20. (1949) M.L.J. Suppl. 25.
21. (1947) M.U.L.R. 163.
22. [1971] 1 M.L.J. xix.
23. [1972] 2 M.L.J. 129. Note: though the views regarding s. 304A of the Penal Code must be considered as wrong because of a later Federal Court decision, the learned Judge's views on *stare decisis* still merits great respect.

Singapore in *Mah Kah Yew's case* where it was held that it was bound by *Mill's case,*[24] which was a decision of the Court of Appeal of Sarawak, North Borneo and Brunei, by virtue of s. 88(3) of the Malaysia Act; but was not bound by the decision in *Cheow Keok's case,*[25] as it was a decision of the Court of Appeal of the Federated Malay States, and that Court is not one which has been mentioned in the said Act. Lee Hun Hoe J. however did not accept the Singapore view on this point and stated as follows:

> "Since the jurisdiction of the Court of Appeal of the Federated Malay States was assumed by the Malayan Union Court of Appeal, the better view would seem to be that the Federation of Malaya would, on the doctrine of *stare decisis* be bound by the decision of the Court of Appeal of the Federated Malay States."

C. APPLICABILITY OF SINGAPORE DECISIONS

Regarding the period when Singapore merged with Malaysia and until the setting up of the Singapore Supreme Court, it seems that Federal Court decisions decided during that period will be applicable to both Singapore and Malaysia, wherever the Federal Court may have sat.[26] Thus, a Singapore case decided by the Federal Court sitting at Singapore, will probably be binding on Malaysia.[27]

D. APPLICABILITY OF DECISIONS OF OTHER JURISDICTIONS TO MALAYSIAN INSURANCE LAW

It will be appreciated that there may be quite a few questions or issues in respect of insurance, where English law may not be very appropriate to local conditions or where the law and practice followed by other countries, e.g. U.S.A., Canada or Australia (also "common law" countries) may seem more attractive in Malaysian Courts. In fact as the Malaysian Insurance Act is based to some extent on Australian law, it would indeed be wise to rely on Australian decisions.

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24. This case is reported as an Appendix to *Mah Kah Yew's case* in [1971] 1 M.L.J.4. It was actually decided over fifteen years ago in September 1955, by the Court of Appeal of Sarawak, North Borneo and Brunei.
25. (1940) M.L.J. 103.
26. Singapore was part of Malaysia from 16th Sept. 1963 to 9th August 1965.
27. The position is clear as to the applicability of all Federal Court decisions for the period Singapore was part of Malaysia. However, for the period (1965-1969) it is open to controversy as to whether Singapore cases decided by the Federal Court would be binding on Malaysia. See K.L. Koh, *Criminal Law : Singapore Law Series No. 3, p. 8.*

Looking back historically, it will also be seen that there is justification for the use of unofficially recognised laws. Thus, though English law had not been officially received in the Federated Malay States till 1937, English law was in fact applied. As Professor Bartholomew puts it, "an almost entirely English trained bench and bar inevitably fell back on English law for want of anything better."[28]

Perhaps the best justification for the use of unofficially recognised law by Courts has been stated by Terrel Ag. C.J. in *Motor Emporium* v *Arumugam*,[29] where he stated:

> ". . . . every Court must have inherent jurisdiction to do justice between the parties and apply such principles as are necessary or desirable for attaining such object and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered."

It is therefore submitted that at least in cases where there is no settled "English law" as such, decisions from Courts of other jurisdictions could be properly applied by Malaysian Courts in exercise of their inherent jurisdiction to do justice.

E. THE DOCTRINE OF STARE DECISIS

INTRODUCTION

In the preceding pages of this Chapter, great pains have been taken to explain the existence and the importance of judicial decisions, and to what extent they are binding on Malaysia. It will be seen that these decisions fall into four main categories.

1) Decisions of English Courts.
2) Decisions of Singapore Courts.
3) Decisions of Malaysian (including Malayan) Courts.
4) Decisions of Courts of other countries.

At this juncture it is necessary to explain once again that England, Malaysia, Singapore and most of the former British Empire countries follow what is called the doctrine of *stare decisis*, which in simple language means the doctrine of binding judicial precedents. Thus, a judge in England would always have to enquire as to what decisions are binding on him. In doing so he is blessed with the fact that only English decisions are binding on him. Whereas, the Malaysian judge is confronted with English, Malaysian and Singapore decisions, and it is not always easy for him to divine what previous decisions of these three countries (precedents) are binding on him. Even then, he is well versed in the principles of *stare decisis* and the hierarchy of Courts

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28. *The Commercial Law of Malaysia*, p. 14.
29. (1933) M.L.J. 276 at 278. This was a Selangor case, i.e. (Federated Malay States).

which existed or now exists in these three countries. However, to the unfortunate local insurer who is faced with legal problems and who is presented with an English, Malaysian or Singapore decision, an appreciation of the value of that decision would not be an easy matter. Accordingly, an attempt has been made to summarise the applicability of the doctrine of *stare decisis* in England and in Malaysia. It is hoped that these summaries would also furnish him with some idea as to the hierarchy of civil courts existing in the two countries to-day.[30]

THE DOCTRINE OF STARE DECISIS AS APPLICABLE IN ENGLAND TODAY (CIVIL CASES)

House of Lords

The decisions of the House of Lords as a court of law bind all other Courts in England. In fact, it had formerly ruled that even its own decisions were binding on it. See *London Street Tramways Co. L.C.C.* (1898) A.C. 375. However, by a Practice Direction, the House declared (Lord Gardner L.C.) that where special grounds existed, it would feel free not to follow one of its previous decisions. This was in 1966.

Court of Appeal

The decisions of the Court of Appeal are binding on all High Court judges trying civil cases, and on all judges sitting in the County Court, Crown Courts and Divisional Courts in those cases in which an Appeal lies from a Divisional Court to the Court of Appeal.

In 1944, in the case of *Young* v *Bristol Aeroplane Co. (1944)* K.B. 718, the Court of Appeal held that it was bound by its own decisions. This decision is, however, subject to limitations. Thus in *Triverton Estates* (1974), the Court of Appeal did not follow its own decision just a year old, namely *Law* v *Jones* (1973).

Divisional Court

The Divisional Court of the Queen's Beach Division is generally bound by a previous decision, unless such decision was an obvious mistake or inconsistent with the authority of a higher Court. On the other hand, the Court may depart from its own decisions, in favour of the citizen.

30. It will be appreciated that these summaries cannot take into account all decisions of the two countries. Moreover, the effect of the Civil Law Act of Malaysia will always have to be borne in mind. For a good summary of the doctrine of *stare decisis* in England, the reader is referred to Kiralfy, *The English Legal system*, 5th edn. (1973) p. 87-93.

High Court

High Court judges are not bound by decisions of other High Court judges. However, in practice, they usually follow each other.

THE DOCTRINE OF STARE DECISIS AS APPLICABLE IN MALAYSIA TODAY (CIVIL CASES)

Introduction

It is necessary to make some general remarks in considering what decisions would be binding on a particular Court sitting in Malaysia. Some of these remarks have already appeared in the preceding pages.

Firstly, one has to appreciate that there are pre-independence cases. Their binding nature today will have to be carefully studied. In doing so, the various changes in the political structure of the country and the dates of these changes will always have to be borne in mind.

Secondly, some of the laws do not uniformly apply throughout Malaysia, though welcome attempts have been made in recent years to achieve uniformity throughout the whole of Malaysia.[31] Sometimes, different decisions will have different effects in different places. For example, one will have to be careful in applying previous decisions of Malayan Courts to Penang, Malacca, Sabah and Sarawak.[32] Similarly one will have to be careful in applying to Penang, Malacca, Sabah and Sarawak certain decisions of Malayan Courts.[33]

Privy Council

The Privy Council is the highest Court of Appeal from Malaysia. All decisions given by the Privy Council on appeal from Malaysia will be binding on Malaysian Courts.[34] Recently, however, it has been decided that criminal appeals will no longer be heard by the Privy Council.

Decisions of the Privy Council given on appeals from other territories will be generally binding on Malaysian Courts if the law is in *pari materia*. See *Khalid Panjang* v *P.P. (No. 2)* [1964]M.L.J. 108.

Decisions of the Privy Council are not binding on itself. See *Read* v *Bishop of Lincoln* [1892] A.C. 644.

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31. Thus, the law of contract and the law of partnership has been made uniform throughout Malaysia. Recently, in 1976, the Penal Code and the Code of Criminal Procedure was made uniformly applicable throughout Malaysia.
32. For a good account of the applicability of the doctrine of *stare decisis* in Malaysia, see Wu Min Aun, *An introduction to the Malaysian Legal system*. Heinemann Educational Books (Asia) Ltd. p. 24 to 32.
33. See Wu Min Aun, *op. cit*, p. 26.
34. Subject of course to the Civil Law Act of Malaysia.

Court of Appeal of the Federation of Malaya, Court of Appeal of Sarawak, North Borneo and Brunei, Court of Appeal of Singapore

Decisions of these Courts (before the formation of Malaysia) would be binding on all courts in Malaysia, including the present Federal Court. See s. 88(3) of the Malaysia Act.

Straits Settlements Court of Appeal

By virtue of the decision in *China Insurance Co.* v *Loong Moh Co. Ltd.* (1964) M.L.J. 307, decisions of this Court would be binding on the Federal Court. Note that the effect of decisions of the former Federated Malay States Court of Appeal is still an open question.

Federal Court

Decisions of the Federal Court will bind all Malaysian Courts. This also applies to decisions made by the Federal Court sitting at Singapore during the merger of Singapore and Malaysia. Following the decision of *Young* v *Bristol Aeroplane* (1944), it would seem that, except in certain cases, decisions of the Federal Court would be binding on itself.[35]

High Courts

Although there are two High Courts (one in West Malaysia and one in East Malaysia) their status is the same. A High Court decision would be binding on all subordinate Courts, but would not be binding on itself. A High Court judge is not bound to follow the decision of another High Court judge. This matter has been settled by the Federal Court in *Sundralingam* v *Ramanathan Chettiar* [1967] 2 M.L.J. 211.

Subordinate Courts

Decisions of all Courts subordinate to the High Court are not binding on themselves or anyone else.

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35. Subject again to the Malaysian Civil Law Act.

CHAPTER III

INSURANCE LAW AND CONTRACT

A. THE INSURANCE CONTRACT

INTRODUCTION

The general principles of the law of contract applies to insurance contracts as in other contracts. In fact an insurance contract is merely a special or specific type of contract.[1] However, in applying the principles of contract to insurance in Malaysia, one has to be a bit careful as Malaysia has its own contract legislation. In fact there had been the Contract (Malay States) Enactment, 1930, which was followed by the Contract (Malay States) Ordinance, 1950.[2] These applied only to the Malay States. The law has now been made uniform for the whole of Malaysia by the Contract (Malay States) Amendment and Extension Act, 1974,[3] and the 1950 Ordinance is now simply known as the Contracts Act, 1950.[4]

This therefore means that the English principles of contract cannot be applied blindly. Where there is a specific provision in the Contracts Act, that provision will have to be applied. English contract law principles however can be applied where the Malaysian Contracts Act is silent on the point. For example, it will be found that the Act is silent on certain aspects of the law relating to indemnities. English decisions would also be useful where the English law and the Malaysian Contracts Act are in *pari materia*. However, newer English legislation on contracts such as the Misrepresentation Act, 1967, or the Unfair Contract Terms Act, 1977 would obviously not be applicable in Malaysia. Herein lies the main difference between the Singapore and Malaysian position as Singapore has no contract legislation of its own and applies English law almost *in toto*. Nonetheless, one should not be unduly perturbed because it will be found that even to-day Malaysian Contract law and English Contract law are still substantially the same.

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1. See for example *Chitty on Contract, Vol 2. Specific Contracts,* 1977 Edn, pp,686 where insurance contracts are dealt with in some detail.
2. F.M. Ordinance No. 14 of 1950.
3. Act A239 of 1974.
4. (Revised–1974). Act 136 of the Laws of Malaysia.

FORMATION OF CONTRACT

Proposal, Acceptance, Consideration.

The Malaysian Act uses the term "proposal".[5] This is equivalent to the English term "offer". The proposal has to be "accepted". If there is consideration, then it would become an "agreement". An agreement which is enforceable by law is a contract. An agreement which is not so enforceable is said to be void. The Act also has specific provisions for the communication, acceptance and revocation of proposals.

The concept of "counter offer" would also be applicable to Malaysia, as it would come under "proposal". It would be a "counter-proposal".

Bearing the above principles in mind one may consider how a contract of insurance in Malaysia would be formed.

First, the proposer would fill in a "proposal form". This would exist in most types of insurance contract, though what one has to fill in depends on the insurance company concerned and the nature of the insurance.

In most cases, the filling in of the proposal form would amount to a "proposal" being made by the proposer (prospective insured) to the insurance company. It should of course be noted that there is no law which says that a proposal has to be in writing, but because of the doctrine of "uberrimae fidei" (utmost good faith), insurance companies like to have it in writing.

If the proposal is accepted either orally or in writing, then there would be an "acceptance". In some cases there is a letter of acceptance.

However, the position is not free from difficulty. As far as life insurance is concerned, most text-book writers take the view that the letter of acceptance does not result in a binding contract. According to them[6] the proposal form merely provides materials to the insurer as a basis for assessment of the risk. The letter of acceptance is therefore only a counter-offer which the proposer may or may not accept. Only where he accepts the terms proposed by the insurance company would there be a valid acceptance.

In life assurance[7] the position may be further complicated by the

5. See s. 2(a)(b) of the Contracts Act.
6. See for example, Indian Federation of Insurance Institutes, *Law of Life Assurance* p. 35. See also, Bacon & New, *Principles & Practice of Life Assurance* 8th edn. 1974, p. 25.
7. Life "insurance" is usually referred to as "assurance". The practice is however not universal. For example, the term "Insurance" is used in the Australian Life Insurance Act.

fact that the first premium has been accepted by the agent as in most cases he has an authority to do so. Thus, in practice, the first premium may be tendered with the proposal form. In such cases, the insurer is still entitled to offer an assurance on terms other than that proposed, or to reject the risk. In cases the proposal is accepted then the insurer would assume risk from the date of acceptance. The assumption of risk would be indicated by a receipt issued for the first premium.

Even though, by using the above analysis, an insurance contract is formed, there is the further complication that in life assurance, the assurance would become invalid if an event occurs between the date of proposal and date of acceptance or date of delivery of first premium which would affect the risks and such event is not intimated to the assurance company. Thus, in the English case of *Canning* v *Farquhar*[8] a proposal was accepted by the Sun Life Assurance Company subject to the condition that the company's liability did not commence until the first premium was paid. Before the premium was tendered, the health of the life assured had deteriorated to a marked degree, and the company accordingly refused to accept the premium or issue the policy. The Court decided in favour of the company as it was held that no contract was completed until the premium was paid.

Contractual documents in insurance

It will be seen from the above discussion that when a contract of insurance is formed, it is usually followed by the issue of a "policy". However it should be noted that a policy is merely evidence of the contract, and is not conclusive evidence that there is a contract of insurance. Indeed, the policy itself may indicate that it will not come into force until the first premium is paid. Here again, whether there is a valid contract or not may well depend on the intention and conduct of the parties. Thus, in the Indian case of *Ocean Accident Corporation* v *Patkar*[9] the insurer sued the assured for premiums due on various policies issued to the latter. The assured contended that pre-payment of premia was a condition precedent of the policy, and therefore there were no valid contracts as no premia had been paid. However, the course of conduct showed that policies were always issued at his request and premia was paid in due course. The parties had throughout acted on the footing that there was a concluded con-

8. (1886) 16 Q.B.D. 727.
9. A.I.R. (1935) Bom. 236. See also *South British Insurance Co* v *Stenson* (1928) I.L.R. 52 Bom. 532.

tract of insurance subsisting between them. Accordingly, the premia was held to be recoverable.

Besides a policy, there are other documents which might well indicate that there is a valid contract of some sort. Such documents are cover-notes, letters of insurance, slips, etc.

Cover notes may be used in many types of insurance, and particularly in marine insurance. This is usually issued after the insurer receives the proposal form and pending acceptance, protection is given. It may sometimes be called "Letter of Cover" or "Interim Protection Note". The Note would normally mention that temporary cover is given under the same conditions as the policy that would be issued, if the insurer finally accepts the proposal.

A recent Malaysian case involving a cover-note is that of *Chop Eng Thye* v *Malaysia National Insurance Sdn. Bhd.*[10] That was a fire insurance case and a smoke house had been insured for fire. A cover-note or protection note had been issued. One of the issues was whether the cover-note was valid and it was held that it was indeed valid. The Plaintiff however lost his claim on other grounds.

The "slip" is often used by Lloyds Underwriters. It contains details of the proposed insurance and once it has been initialled by underwriters they are bound, even though the policy may not be issued for some time. However, in the case of *Jaglom* v *The Excess Insurance Co. Ltd. & Others*[11] it was held that underwriters are not bound until the slip is fully subscribed. This judgement has been criticised as it is established practice that the underwriter's initialling of the slip represents his acceptance. As Malaysia has Lloyds underwriters operating in the country there is no harm for businessmen to be acquainted with Lloyds procedure which is slighly different from the procedure followed by insurance companies..

Premium as consideration

Everyone knows that premium has to be paid with regard to insurance contracts. In contractual language, this premium is regarded as the consideration on the part of the insured. On the part of the insurers, the consideration is the undertaking to provide payment, compensation or indemnity in terms of the insurance contract which is usually evidenced by a policy.

It has been seen that it is not necessary for the premium to have been paid to have a valid contract. Sometimes, there may be a valid contract even if the amount of premium to be paid has not been

10. [1977] 1 M.L.J. 161.
11. [1971] 2 Lloyds 171.

decided as yet. In some types of insurance such as liability insurance, the exact amount of premium may not be decided until the contract has expired. In such cases, a provisional premium may be paid at the commencement of the insurance, and the amount paid can be adjusted at the end.

Premium may be paid in cash but in practice, it is often paid by cheque. It should be noted that payment by cheque is merely a conditional payment. Therefore, if the cheque is honoured, the premium will be deemed to have been paid. If the cheque is dishonoured, then the premium is deemed not to have been paid. Where an insured is taking out policies from time to time, premium may also be paid by what is called settlement of account. In such a case, provided the account is settled on the date agreed, the premiums are deemed to have been paid on the dates when they fell due, rather than on the date of settlement of the account.

Renewal Premium – a new contract

Life insurance is a long term contract and the premiums that are paid will be in connection with one contract only. However, motor insurance or fire insurance may be renewable annually. Although a new policy may not be issued, every renewal of such policies would amount to a new contract in law.

Premium paid to agents (or brokers)

On many occasions payments have been made to agents or brokers. Sometimes this may amount to payment to the insurers. This question will be dealt with in more detail in dealing with agents and brokers.

Return of premium

As premium is consideration, there may be occasions where the whole of the premium will have to be returned by the insurer where there is a total failure of consideration. In cases where there is a partial failure of consideration on the part of the insurers, a proportionate part of the premium will have to be returned to the insured (unless the policy otherwise specifically provides).

There is a complete failure of consideration on the part of the insurers, and thus an obligation to return the whole of the premium paid to the insured in the following situations:

(a) there is no *consensus ad idem* (of the same mind) between the parties;
(b) the policy issued is *ultra vires* the company;
(c) where the policy is illegal; but the insured would not be entitled to a return of the premium when he is a party to the illegality or is aware of the illegality;
(d) where the policy is avoided by the insurers on grounds of innocent misrepresentation or non-disclosure by the insured;
(e) where there has been fraud or breach of good faith by the insurers;
(f) the subject matter of the insurance has been destroyed before inception of the policy or is incapable of identification; and
(g) where the insured has no insurable interest in the subject matter of the insurance.

There is a partial failure of consideration on the part of the insurers, and therefore an obligation to return a proportionate part of the premium to the insured (unless the policy otherwise specifically provides) in the following situations:

(a) there is over insurance;
(b) the policy provides that part of the premium will be returned in certain circumstances (e.g. where the policy allows the company to cancel the policy at any time and provides a return of part of the premium), and
(c) where the company goes into liquidation; in such an event it can be said that generally the insured is entitled to a return of premium proportionate to the period of insurance remaining unexpired at the date of the liquidation.

B. NON DISCLOSURE AND MISREPRESENTATION

INTRODUCTION

A contract of insurance is one of *uberrimae fidei* (utmost good faith) and therefore what is generally referred to as "non-disclosure or misrepresentation" by either party would entitle the other party to avoid the contract. There have been cases where the company may be guilty of non-disclosure or misrepresentation, but in most cases the non-dosclosure or misrepresentation is on the part of the insured.

In ordinary contracts there is no duty of disclosure because of the principle of *caveat emptor* (buyer beware). This is usually justified because both parties are in a position to ascertain for themselves what is being bought or sold. However, in insurance contracts many

things which may be known to the insured cannot be known by the insurer unless it is disclosed by the insured. The insurer has to rely on the insured, or rather on what the insured tells him, so that he can decide whether to accept or refuse the risk or to fix the right premium. Thus, the duty of the insured is that of full disclosure, and strictly speaking he should disclose things which are *material* to the risk even though he may not be asked. In practice however, one might see in certain proposal forms or policies that the insured is not liable for not disclosing what he has not been asked.

NON-DISCLOSURE

Nature & Meaning of

Firstly, non-disclosure has to be distinguished from misrepresentation as misrepresentation denotes a positive act where something wrong or inaccurate or untrue has been said. Whereas non-disclosure is really an omission to say or disclose what should be said or disclosed.

Secondly, in using the term "non-disclosure" in insurance law, some text-book writers further distinguish between non-disclosure and "concealment". Thus non-disclosure is sometimes limited to the omission to disclose due to inadvertence or because the insured thought it immaterial; and concealment is meant to cover cases of intentional suppression.

It is therefore important to note that certain cases of non-disclosure may amount to "fraud" within the meaning of s. 17 of the Malaysian Contracts Act. Section 17 is as follows:

> "17. "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intend to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.
>
> Explanation – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

It is thus clear that in certain cases silence amounts to fraud; this is particularly so in insurance contracts where there is a "duty" on the part of the person keeping silence to speak. Moreover, it is also clear that in certain cases "active concealment" of a fact amounts to fraud.

Sometimes it may not be easy to distinguish between non-disclosure and misrepresentation. Suppose a tuberculosis patient is asked in filling a life proposal form whether he or she is suffering or has suffered from tuberculosis, and the answer is "No". Is it non-disclosure or misrepresentation? It is submitted that this is misrepresentation as the person concerned is not only keeping silent or concealing a fact, but in fact is saying that he or she is not suffering from or has never sufferred from tuberculosis. In practice, however, such a distinction would not make much difference, for in either case, it would amount to "fraud" within the meaning of s. 17 of the Contracts Act.

What is the position where the questions are not answered and there is a blank? Is it non-disclosure or misrepresentation, or nothing? The answer is not free from difficulty. In *Markovitch* v. *Liverpool Victoria Friendly Society* [12] it was held that the omission to answer a question cannot be regarded as a mis-statement of fact unless the obvious inference is that the applicant intended the blank to represent a negative answer. In *London Assurance* v *Mansel* [13] Jessel M.R. said *obiter* that, if a proposer purposely avoids answering a question and does not state a fact which it is his duty to communicate, that is non-disclosure. On the other hand, where a question is answered, and the policy is issued without further inquiry inspite of the unanswered questions, then it could well be considered as a waiver of information on the part of the insurance company. [14]

Similarly, where the answers are incomplete and a policy is issued without further inquiry, it could also be argued that the insurance company has waived the disclosure. If in a motor policy proposal the applicant is asked "How many accidents have you had in the last ten years" and replies "Cannot say yet" or "Details unavailable at present", the insurer would be waiving disclosure of all accidents if no more inquiries were made. [15]

Scope and Extent

It should be noted that an insurance company may be able to avoid a policy on grounds of non-disclosure in Malaysia, even if it

12. (1912) 28 T.L.R. 188, 189.
13. (1879) 11 Ch.D. 363, 369.
14. *Thomson* v *Weems* (1884) 9 App. Cas. 671, 694.
15. See *MacGillivray & Parkington on Insurance Law*, 6th edn. 1975, para. 798.

may not amount to fraud within the meaning of s. 17 of the Contracts Act. This is because of the generally accepted principles of English insurance law which would be applicable to Malaysia by virtue of s. 5 of the Civil Law Act. The general duty of disclosure has been stated in a leading authority on the subject as follows: [16]

> "Subject to other refinements considered below, the assured's duty may be summarised thus : the assured must disclose to the insurer all facts material to the insurer's appraisal of the risk which are known or deemed to be known to the assured, but not known or deemed to be known to the insurer."

Material Facts

One of the frequently adopted tests as to materiality is that laid down in s. 18(2) of the English Marine Insurance Act, 1906. It provides that: [17]

> "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."

The other test is that of the "reasonable assured". Would a reasonable man in the position of the assured realise that the facts known by him were material to the risk? This test seems to have been used in quite a number of life assurance cases. There have also been occasions where it has been applied to property insurance cases. No doubt there have been variations in the language used. In the case of *Anglo African Merchants* v *Bayley* [18] which concerned a policy on goods in storage Megaw J. said that the test was whether the assured, knowing certain facts, should have realised as a reasonable man what he knew might be (not would be) regarded as material by a normal prudent underwriter.

It should also be pointed out that in considering the question of materiality the opinion of the particular assured will not as a rule be considered. However, this proposition should not be stated too highly as there may be cases where the opinion of a particular assured may coincide with what the opinion of a reasonable assured would be in the circumstances. In *Life Association of Scotland* v *Foster* [19] the assured had at the date of her proposal a slight swelling in her groin. She attached no importance to it and did not mention it to the company's doctor. It was held that this did not amount to

16. MacGillivray, *op cit*, para 727.
17. See also s. 80(5) of the Malaysian Road Traffic Act, where "material" means it is of such a nature as to influence the judgement of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions.
18. [1970] 1 Q.B. 311.
19. (1873) 11 M. 351, 359.

non-disclosure of a material fact as a reasonable and cautious person unskilled in medical science and with no special knowledge of the law and practice of insurance would have done the same.

Should a judge be in any doubt as to what is a material fact in a particular type of insurance, he may call expert evidence from the insurance world. However, expert evidence is not limited to those from the insurance world, and there may be occasions for example where a doctor might have to be called.

Malaysian decisions can be found where the principle of disclosing material facts has been recognised. The case of *Goh Chooi Leong* v *Public Life Assurance Co.*[20] is in point. That was a case where the assured had not disclosed that he had been previously treated for tuberculosis. Gill J. (as he then was) remarked:

> "It is trite law that a contract of insurance is a contract *uberrimae fidei* which can be avoided for non-disclosure of material facts."

In that case, there was of course no dispute that the presence or absence of tuberculosis was a material fact.

An earlier Malayan decision is that of *Teh Say Cheng* v *North British & Mercantile Insurance Co. Ltd.*[21] The Plaintiff had insured against fire for $80,000-00. He had failed to disclose that there were unsatisfied judgements outstanding against him. On a claim being made, it was held that this fact should have been disclosed as it was a material fact. The learned judge (Whitley J.C.) referred to the test laid down in s. 18(2) of the Marine Insurance Act. He also referred to the evidence of the expert witnesses and stated:

> "In view of this evidence, and the nature of the facts themselves, it seems to me to be beyond doubt that Plaintiff's financial position, between the time of his proposal and the time of the issue of the policy, was such as would have affected the judgement of any rational insurer in considering whether he would accept or decline the proposal."

Facts known or deemed to be known to the insurer

Such facts need not be disclosed. This principle would even cover fraudulent concealment because it would not have influenced the insurer's judgement. It would also cover facts known to the agent but not communicated to the insurers but are nonetheless deemed to be known by the insurer. With regard to such facts known to the agent, the position has been simplified in Malaysia since 1978, by the introduction of a new s. 44A. By this new section, the knowledge of

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20. [1964] M.L.J. 6.
21. [1921] F.M.S.L.R. 248.

an agent relating to any circumstances relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

There are of course a variety of circumstances whereby the insurer may come to know of certain facts. An instructive Malaysian case is that of *Tan Kang Hua* v *Safety Insurance Co.* [22] That was a motor insurance case and the proposer had answered "Nil" to a question whether he had made a claim under any motor vehicle policy. It was also disclosed that he had previously insured with the New India Assurance Company. Accordingly, the Safety Insurance Co. wrote to the New India Assurance and was informed that they had previously settled a claim for $200-00. The trial judge accepted the contention of the Safety Insurance Co. that they had not received back the questionnaire sent to the New India Assurance Co. However, on appeal the Federal Court disagreed with the trial judge and felt that the more logical inference is that the Plaintiffs were aware of the facts which were alleged to have been concealed by the Defendant at the time of the issue of the policy. The Federal Court then referred to *MacGillivray on Insurance Law*, 5th edn. para. 903 and allowed the appeal.

Effect of Questions in proposal forms.

The questions put by insurers in the various proposal forms may limit or enlarge the proposer's duty of disclosure. As a general rule it may be said that by answering the questions, the duty of the proposer to disclose all material facts does not come to an end. For example, in a burglary insurance, although the proposer or applicant may have answered all the questions, it may be necessary to disclose whether he has a criminal record or not. In *Lambert* v *Co-operative Insurance Society Ltd.* [23] the Plaintiff signed a proposal form for one of the company's "All Risks" insurance policies to cover her own and her husband's jewellery. No questions were asked, and the Plaintiff gave no information about any previous convictions although her husband, to her knowledge, had been convicted some years earlier of receiving stolen cigarettes and had been fined. Condition 2 of the policy provided that the policy would *ipso facto* be void if there should be an omission to state any fact material for estimating the risk. It was held by the English Court of Appeal that the Plaintiff was under a duty of disclosure and that duty was the same when applying for a renewal as it was when applying for the original policy. The

22. [1973] 1 M.L.J. 6.
23. [1975] 2 Lloyds Rep. 485.

Court of Appeal also relied on s. 18(2) of the Marine Insurance Act and took the view that there was no obvious reason why there should be a rule of disclosure in marine insurance different from the rules in other forms of insurance.

In the Malayan case of *Teh Say Cheng* (supra) it will be recalled that the non-disclosure related to the financial standing of the insured. One of the arguments raised was that the financial standing of the insured was never asked by the insurer. The learned judge relied on a passage by Vaughan Williams L.J. in *Joel* v *Law Union and Crown Insurance Co.* [24] and held that although the question may not have been put, there was nothing in the conduct of the insurers which relieved him of the duty to disclose every material fact.

It is however fair to point out that in certain proposal forms, the questions which are asked might well limit the duty of disclosure. The authorities are not clear when such an implication might be made. It is probable that when certain information is sought in respect of a particular period of time, this necessarily implies a waiver concerning the same sort of facts occurring outside it.

The somewhat controversial case of *Abu Bakar* v *Oriental Fire and General Insurance Co Ltd* [25] decided by the Federal Court of Malaysia also brings out the difficulty in construing whether there was a non-disclosure or not when the proposer answers certain questions asked of him. In that case a fire proposal form was involved. The form contained the following question:

> "For what purposes are the premises occupied? (e.g. dwelling, shop, godown etc.). If variously tenanted, please state the trade or business carried therein."

The Plaintiff gave the following answer:

> "Sundry shop downstairs, dwelling first floor."

Fire broke out in the front of the ground floor. It appears that all the time at the back of the ground floor there were 4 electrically operated grinding mills. It was contended by the insurance company that this fact should have been disclosed. The trial judge held that there had not been full disclosure and found for the insurance company. On appeal to the Federal Court, the said judgment was reversed by a majority of two to one (Gill F.J. dissenting).

One of the majority judges (Ong Hock Sim F.J.) reiterated the view expressed by the House of Lords in *Condioganis* v *Guardian Insurance Co* [26] that if an answer to a question is obtained and is

24. [1908] 2 K.B. 878.
25. [1974] 1 M.L.J. 150.
26. [1921]2 A.C. 125.

upon a fair construction a true answer, then it is not open to the insuring company to maintain that the question was put in a sense different or more comprehensive than the proponent's answer covered. It was therefore held that the above answer was unimpeachable on any reasonable construction.

MISREPRESENTATION

Fraudulent or innocent

It is obvious that for misrepresentation to exist, there has first to be a representation. If the representation is innocently or inadvertently made, it is regarded as innocent misrepresentation. If the representation is a deliberate lie or is recklessly made not caring in the truth or falsity of it, then it is regarded as fraudulent.

Under the Malaysian Contracts Act the latter type of misrepresentation would come under the definition of "Fraud", as stated in s. 17 of the Act. The said section has already been reproduced with regard to non-disclosure. Accordingly it would here be relevant to reproduce s. 18 which defines misrepresentation.

> "18. "Misrepresentation" includes:—
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

Whether there be "fraud" or "misrepresentation", s. 19 stipulates that the agreement or contract is voidable at the option of the aggrieved party. Therefore in insurance it means that whether the misrepresentation be innocent or fraudulent, the insurer has the option to avoid the policy.

Nature of misrepresentation

There are circumstances where in insurance contracts it may be a little difficult to decide whether there has been a misrepresentation or not. The case of *Abu Bakar* (supra) which has been discussed with regard to non-disclosure is a case in point.

In *New India Assurance Co Ltd* v *Pang Piang Chong*[27] the main question was whether there was in fact a misrepresentation made in a motor insurance proposal form. A question in the proposal form was whether the proposer had been convicted of any offence in connection with the driving of any motor vehicle. The answer was in the negative. On the facts, it transpired that the Defendant had indeed been convicted of several statutory offences such as driving without an "L" plate. The learned judge held that there had been no misrepresentation as the convictions were not in connection with the driving of a motor vehicle.[28]

A more interesting question arose in the case of *Pacific & Orient Underwriters (M) Sdn Bhd* v *Choo Lye Hock*.[29] In that case also the insurance company had sought to have the motor insurance policy declared void. One of the grounds advanced by the company was that there was non-disclosure or misrepresentation as the address and occupation were wrongly stated. The learned judge Abdul Hamid J. took the view that there would be a misrepresentation only if the "answers" to the questions in the proposal form were incorrect or untrue. According to him, the statements concerning the address and occupation cannot be regarded as answers to the questions.

The effect of the basis clause

One of the complicating factors in considering the effect of misrepresentation is the existence of the basis clause in most proposal forms. It runs something like this:

> "I declare that the particulars and statements made by me above are true, and I agree that they shall be the basis of the contract between me and the . . . . company."

As one writer has put it:[30]

> "No meaningful reform of insurance law can be achieved without a complete overhaul of the law which has developed around 'the basis of the contract' clause in insurance litigation."

Regarding the effect of the clause, he states as follows:

> "The effect of this language is to incorporate the insured's answers into the insurance policy although they are not set out in the policy. An incorrect answer into anyone of these questions is fatal to the insured's claim. This is so, whether he answered the question in good faith to the best of his know-

27. [1971] 2 M.L.J. 34.
28. The learned judge relied on two English cases, *Taylor* v *Eagle Star* (1940) 67 Ll.L. Rep 136 & *Corcos* v *De Rougemont* (1925) 23 Ll.L. Rep 164.
29. [1977] 1 M.L.J. 131.
30. R.A. Hasson, "The 'basis of the contract clause' in the Insurance Law" (1971) M.L.R. 29.

ledge, or indeed, whether his response related to a material fact or not."

As far as Malaysia is concerned, strictly speaking, an insurer does not need to rely on the basis clause to avoid a policy, once there is misrepresentation within the meaning of s. 18 of the Contracts Act. However, the basis clause would become useful where there are certain misrepresentations (or rather mis-statements) which may not qualify as a misrepresentation under s. 18, but nonetheless being a statement in a proposal form would entitle the insurance company to avoid the policy or repudiate liability. Indeed the "basis clause" has been invoked from time to time in insurance litigation in Malaysia.

Thus, the main legal significance of the basis clause is that it converts every statement in the proposal form into a "condition", and therefore any untrue or incorrect statement would amount to a breach of condition. This approach can be seen in the case of *China Insurance Co Ltd* v *Ngau Ah Kau* decided by the Federal Court (Suffian F.J. dissenting).[31] In that case it was not in dispute that certain answers in the motor policy proposal form were incorrect. The insured however alleged that they were inserted by or at the instance of the agent.[32] The learned trial judge took the view that in any case the answers were not material. On Appeal, Azmi L.P. pointed out that there being a basis clause, it was not open to the learned judge to consider whether the answers were material or not, and stated as follows:

> "In my view he could not, because the truth of the answers had been made a condition of the policy . . . . . ."

The Lord President then concluded on this point as follows:

> "In my view, therefore, once it is established that the truth of the answers in questions 6(A) and (B) is a condition of the contract, it is not open to the judge to consider the question of its materiality."

By adopting this approach, it will be seen that it was unnecessary to decide the question whether there was "misrepresentation" or not within the meaning of s. 18 of the Contracts Act.

The indisputability clause in life policies and misrepresentation

We have discussed above the effect of the "basis clause" on any mis-statement even if it may not amount to a "misrepresentation" within the meaning of the Contracts Act. Fortunately however, the suffering of the insuring public is alleviated with regard to life policies by what is called the "indisputability clause". As far as Malaysia is concerned, the recent amendments to the Insurance Act have introduced a "statutory indisputability clause" for life policies and

31. [1972] 1 M.L.J. 52.
32. This case is also relevant to agency. This aspect will not be dealt with here.

would be of assistance where the policy does not contain an indisputability or incontestability clause.

In simple language, the clause usually states that the policy shall be indisputable or incontestable except in the case of fraud or wilful misrepresentation by the assured. This clause, being an express provision, would amount to a waiver of the insurer's right to set aside a policy on grounds of misrepresentation unless the misrepresentation was "wilful". The reason why fraud or wilful misrepresentation is usually excluded is because of the principle that no man shall profit from his own fraud.

The Insurance (Amendment) Act 1975 introduced a new section, namely 15C which related to mis-statements and avoidance of policy. Section 15C(4) as further amended by the Amendment Act of 1978, is as follows:

> "(4) No life policy effected before the commencement of this section shall, after the expiry of two years from such commencement, and no life policy effected after the commencement of this section shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a Statement made in the proposal for insurance or in a report of a doctor, referee, or any person, or in a document leading to the issue of the policy, was inaccurate or false unless the insurer shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policyholder with the knowledge that the statement was false or that it suppressed a material fact"

This sub-section thus introduced what is really a built-in "indisputability clause" into any life policy effected in Malaysia. It may here be noted that the sub-section as introduced in 1975 was more or less a copy of s. 84 of the Australian Life Insurance Act. The sub-section as it now stands is an improvement in more than one way. Firstly, it reduces the period from three years to two years. Formerly, any misstatement which was fraudulently untrue would not be covered. Now, even if a statement is fraudulently made it must still relate to a "material matter" or must have suppressed a "material fact".

Some local case law on misrepresentation

Most of the local cases on misrepresentation present no difficulty as they concern situations were the misrepresentation is clear.[33] The case of *Goh Chooi Leong* v *Public Life Assurance Co Ltd*[34] which refers to "non-disclosure" can also be regarded as a case of misrepresentation with regard to life insurance. There the patient did not dis-

33. The more difficult situations have been mentioned in the previous pages. See *New India Assurance Co Ltd* v *Pang Piang Chong* [1971] 2 M.L.J. 34; and *Pacific and Orient Underwriters (M) Sdn Bhd* v *Choo Lye Hock* [1977] 1 M.L.J. 131.

34. [1964] M.L.J. 6. This case has already been mentioned in dealing with non-disclosure.

close that he had suffered from tuberculosis. Question 9 was as follows:

"Q. Have you ever had advice about heart or lungs or for cough?
A. No."

The trial judge Gill J. (as he then was) remarked that this was a deliberate lie. It is therefore clear that though this case has been labelled as "non-disclosure" it is really a case of misrepresentation.

A few cases on motor insurance may be mentioned. In *United Malayan Insurance Co Ltd* v *Lee Yoon Heng*[35] the question arose with regard to the description of the vehicle in the proposal form. It was described as a "Volkswagen Station Wagon", and a private car policy had been issued. The learned judge held that the vehicle was in fact a different breed from a station wagon. He however felt that nothing much turned on this misrepresentation, and was only a wrong description of the motor vehicle. However, the misrepresentation was more serious with regards to the user of the vehicle. It was held that from the evidence the Defendant bought the motor vehicle in question to use it for the purpose of his business and not as a private passenger car. The essential purpose for which it was used was for the carriage of goods and equipment in connection with his business. There was therefore clearly a misrepresentation.

In the case of *National Insurance Co Ltd* v *Joseph*[36] the misrepresentation related to the question whether the company had been informed of a previous cancellation of a policy by another company, and also information relating to a previous accident. On the evidence, the trial judge (Ong J.) came to the conclusion that he had deliberately suppressed and misrepresented these material facts. On similar facts a similar conclusion was reached by Hashim Yeop A. Sani J. in *Ong Eng Chai* v *China Insurance Co Ltd.*[37]

One of the unfortunate cases where a fire policy was involved is that of *Wong Lang Hung* v *National Employees' Mutual General Insurance Association Ltd.*[38] It was apparently a case of innocent misrepresentation, but the insured nevertheless suffered for it. In that case the Plaintiff Madam Wong had merely studied Chinese at primary school level, but on the evidence she had approved of the answers before signing her name in Chinese on the proposal form. The learned trial judge found that among others, there was misrepresentation with regard to the answers to questions 6, 7 & 8. The questions and answers are reproduced below:

35. [1964] M.L.J. 453.
36. [1973] 2 M.L.J. 195.
37. [1974] 1 M.L.J. 82.
38. [1972] 2 M.L.J. 191.

6.	Are any hazardous trades carried on or hazardous goods stored? If so, give details.	No.
7.	Are there any stoves, furnaces, or means of producing fire, heat OTHER THAN for cooking? If so give details.	Kerosene stove and fire-wood stove.
8.	Are the premises attached to other buildings? If so, state construction and occupation of adjoining buildings.	No.

Accordingly, the policy was held to be void, and the Plaintiff could not recover for the loss by fire.

With regard to misrepresentation in marine insurance, there seems to be no decided local cases. However, as the English Marine Insurance Act 1906 applies to Malaysia by virtue of s. 5 of the Civil Law Act, reference may be made to s. 20 of that Act which relates to misrepresentation. Section 20 is as follows:

> "20. (1) 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.
>
> (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
>
> (3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.
>
> (4) 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.
>
> (5) A representation as to a matter of expectation or belief is true if it be made in good faith.
>
> (6) A representation may be withdrawn or corrected before the contract is concluded.
>
> (7) Whether a particular representation be material or not is in each case, a question of fact."

As far as workmen's compensation insurance cases are concerned, the non-disclosure or misrepresentation usually relates to the number of workmen employed by the insured, and the remuneration paid to them. This, it is thought, would reduce the premium payable to the insurance company. Good examples are that of *Suhaimi Bin Ibrahim* v *United Malaya Insurance Co Ltd*[39] and *Fook Yew Timber Co* v *The Public Insurance Co Ltd.*[40] In both cases the insured had given a lower number of employees than that actually employed by him. It

39. [1966] 1 M.L.J. 140.
40. [1960] M.L.J. 72.

was held that the insurance company could avoid the policy.

CONCLUSION

It will be seen from all the above cases decided by Malayan or Malaysian judges that in declaring the policy void for misrepresentation reliance has been placed on English decisions and no reference has been made to the Contracts Act which allows a contract to be avoided for misrepresentation or fraud within the meaning of that Act. While it is possible that some cases of non-disclosure or misrepresentation may not come within the meaning of "misrepresentation" or "fraud" under the Contract Act, other cases may well come under it. In such cases, as there is other provision made by written law in Malaysia within the meaning of s. 5(1) & (2) of the Civil Law Act, strictly speaking the Contracts Act should be applied whenever it is applicable.[41]

C. CAPACITY TO CONTRACT

AGE OF MAJORITY

Section 11 of the Contracts Act states as follows:

> "11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

It is therefore also important to know what the age of majority in Malaysia is. After the English reduced their age of majority from twenty-one to eighteen by their Family Law Reform Act, 1969, Malaysia also streamlined the age of majority by the Age of Majority Act, 1971. Section 2 is as follows:

> "2. Subject to the provisions of s. 4, the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority."

It can thus be said that as a general rule it is safe to consider that the age of majority is eighteen.

SPECIAL PROVISIONS IN THE INSURANCE ACT

However, insurance had created problems in England as to at what age a person would be competent to contract, and also whether

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41. It may be noted here that England is now considering changes with regard to non-disclosure and mis-representation. Among other changes, the drastic curtailment of the basis clause is being considered. See *Working Paper No 73 on "Insurance Law: Non-disclosure and Breach of Warranty"* (H.M.S.O.). The Law Commission is circulating the Paper for comment and criticism.

an infant could repudiate his policy and recover his premiums on attaining majority.

It is therefore interesting to note that special provision has been made in the Malaysian Insurance Act with regard to the age when a person can enter into a contract of insurance.

Section 41 of the Act states as follows:

"41. (1) Notwithstanding any law to the contrary, a person over the age of ten years shall not by reason only of being under the age of majority lack the capacity to enter into a contract of insurance; but a person under the age of sixteen years shall not have the capacity to enter into such a contract except with the consent in writing of his parent or guardian.

(2) This section shall be deemed always to have had effect."

It may be pointed out here that this provision is the same as the corresponding provision in the Singapore Insurance Act, and is substantially the same as the provisions contained in s. 85 of the Australian Life Insurance Act and which is as follows:

"85. (1) A minor who has attained the age of ten years but has not attained the age of sixteen years may, with the written consent of his parent or of a person standing *in loco parentis* to the minor –

(a) effect a policy upon his own life or upon another life in which he has an insurable interest; or

(b) take an assignment of a policy.

(2) A minor who has attained the age of sixteen years may: –

(a) effect a policy upon his own life or upon another life in which he has an insurable interest; or

(b) take an assignment of a policy, and subject to the next succeeding sub-section, is as competent in all respects to have and exercise the powers and privileges of a policy owner in relation to a policy of which he is the owner as he would be if he were of full age.

(3) A minor who has attained the age of sixteen years is not competent to assign or mortgage a policy except with the consent in writing of his parent or of a person standing *in loco parentis* to the minor."

It will be noted that the Malaysian and Singapore provisions are more precise but the effect is really the same as the Australian provisions. However they cover not only life insurance but other fields as well.

It will be noted that in the Malaysian Act a minor above the age of ten years can only "enter" into a contract. This means that any minor above the age of ten and under the age of sixteen can "enter" into a contract i.e. take a policy. He apparently has no capacity to make other contracts such as "assigning" a policy or "mortgaging" a policy, or taking a loan under the policy.

It will also be further noted that such capacity to enter into a contract, must be accompanied by a consent in writing of his parent or guardian.[42] However, such written consent will not be required for those over sixteen and below eighteen (which is the age of majority).

It therefore seems that with or without the consent of his parent or guardian a minor has no capacity to make other contracts relating to insurance such as assignments, mortgages or loans.

SOME CONSIDERATIONS

It is difficult to understand what the rationale is in allowing any child over ten years of age to enter into *any* contract of insurance. It is not easy to envisage a situation where a minor aged eleven years would be entering into contracts for insurance of cargo or ships as it is unlikely that he will be doing business at that tender age.

Moreover, the position is not very clear where a minor is on the receiving end of a contract. Can a life policy, for example, be assigned to a minor by way of mortgage? The answer will probably be in the negative as that would in turn entail some money being lent by the minor. If however, a life policy is assigned to a minor by way of gift that would be in order. This is because of the general law that a minor can take but cannot give. In any event, a "gift" would not be a contract and therefore does not involve the question of contractual capacity.

D. INSURABLE INTEREST

NECESSITY OF

To put it briefly, one of the main reasons why an insurable interest is necessary in an insurance contract is because it would otherwise amount to a wagering contract. It may also be inherent in the nature of the insurance contract itself.

Thus, in England, the Life Assurance Act was passed in 1774 to stop gambling on lives and was indeed known as the "Gambling Act". Similarly gaming and wagering on ships and cargo was prohibited since the passing of the Marine Insurance Act, 1745.

MEANING OF

Neither in any English legislation nor in any Malaysian legislation

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42. Note that the Australian section uses the term "in loco parentis" instead of guardian.

is there a general definition of insurable interest. There is however a definition with regard to marine risks in the Marine Insurance Act, 1906. As this Act would be applicable to Malaysia by virtue of s. 5 of the Civil Law Act, the relevant provisions may be noted.

Relevant Provisions of the Marine Insurance Act, 1906

"4. (1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract —

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

5. (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where 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 insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

6. (1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost", the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

7. (1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, not withstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

8. A parital interest of any nature is insurable.

9. (1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

10. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

11. The master or any member of the crew of a ship has an insurable interest in respect of his wages.

12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

13. The assured has an insurable interest in the charges of any insurance which he may effect.

14. (1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgagee.

(2) A mortgagee, consignee or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law."

General Definition

For a general definition which would be applicable to all types of insurance, it may perhaps be defined as the assured's pecuniary interest in the subject matter of the insurance.[43] This definition may be workable in cases where the insurance contract is one of indemnity. However, in cases such as life insurance which are not contracts of indemnity, it is difficult to say that a person has a "pecuniary interest" in the life insured.

Perhaps one of the most exhaustive descriptions as to what insurable interest is, can be found in the old English decision of *Lucena* v *Crauford*[44] where Lawrence J. stated as follows:

"And whom it importeth, that its condition as to safety or other quality should continue: interest does not necessarily imply a right to the whole, or part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject

43. See *MacGillivray and Parkington on Insurance Law*, 6th edn. 1975, p. 3.
44. (1806) 2 Bos & P.N.R. 269.

of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a 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, but for those risks or dangers he may be said to be interested in the safety of the thing. 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. The property of a thing and the interest devisable from it may be very different: of the first the price is generally the measure, but by the interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended."

It can thus be said that any person who has some relation to or concern in the subject of insurance has an insurable interest. Moreover, he need not be the owner of the subject matter of insurance. As long as he would suffer a damage, detriment or prejudice, he would have an insurable interest.

LIFE ASSURANCE ACT, 1774 (England)

This Act has been mentioned above to show that England attempted to stop gambling on lives since 1774. As this Act would come under English law, and as it is not inconsistent with any Malaysian written law such as the Contracts Act or the Insurance Act, its provisions could be applied in certain circumstances in Malaysia by virtue of s. 5 of the Civil Law Act. As it is a short Act, and also as it may well apply to some other types of insurances besides life, it is hereby reproduced below:

"No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming and wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

And be it further enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in, such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote.

And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

Provided always, that nothing herein contained shall extend, or be con-

strued to extend, to insurances bona fide made by any person or persons, on ships, goods or merchandise; but every insurance shall be as valid and effectual in the law as if this Act had not been made."

This Act therefore insists that for life purposes, the person effecting the insurance must have an interest in the life assured. It also provides that in cases where the insurable interest can be measured, then no greater sum than the value of the interest of the assured shall be recovered.

The controversial aspect of the Act is that though it is called the "Life Assurance Act" it obviously does not deal with insurable interest in life insurance only. This is because it refers not only to "life or lives", but also to "other event or events". Moreover, the proviso expressly states that it does not cover insurance to "ships, goods or merchandise". The implication therefore is that it covers other types of insurance. Accordingly, many text book writers hold that it also relates to certain types of insurance such as fire insurance.

WAGERING CONTRACTS AND INSURABLE INTEREST

Section 31 of the Contracts Act states that wagering agreements are void. It is as follows:

"31. (1) 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 name or other uncertain event on which any wager is made.

(2) This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of five hundred dollars or upwards, to be awarded to the winner or winners of any horse-race.

(3) Nothing in this section shall be deemed to legalise any transaction connected with horse-racing forbidden by any written law."

Therefore, certain insurance contracts in Malaysia which lack an insurable interest would also be void by virtue of s. 31 of the Contracts Act. It should however be noted that this does not mean that every insurance contract which lacks insurable interest is necessarily a wagering contract. One can contemplate many instances where there may be no insurable interest as understood in the law of insurance, but nonetheless is not a wagering contract under the Contracts Act.

It will be noticed that s. 30 of the Contracts Act refers to "wagers" and no reference is made in it to insurances or insurable interests. An interesting English case which illustrates that lack of insurable interest does not necessarily mean that the contract is a

wager is that of *William* v *Baltic Insurance.*[45] In that case the policy purported to indemnify the assured against liability incurred by personal friends or relatives while driving the car. Roche J. observed that the insured would be very much suprised to be told that he was holding a gaming policy, although it was true that he had no insurable interest in the friends or relatives other than those he was legally liable to indemnify.

SPECIAL PROVISIONS IN THE INSURANCE ACT

Section 40 of the Insurance Act modifies the English law relating to insurable interest in life insurance. The section is reproduced below:

> "40. (1) A life policy insuring the life of anyone other than the person effecting the insurance or a person connected with him as mentioned in subsection (2) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected; and the policy moneys paid under such a policy shall not exceed the amount of that insurable interest at that time.
>
> (2) The lives excepted from sub-section (1), besides that of the person effecting the insurance, are those of that person's wife or husband, of that person's child or ward being under the age of majority at the time the insurance is effected, and of anyone on whom that person is at that time wholly or partly dependent.
>
> (3) In this section "insuring the life of" a person means insuring the payment of money (or the equivalent) on that person's death or on the happening of any contingency dependent on the termination or continuance of that person's life, and includes granting an annuity to commence on that death or at a time to be determined by reference thereto or to any such contingency.
>
> (4) In so far as in the case of any life policy the policy moneys do not consist wholly of a cash payment due on the death in question, the limit under this section on the amount to be paid shall be applied by reference to the value of the right to the policy moneys immediately after the death or the happening before the death of any event on which they become payable.
>
> (5) This section shall not affect policies issued before the commencement of this Act.

It may here be noted that the above provision in the Malaysian Act is more or less identical with the provision in the Singapore Act. Also, to some extent it overlaps with the provisions of the Life Assurance Act, 1774 which has been mentioned above.

45. [1924] 2 K.B. 282. Note this was before the English Road Traffic Act, 1930. Now, the contract would be covered by the Road Traffic Ordinance in Malaysia also.

The persons who are expressly mentioned and with regard to whom one has an insurable interest are the following:

(a) a husband on the wife, and the wife on the husband.
(b) a parent has an insurable interest in the life of his child below the age of majority.
(c) a guardian has an insurable interest in the life of his ward who is below the age of majority.
(d) a person who is wholly or partly dependent has an insurable interest in the life of the person to whom he is so dependent.

Regarding clause (a) above, it is nothing new as that was the law anyhow.

Clause (b) makes it wider than in England as a parent, as such, has no insurable interest on his child under English law.

Similarly clause (c) above makes it wider than English law.

Clause (d) also makes it wider than English law. For example an old aunt who is dependent on her niece can insure the life of her niece. The wording is also wide enough to allow children who are wholly or partly dependent on their parents to insure the life of their parents.

SUMMARY OF INSURABLE INTEREST

It is easier to summarise the law relating to insurable interest by grouping insurance into three categories.

1. Marine Insurance

This insurance is governed by the provisions of the Marine Insurance Act, 1906 which have been reproduced above. Interest must be proved at the time of loss only.

2. Property Insurance

These would be governed by the Contracts Act, and the general law. English decisions would also be relevant. The only reported Malaysian decision relates to insurable interest on a motor car and is that of *Nanyang Insurance Co Ltd* v *Salbiah.*[46] It was held in that case that the owner of a car still has an insurable interest in it, even though the car may have been transferred by an agreement to sell.

Broadly speaking, the following persons would be considered to have "insurable interest" in the subject matter in which they are respectively interested:

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46. [1967] 1 M.L.J. 96.

a) Owners of property in that property, whether moveable or immovable.[47]
b) Vendors and Purchasers.
c) Mortgagors and Mortgagees.
d) Landlord and Tenant.
e) Bailors and Bailees (whether gratuitous or for reward).
f) Pledgor and Pledgee.
g) Consignor and Consignee.
h) Common carriers and other carriers.
i) Persons having a lien e.g. unpaid seller of goods.
j) Shareholders in their shares.
k) Agents in their commission.
l) A trader in his stock in trade and profits.
m) A hire in the thing hired.
n) An insurer in his risk: Right of Reinsurance.

3. Life Insurance

The special provisions with regard to insurable interest in life has been mentioned above. However, the categories listed in s. 40 of the Insurance Act are not exhaustive. For example, the following would probably be considered to have an insurable interest:

a) A master on his servant and *vice versa.*
b) A creditor on his debtor.
c) A trustee on his beneficiary and *vice versa.*
d) A female fiancé on the male fiancé (the law however is not settled).
e) A mortgagee on the mortgagor.
f) One partner on the life of another partner.

The above list is, of course, not exhaustive.

E. ASSIGNMENTS AND INSURANCE

ASSIGNMENT OF THE SUBJECT MATTER OF THE INSURANCE

This is quite different from assigning the policy or the proceeds of the policy. It often happens in motor insurance. Thus, when a person sells a car or a house, the policy of insurance covering it cannot be sold with it. The contract of insurance is a personal contract between the insured and the insurers. Therefore its assignment is quite a different transaction from the assignment of the subject matter of the insurance.

47. The above list is not exhaustive.

It is important to remember that in assigning the subject matter of the insurance, this should be done together with the assignment of the contract of insurance. In the old English case of *Lynch* v *Dalzell*[48] a house was sold and subsequently caught fire. The vendor purported to assign the policy to the purchaser after the fire. On a claim being made by the purchaser, the House of Lords held that the policy lapsed when the vendor sold the property and the assignee of the property could not recover.

ASSIGNMENT OF THE CONTRACT OF INSURANCE (assignment of the Policy)

This assignment is really an assignment of the policy itself as opposed to the proceeds of the policy. In such a case, there would be a substitution of the original assured by a new assured. Thus, in effect, there would be a novation, and the consent of the insurer would be required.

It should also be remembered with regard to this type of assignment that the contract of insurance is a personal contract between the insured and the insurers. It can only be assigned, if at all, with the consent of the insurers. Furthermore, it does not pass with the assignment of the subject matter. In fact, if the subject matter is assigned and is not accompanied by an assignment of the contract of insurance, the policy would lapse immediately. This is because the assignor of the subject matter ceases to have any insurable interest in it.

With regard to the rule that in such an assignment the consent of the insurers is required, one must point out that policies such as life policies or marine policies would form exceptions.

Assignment of life policies

Life polices are treated in law as reversionary interests i.e. a right in property the enjoyment of which is deferred. They can be assigned, charged or otherwise dealt with. Such transactions will have to be for consideration, but the purchaser or person to whom the life policy is assigned need have no insurable interest in the life assured. For example, a bank which accepts an assignment of a life policy for money lent has no insurable interest in the life of the insured.

It should be noted that for the assignment of a life policy, the English Policies of Assurance Act, 1867, would probably apply to Malaysia by virtue of s. 5 of the Civil Law Act. Under that Act,

48. (1729) 4 Bro. P.C. 431.

notice of assignment should be given to the assurer, but it is not compulsory. That Act also gives the assignee of a policy the right to sue in his own name, but provides that no right shall be conferred until written notice of the date and purport of the assignment has been given to the assurer. The general effect of the Act seems to be that an assignee who gives notice can claim precedence over all other interests of which that assignee was unaware. The assurer would also be protected provided he pays the assignee, on satisfactory proof of title, in accordance with notices received.

Assignment of marine policies

It has already been mentioned that the English Marine Insurance Act 1906 would also apply to Malaysia by virtue of s. 5 of the Civil Law Act. Sections 50 and 51 which deals with assignments are as follows:

> "50. (1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.
>
> (2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.
>
> (3) A marine policy may be assigned by indorsement thereon or in other customary manner.
>
> 51. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:
>
> Provided that nothing in this section affects the assignment of a policy after loss."

It should however be noted that in practice, the above provisions may be varied by special provision in the policy. Also, in practice, the opening words of the S.G. form of policy (i.e. Ship and Goods) is often called the "Assignment Clause".

It may further be pointed out that different considerations apply to assignment of cargo policies and assignment of hull policies.

A cargo policy is a document used in international trade, and therefore should pass with each change of interest in the goods during the currency of the insurance. A cargo policy is usually assigned by a blank endorsement, that is, by mere signature of the

policy holder without specifying the assignee. Also, notice of assignment to the underwriter is not necessary.

On the other hand, the ownership or management of a ship is an important element in underwriting a hull policy. Underwriters do not intend that the policy should follow the ship if she changes ownership during the currency of the policy. They would insist that their written consent be first obtained.

ASSIGNMENT OF THE PROCEEDS OF THE POLICY (Right of recovery)

An assignment of the proceeds of the policy means that the assignee would be able to recover under the policy. It is simply a direction to the debtor (insurer) to pay the debt to a specified person. In legal language this amounts to an assignment of a chose in action and in Malaysia will have to comply with s. 4(3) of the Civil Law Act. The sub-section reads as follows:

> "(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to such debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

It should be noted that in such an assignment the insured remains liable to fulfil the conditions of the policy. He merely transfers the legal right to the debt or chose in action.

It should be noted that the above provision is similar to that contained in s. 136 of the English Law of Property Act, 1925. It will also be noted that both provisions refer to an "absolute assignment" i.e. a legal assignment. Such a legal assignment may be with or without consideration. Thus, where a man makes an absolute assignment of the proceeds of his life policy to his wife, it is usually by way of gift and there is no consideration.

It should therefore be noted that there may be an equitable assignment of the proceeds of a policy. In an equitable assignment no special form is required. Also, in an equitable assignment, notice is not necessary. However, it is advisable to give notice of assignment to the person liable under the contract to secure priority over other assignees.

As both the Malaysian and English provisions refer to an "absolute assignment", every "conditional assignment" would amount to an equitable assignment.

ASSIGNMENT BY OPERATION OF LAW

The three types of assignment referred to above deal with what are called voluntary assignments i.e. assignments by agreement between the parties. We now come to two types of assignment which takes place involuntarily by operation of law; namely (a) death, and (b) bankruptcy.

The general principle is that on death and bankruptcy, both the subject matter insured and the policy itself pass to the personal representatives or the Official Assignee, as the case may be.

However, the personal representatives or the Official Assignee cannot have a better title than the deceased or the bankrupt. The claim would be liable to be defeated by any non-disclosure or misrepresentation or breach of condition on the part of the insured before the assignment takes effect. Insurers should also note that if payment is made to a bankrupt after the Official Assignee becomes entitled to enforce the policy, then they may well have to pay twice.

CONDITIONS PROHIBITING ASSIGNMENT

Any person who takes an insurance policy should find out whether there is any special clause prohibiting or restricting assignment. Some policies may prohibit the assignment of the subject matter during the currency of the policy. Some policies may prohibit assignment otherwise than by will or operation of law. In cases of doubt or ambiguity, the insured should take legal advice with regard to the effect of such clauses.

CHAPTER IV

AGENCY AND INSURANCE LAW

A. AGENTS AND AGENCY

IMPORTANCE OF AGENCY IN INSURANCE

A good deal of insurance is done through a variety of intermediaries whose legal position is not always clear. Some are called agents, some are called brokers. There are different types of agents and different types of brokers. Some are agents in the limited sense of the word and are in fact known as "sub-agents" in the insurance world.

As they deal with the public, it is important for the public to understand the legal relationships involved in dealing with them. For this purpose it may be worthwhile to state briefly the general principles of the law of agency as applicable in Malaysia.

STATUTORY PROVISIONS

Most the law relating to agency will be found in the Malaysian Contracts Act. Part X of the Act is worth studying.

Appointment of Agents

Section 135 of the Act defines an "agent" as a person employed to do any act for another or to represent another in dealings with third persons. That other person is called the "principal".

Under section 136 any person who is of the age of majority can employ an agent. Thus, by virtue of the Malaysian Age of Majority Act, 1971, any person above the age of 18 can employ an agent.

Section 137 is in two parts. As between the principal and third persons, any person may become an agent. However, a person who is below the age of majority cannot become an agent so as to be responsible to his principal under the Contracts Act. Section 138 states that no consideration is necessary to create an agency.

It will thus be seen that in this respect and in other respects as well, the general law of agency is similar to the English position.

Authority of Agents

Section 139 of the Act divides the authority of an agent into

"expressed" or "implied". Section 140 defines what is express or implied authority.

Section 141 explains the extent of an agent's authority. An agent having an authority to do an act has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business. As in English law an agent is also given certain authority in an emergency (s. 142).

Sub-Agents

The existence of sub-agents is recognised under the Act only under certain circumstances. Section 143 embodies the English principle of *delegatus potest non delegare* (a delegate cannot delegate) and states that an agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally. However, sub-agents are allowed where by the ordinary custom of trade or from the nature of the agency, a sub-agent may or must be employed.

Thus, we see sub-agents being employed in Malaysia in the insurance industry, and this is probably permissible by the ordinary custom of trade.

Section 144 defines a sub-agent as a person employed by, and acting under the control of, the original agent in the business of the agency. Section 145 further states that where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal. The agent is responsible to the principal for the acts of the sub-agent. Furthermore, a sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

Section 146 is of practical importance to the insurance industry in Malaysia as many "sub-agents" are not known to the principal (insurance company). Thus the section states:

> "146. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards that person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal."

Section 147 and 148 further deal with sub-agents who are allowed to be appointed by the principal.

Ratification

As agents sometimes act beyond the scope of their authority, it is

important to realise that in certain situations their acts may be "ratified".

Section 150 states that ratification may be express or implied. Under s. 151 no valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. Section 152 states that in ratifying a particular act the whole transaction of which that act forms a part is ratified. In other words there cannot be ratification of only part of a transaction.

Termination of Agency

Section 154 explains that agency may be terminated in the following ways:

(a) by the principal revoking his authority.
(b) by the business of the agency being completed.
(c) by either the principal or agent dying, or becoming of unsound mind; or
(d) by the principal being adjudicated or declared a bankrupt or an insolvent.

With regard to (d) above, it should be noted that the bankruptcy of an agent does not necessarily revoke the agency. It is the bankruptcy of the principal that is the important factor.

Section 155 deals with what are known in English law as agencies which are "irrevocable". Thus, where the agent himself has an interest in the property, the agency cannot be terminated; unless there is an express contract that it can be so done.

Section 158 deals with agencies which are to exist for any period of time. In such a case compensation has to be given by the party revoking or renouncing the agency without sufficient cause. Section 159 also provides that reasonable notice of revocation or renunciation should be given.

Agent's duties to a Principal

The English principle of "obedience" on the part of the agent is to be found in section 164. This section states that an agent is bound to conduct the business of his principal according to the directions given by the principal. In the absence of such directions, the agent is to conduct the business according to the customs prevailing for similar business in the same place. Otherwise the agent will be saddled with the loss; but if there is profit, he must also account for it to the principal.

Section 165 states that an agent is bound to conduct the business with skill unless the principal has notice of his want of skill. He must

also act with reasonable diligence. He will thus be liable to the principal for the direct consequences of his own neglect, want of skill or misconduct. However he would not be liable for loss of damage which are remotely connected with such neglect etc.

Under s. 166, an agent is bound to render proper accounts to his principal on demand.

A further duty to communicate with his principal is imposed an agents under s. 167. Furthermore, the agent must disclose to the principal all dealings on his own account in the business of the agency. The principal is also given the right to repudiate the transaction if the dealings have been disadvantageous to him.

The English principle of indemnity is enacted in s. 170. The agent is therefore entitled to retain from the moneys of the principal all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business. He can also retain such remuneration as may be payable to him for acting as agent. Subject to these deductions, the agent is bound to pay to the principal all sums received on his account.

Under s. 173, an agent who has misconducted himself in the business is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Section 174 deals with an agent's lien over the principal's property. This lien would exist where he has not received from his principal the amount due to him for commission, disbursements and services rendered.

Principal's duties to an Agent

The principle of indemnity is repeated in broader language in s. 175. Thus, the principal is to indemnify the agent against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him. This principle of indemnity is extended in s. 176 where the principal is bound to indemnify an agent for the consequences of any act done by the agent in good faith for the principal, even though it causes injury to the rights of third persons. However, under s. 177, the principle of indemnity does not extend to criminal acts done by the agent.

Under s. 178, the principal is to make compensation to his agent in respect of injury caused to the agent by the principal's neglect or want of skill.

Effect of Agency on Contract with Third Persons

Sections 179 to 191 deals with the above matter. It is of impor-

tance in insurance law as insurance agents of various types have to deal with members of the public (Third persons), and therefore the effect of such dealings should be carefully understood.

Section 179 states the general principle that the act of an agent would be an act of the principal. Section 180 clarifies the situation by stating that where an agent has exceeded his authority, the acts done by him should be separated and those acts done within his authority are binding between him and his principal. However, s.181 further states that where the acts cannot be separated, the principal is not bound to recognise the transaction.

Section 182 is important in insurance, and deals with the question of imputed notice. It states that any notice given to or information obtained by the agent in the course of the principal's business, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Section 183 states the general principle that an agent cannot personally enforce, nor be bound by, contracts on behalf of the principal.

Then there are situations where the agency is not disclosed to the third party. In other words, this is the situation where in English law one refers to the "undisclosed principal". If the agency is not disclosed, it means that the third party does not know that there is a principal, and therefore the principal is also "undisclosed". Sections 184 and 185 which are relevant to the question of undisclosed principal is hereby reproduced.

> "184. (a) If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.
>
> (b) If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.
>
> 185. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain the performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

ILLUSTRATION

A, who owes $500 to B, sells $1,000 worth of rice to B. A is acting as agent

for C, in the transaction, but B has no knowledge nor reasonable ground of suspicion that that is the case. C cannot compel B to take the rice without allowing him to set-off A's debt."

Section 186 deals generally with cases where an agent may be personally liable. In such cases, a person dealing with him may hold either him or his principal, or both of them, liable.

Section 187 limits the rights of a third party who has induced the principal or the agent to believe that only one of them will be liable. In such a case that third party cannot hold both the agent and the principal liable.

The liability of a pretended agent is dealt with in s. 188. By that section a person untruly representing himself to be an agent will be personally liable if his alleged employer does not ratify his acts.

Section 189 states that a person falsely contracting as an agent is not entitled to performance.

Under s. 190, the principal is liable if he induces the third party to believe that the agent's unauthorised acts were in fact authorised.

Section 191 deals with the important question of misrepresentation by agents and may be reproduced in full:

"191. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

ILLUSTRATIONS

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor."

Importance of the Statutory provisions to Insurance

As insurance contracts are merely one species of contract, there is no doubt that the provisions in the Malaysian Contracts Act dealing with Agency is applicable to insurance contracts as well. This is inspite of sections 5 (1) and (2) of the Civil Law Act which has been dealt with in Chapter II. One often has the feeling that English law has been automatically applied to insurance although there is local law in point which should be applied. This is because English law should not be applied where other provision is made by any written

law. Thus, for agency, provision is made in the Malaysian Contracts Act. It is therefore submitted that wherever applicable, the Contracts Act should first be applied. In practice, of course, it may make little difference as the English law of agency and that embodied in the Malaysian Contracts Act will be similar in most cases.

B. SOME ASPECTS OF AGENCY

SCOPE OF AGENCY IN INSURANCE

It is wrong to believe that the law of agency is confined only to insurance agents who are appointed as such and known to be such. It should be remembered that in insurance transactions various types of persons with widely different powers act as agents. Thus, they would include the following:

(a) the directors of an insurance company;
(b) the employees of an insurance company, who are also allowed to sell insurance as part of their work. This may well include, managers, assistant managers etc.;
(c) brokers;
(d) full-time agents appointed under what is called an "agency contract";
(e) part-time agents, some of whom work for more than one insurance company.

In actual practice, one has to add the thousands of "sub-agents" who find business for the insurance agents throughout Malaysia. Moreover, the agency structure of a particular company may vary in sophistication depending on the size of the company. Thus besides "agents", there may be trainee agents, supervisors, agency managers and divisional managers. Thus in Malaysia, like in Singapore, one often refers to the "pyramid structure". This structure is becoming increasingly criticised and there may be changes in the field of agency with regard to insurance in the not too distant future. Also, there is a tendency in some quarters to question the wisdom of having agents living on "commissions", as this in turn may well lead to certain undesireable practices by agents such as over-selling and twisting. It is however beyond the scope of this book to go into the more practical aspects of agency.

AGENCY CONTRACTS

In practice, the persons known as "insurance agents" are usually appointed under a standard contract of the company known as an "agency contract". The language varies from company to company,

but in substance they would embody more or less the same points. Thus, the remuneration of the agent would usually be spelt out. Similarly, the right of an agent for indemnity would also be found.

In life agency agreements, the agent is not normally what is called a "del credere" agent, that is, an agent who undertakes that the third parties dealing through him will pay the principal. However, agents for general business, are under the terms of the agreement, often designated as *del credere* agents.

All insurance agents should therefore scrutinise their agency contracts, because in the presence of express provisions, the express provisions will apply. The general law of agency detailed above may therefore be modified in the agency contract. An instructive case in point is that of *Royal Insurance Group* v *David*,[1] decided by the Federal Court of Malaysia. In that case the appellant insurance company had claimed a sum of money from the respondents who were their *del credere* agents, being the premia due in respect of policies issued by the appellants. The Sessions Court at Ipoh (the trial Court) gave judgement for the Appellants, but on appeal to the High Court the appeal was allowed and the claim was dismissed. On further appeal to the Federal Court it was held, allowing the appeal, that under the letter of appointment the respondents were *del credere* agents and were liable whether the premia had been collected or not.

This decision is important because it shows that in ordinary circumstances the agents would be bound by the contract between them and the insurance company, be it embodied in a "letter" or "agreement".

An earlier decision which also shows the binding effect of letters of appointment is that of *Bankers and Traders Insurance Co Ltd* v *Allied Insurance Services*[2] which was decided by the Federal Court sitttting at Singapore. In that case the plaintiff insurance company was suing the defendants (insurance agents) for a sum of money representing the premiums collected on their behalf or alternatively due under their letter of appointment where a guarantee was given in respect of the premiums due. The trial Judge held that the letter of appointment did not contain a guarantee by the defendants as alleged, and in any case no valuable consideration was given. On appeal to the Federal Court it was held that it was irrelevant whether there was a guarantee or indemnity as the defendants accepted all the terms of the letter of appointment by signing it; and secondly there was consideration for the giving of it.

1. [1976] 1 M.L.J. 128.
2. [1969] 1 M.L.J. 61.

INSURANCE AGENTS AS AGENTS OF THE INSURED

What members of the public find it difficult to understand is that a person who is known to them as agent of a certain insurance company and is ostensibly acting as such, is deemed in law in certain circumstances to be acting as their agent and not that of the insurer (insurance company).

This situation arises largely out of the fact that the agent may at one time be acting as agent of the insurers, and at another time as agent of the insured. Among other circumstances, it has been usually accepted that a person may be acting as agent for the insured in the following circumstances.

(a) Where a person approaches an agent or broker for the type of insurance he needs and the most suitable market in which it can be obtained, the agent or the broker, in giving advice and arranging the insurance, is acting on behalf of the insured.

(b) where an agent or broker gives assistance to their clients (insured) in respect of claims, they act on behalf of the insured.

(c) where an agent completes a proposal form, which the insured then signs, it is settled law that the agent is acting as agent of the proposer.

In Malaysia, item (c) above has been a fertile source of litigation, but the matter has now been settled to a considerable extent by the Insurance (Amendment) Act, 1978, which changes the position of an insurance agent in important respects.

One of the reasons for the litigation is that in completing the proposal form the insurance agent is told many things by the proposer. Some of the information given to him may be inserted, while some of the information may not. Also, in certain cases, the agent may be filling in certain answers on his own. Indeed, cases are not unknown where a proposer may even sign the proposal form in blank. To overcome the allegations by insured that the answers were in fact written by the insured, certain proposal forms even contain a declaration by the proposer that if any handwriting is not that of the proposer, then the proposer has given authority to that person to fill it on his behalf.

Certain local cases, some of which may no longer be good law in Malaysia to-day, are briefly discussed below.

United Malayan Insurance Co Ltd v *Lee Yoon Heng* [3]

In that case the defendant had bought a motor vehicle from a

3. [1964] M.L.J. 453.

finance company on hire purchase terms. The finance company were also the agents of the insurance company. Thus, one of the employees of the finance company filled up the proposal form. On alleged non-disclosure and misrepresentation, the question was whether the defendant was liable for what was filled in by the employee of the finance company.

Gill J (as he then was) sitting in the High Court at Kuala Lumpur relied on the declaration at the foot of the proposal form to the effect that the particulars of the proposal form were true and shall be the basis of the contract, and therefore found as a fact that the defendant made the application for insurance and that he completed the form. It was argued that the employee of the finance company was the agent of the insurance company, and his knowledge of the type of vehicle must be imputed to the insurance company. Gill J. disposed away this contention by relying on the general principle that in filling in the answers in a proposal form, the insurance agent is normally regarded as the agent of the proposer.

It is doubtful whether this case will still be good law in Malaysia after the enactment of s. 44A of the Insurance Act by the Insurance (Amendment) Act, 1978. Sub-section (1) of that section lays down that any person who claims to be an authorised representative of an insurer and who solicits or negotiates a contract of insurance shall be deemed for the purpose of the formation of the contract to be the agent of the insurer.

Section 44A is obviously based on the Fifth Report of the English Law Reform Committee published in January 1957. One of its recommendations was that "any person who solicits or negotiates a contract of insurance shall be deemed, for the purpose of the formation of the contract, to be the agent of the insurers, and that the knowledge of such person shall be deemed to be the knowledge of the insurers." This recommendation has not yet been accepted in England as it involves the somewhat revolutionary principle in the law of contract that a person may escape liability for what was written over his signature. English law has always accepted that a person is responsible for what is written over his signature.

It is certainly praiseworthy that Malaysia has found it fit to take a somewhat revolutionary step in enacting s. 44A.

China Insurance v *Ngau Ah Kow* [4]

This case was ultimately decided by the Federal Court, and is of some interest as there is a dissenting judgment by Suffian F.J. who is now the Lord President. In that case also the alleged answer in the

4. [1972] 1 M.L.J. 52.

proposal form which amounted to disclosure was filled in by the agent. That was a case where the agent was supposed to have told the proposer that he was only to concern himself with claims made under motor policies within the last three years, and that earlier claims need not be mentioned. The majority judges relied on the English cases of *Biggar* v *Rock Life Assurance Co*[5] and *Newsholme Bros* v *Road Transport and General Insurance*[6] and held that the proposer was liable as the agent was acting as his agent. It is interesting to note that Ali F.J. followed the English decisions reluctantly, and stated:

> "Needless to say that I have come to this view with some reluctance and in the words of Viscount Cave that although one would have little sympathy with an insurance company who are seeking to profit by mistakes contributed by their agent the case has to be decided according to law and the law happens to be on their side."

Suffian F.J. dissented not on the law but on the facts. He distinguished the facts of the instant case from those in the two English cases quoted above. He found as a fact that there was close consultation between the agent and the company's manager, and therefore the agent was the company's agent and his knowledge was to be imputed to the company.

In view of s. 44A of the Insurance Act, the majority judgment in the above case will probably no longer represent the law. As stated above, Malaysia has changed the law, and it might be comforting for some to know that the law is no longer on the side of the insurance company in this respect.

Wong Lang Hung v *National Employees' Mutual General Insurance Association Ltd*[7]

This was a fire insurance case and also involved the agent filling in the proposal form. B.T.H. Lee J accepted the general principle in the English law of insurance that an agent who fills in a proposal form is acting as an agent of the insured and not as an agent of the company.

Ong Eng Chai v *China Insurance Co Ltd*[8]

In this case the plaintiff had instructed his brother-in-law to arrange for the insurance of his motor vehicle. He had also done so on previous occasions. What is interesting in this case is that the brother-in-law was himself a sub-agent of the agent of the insurance

5. [1902] 1 K.B. 516.
6. [1929] 3 K.B. 356.
7. [1971] 2 M.L.J. 191.
8. [1974] 1 M.L.J. 82.

company, namely, Lime Keat Chye Agency. The brother-in-law in turn asked a clerk employed by the agency to fill in the proposal form. The clerk testified that the brother-in-law had answered all the questions asked by him in accordance with the proposal form and he on his part, filled up the answers accordingly. The proposal form was then signed by Lim Keat Chye.

An officer of the insurance company gave evidence that Lim Keat Chye was not authorised to fill in proposal forms to the company. Neither was Lim Keat Chye authorised by the company to sign on behalf of the proposer. The learned judge (Hashim Yeop A. Sani J) accepted the usual principle that in filling in the answers to a proposal form (except in industrial assurance)[9] the insurance agent is normally regarded as the agent for the proposer (insured).

Moreover, the learned judge found on the facts that a legal relationship of principal and agent was thus created between the plaintiff and his brother-in-law, and the agent of the insurance company Lim Keat Chye had by implication authority to sign the proposal form on behalf of the plaintiff.

On the above finding of facts, it is not easy to say whether this decision would now cease to be good law by virtue of the new S. 44A of the Insurance Act. For this section to apply, the person concerned must be "an authorised representative of an insurer and who solicits or negotiates a contract of insurance." In a sense, Lim Keat Chye would come under the ambit of the above phrase. Moreover, in view of the fact that the plaintiff's brother-in-law was himself a sub-agent of Lim Keat Chye, he would also come within the ambit of that phrase. At the same time, he had been expressly authorised by the plaintiff himself. It is therefore possible to envisage some questions of interpretation arising out of the new s. 44A.

THE DOCTRINE OF IMPUTED NOTICE

This doctrine relates to situations where the knowledge of the agent would be imputed to the principal even though the agent had not communicated the same to the principal. It can therefore be seen that this doctrine is of considerable importance in insurance law as many insurance agents, especially in negotiating the insurance and filling in the proposal forms and/or asking questions to the insured, are told many things which for some reason or other is not communicated to the insurance company in the proposal form itself or by other means. It will also be seen that this point is related to the ques-

9. In Malaysia and Singapore, industrial assurance policies are known as "home-service policies."

tion of the insurance agent being the agent of the proposer in filling in the proposal form, as a good deal of the information is provided while filling in the proposal form.

Section 182 of the Contract Act is relevant in this connection and may be reproduced.

> "182. Any notice given to or information obtained by the agent, provided it to be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.
>
> ILLUSTRATIONS
>
> (a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.
>
> (b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C."

It may be observed that this section does not seem to have been applied against insurance companies in any reported decision of Malaya or Malaysia. The main reason may well be that in view of the accepted English principles on insurance, the insurance agent in filling in the proposal form has been regarded as the agent of the proposer and not the insurance company. Secondly, following English principles, it has also been accepted that even if the insurance agent is acting as the agent of the insurance company in not disclosing the material facts which have come to his knowledge he is acting beyond the scope of authority given to him by the insurance company and therefore the insurance company is not liable. Furthermore, in not deliberately disclosing facts which have come to his knowledge to the insurance company, he has acted in fraud of the insurance company and therefore the company is not liable.

A Malaysian decision which might be mentioned in this connection is that of *National Insurance Co Ltd* v *Joseph*.[10] In that case the defendant had alleged that the plaintiff's agent had obtained his signature on the proposal form without the particulars filled in. Yong J. remarked that if these allegations were true then the insurance agent must have invented the false and untrue answers. He then stated his

10. [1973] 2 M.L.J. 195.

views as follows:

> "In my view if a person applying for insurance, signs a proposal form in blank and leaves it to the agent of the insurance company to complete it on his behalf after having given him certain information, and the agent completes it with false and untrue material particulars for the purpose of getting a policy of insurance for the applicant and a commission for himself in fraud of his principal, the agent is not acting within the scope of his authority and in so doing he is not acting as agent of the insurance company and the latter with no knowledge of such fraud is entitled to avoid the policy of insurance."

A similar decision is that of *Abu Bakar* v *Oriental Fire & General Insurance Co Ltd* [11] which has been referred to with regard to the question of non-disclosure and misrepresentation. It will be recalled that in that case it was alleged that the plaintiff had not disclosed the existence of certain grinding machines at the back of his premises. The plaintiff in turn alleged that the insurance agent had seen the grinding machines and was aware of their existence. It was held by all courts that the insurance agent in filling in the proposal form was acting for the plaintiff and the knowledge or information he obtained could not be imputed to the defendant company.

However, it is important to note that the new section 44A may also change the position as to imputed notice quite considerably. As stated above not only would the insurance agent in negotiating the contract be deemed to be the agent of the insurer under s. 44A(1), but furthermore any knowledge obtained by him relating to any circumstance relevant to the acceptance of risk by the insurer shall be deemed to be the knowledge of the insurer.

It is therefore submitted that in view of the new s. 44A of the Insurance Act, section 182 of the Contract Act may also be used in dealing with the information given to an insurance agent. It is however possible to say that the use of s. 182 may be unnecessary as the Contract Act is a general Act, and as the Insurance Act is a special Act with a special provision, that provision alone should be applied if it is sufficient by itself.

C. INSURANCE BROKERS

INTRODUCTION

In talking of insurance brokers in Malaysia, one should distinguish between firms which are carrying on business as Lloyds brokers, and companies, firms or individuals who call themselves brokers

11. [1974] 1 M.L.J. 150.

and hold out themselves as experts (or as persons with expertise) in the field of insurance.

Even for a person belonging to the insurance world, the totality of the statutory provisions relating to agents and brokers does make the situation a bit confusing. This is partly because in the Insurance Act one will come across the terms "Malaysian insurance agent" as opposed to the term "agent", the term "Malaysian insurance broker" as opposed to the term "broker".

THE STATUTORY PROVISIONS

Section 2 (1)(a) of the Insurance Act divides insurance business in Malaysia into two types; life business and general business.

Section 2 (1)(b) then states that references to carrying on insurance business include the carrying it on through an agent, or as agent; but "insurer" shall not include an insurance agent as such nor, in the case of a person who is both insurer and insurance agent, have reference to business done as an insurance agent.

Section 2 (1)(c) then states that "Malayan insurer" and "Malayan insurance agent" mean a person who has been carrying on insurance business in Malaysia as insurer and as insurance agent respectively, and "Malayan Insurance broker" means a person who is or has been carrying on business as an insurance broker in Malaysia.

The term "broker" is then defined in s. 1A as follows:

> "broker" means any individual, firm or company who for compensation as an independent contractor, in any manner solicits, negotiates or procures insurance or the renewal or continuance thereof on behalf of the insured other than himself.

This definition of broker was inserted by the Insurance (Amendment) Act, 1975.[12] The definition was apparently necessary as Malaysia enacted a new s. 20B by that Amendment Act for the licensing of brokers. One of the obvious reasons for licensing brokers is that there is nothing in law to prevent anyone calling himself a "broker" and therefore it was desirable to scrutinize his qualifications and background before allowing him to act as such. Moreover, such scrutiny might reduce the chances of brokers going "broke".[13]

It should however be pointed out that Lloyds brokers are still in a different position from ordinary brokers. They are in a sense insurers as well as brokers. Section 20(1)(b) of the Insurance Act reads:

12. Act A294 of 1975.
13. For an interesting case where a broker disappeared, see *The American Insurance Co v Limbang Timber (JK) Ltd* (Civil Appeal No. 1 of 1974), decided by the Court of Appeal of Brunei.

"20(1) Section 3 shall not prevent general business being carried on in Malaysia by an individual if –

(a) .....

(b) he carries on such business as a member of an association of individual underwriters established outside Malaysia and for the time being approved for the purposes of this section by the Director General; and"

Section 20(2) of the Insurance Act is as follows:

(2) The Director General shall not approve an association for the purposes of this section unless it is organised on the system known as Lloyds, that is to say, a system whereby every underwriting member of a sydicate of the association becomes liable for a separate part of the sum secured by every policy subscribed by that syndicate, limited or proportionate to the whole sum thereby secured.

Section 20(8) & (10) contains further provisions for the carrying of business as a "Malaysian Insurance Agent" or "Malaysian Insurance Broker". The former is to have a surplus of assets over liabilities of not less than one hundred thousand dollars or such greater amount as may be specified by notice in writing by the Minister. The latter is to have a certificate of solvency signed by his auditor and has a professional indemnity insurance policy of a value not less than five hundred thousand dollars or such greater amount as the Director General may specify.

LEGAL POSITION OF INSURANCE BROKERS

It is important to bear in mind that at different times an insurance broker may be the agent of the insured or the agent of the insurer. Thus, in cases where the broker gives advice to persons as to the type of insurance they need and the most suitable market in which it can be obtained, he is regarded as acting on behalf of the insured. In other words, in arranging for insurance, he would be regarded as the agent of the insured. On the other hand, when a claim arises, they take part in the settlement of claims and may sometimes act for the insurance company. In such a case, they would be regarded as the agent of the insurer.

This practice of brokers acting for both parties at different times has led to judicial criticism. In *North and South Trust Co* v *Berkeley*[14] a firm of Lloyds Brokers had acted for North and South Trust Co in the placing of insurance and were apparently acting as their agents. Later a claim arose under the insurance policy and the insurers repudiated liability. The brokers were given certain documents

14. [1970] 2 Lloyds Rep 467; [1971] 1 All E.R. 980.

by the insurers with regard to the claim, and they refused to allow the insured to inspect them. The insured therefore asked for a declaration from the Court that they were entitled to inspect them. Donaldson J. held that they were not entitled to inspect them as the brokers were then acting as agents of the insurer. He however severely criticised the situation in which the brokers were placed and even added that his views were not *obiter dicta.*

The above case related to Lloyds brokers, but the situation is common to other types of insurance brokers as well.

SOME CASE LAW ON INSURANCE BROKERS

Anglo-African Merchants Ltd v *Bayley & Others.*[15]

This case concerned the insurance of a quantity of unused old army leather jerkins. One of the questions which arose was as to the legal position of the brokers. The brokers had made their files available to the underwriters but refused to show them to the assured, although they were acting as agents of the assured. Megaw J. held that the action taken with regard to the files were unjustified. It was further held that an insurance broker is an agent of the insured. Therefore, having accepted employment from one principal, he cannot in law accept any engagement inconsistent with his duty to the first principal, unless the fullest disclosure of all material facts was made to both principals and their informed consent was obtained in so acting. It was therefore held that the brokers had acted in breach of duty.

Everett v *Hogg, Robinson & Gardner Mountain (Insurance) Ltd*[16]

This case is of some importance as it highlights the point that insurance brokers can be liable for negligence. In that case the Plaintiff was a representative of a Lloyds underwriter. He instructed the Defendant insurance brokers to effect a re-insurance policy. The Defendants made an untrue statement to the reinsurers with regard to an answer to a question. The reinsurers in due course repudiated liability on this ground. The Plaintiff therefore claimed damages for negligence from the insurance brokers. It was held that the Plaintiff was entitled to succeed.

Mc Nealy v *Pennine Insurance Co Ltd*[17]

This case again concerns liability of brokers for breach of duty of

15. [1970] 1 Q.B. 311.
16. [1973] 2 Lloyds Rep 217.
17. [1978] RTR 285.

care i.e. for their negligence. In that case the plaintiff had taken motor insurance through insurance brokers and particularly through their director. The director had merely inserted "property repairer" as the plaintiff's occupation, although the plaintiff was a property repairer as well as a part-time musician. The director knew that musicians were not acceptable risks with the insurance company. Thereafter an accident occurred and the insurance company denied liability. Both the trial judge and the Court of Appeal held that the insurance company was not liable but that the brokers were liable for their breach of duty. In doing so, the Courts apparently regarded the brokers as agents of the insured.

Cherry Ltd v *Allied Insurance Brokers Ltd*[18]

This case also concerns the ngligence of brokers. It arose out of the dissatisfaction between the plaintiffs and the defendants who were the original insurance brokers. The plaintiffs had cancelled their new policies thinking that the old policies with their original brokers were in force. Actually the old policies had been cancelled by the insurance company but this fact had not been informed by the original brokers. A disastrous fire occurred and the plaintiffs sued their original brokers by way of damages for breach of contract or negligence. It was held that the original brokers were liable for negligence.

Woolcott v *Excess Insurance Co Ltd*[19]

This case deals with the other side of the coin; namely the liability of insurance brokers to the insurance company. The facts were that a household comprehensive policy had been taken through insurance brokers. The plaintiff had a criminal record and it seems that the brokers were aware of it. A fire occurred and the insurers denied liability for non disclosure. It was held on the facts that the insurers were not entitled to deny liability but were entitled to be indemnified by the brokers as they were under a duty to disclose their knowledge of the plaintiff's criminal past to the insurers (defendants).

D. FUTURE OF AGENTS AND BROKERS IN INSURANCE

GREATER CONTROLS

During the past five years one sees that greater controls have been imposed on brokers and agents of all kinds.

18. [1978] 1 Lloyds Law Rep p. 274.
19. [1978] 1.Q.B. 633.

Thus, one sees that even criminal liability has now been imposed by s. 16A for misleading statements made by any person inducing another person to enter into an insurance contract. Section 16A which was introduced by the Amending Act of 1978 is as follows:[20]

> "16A. Any person who, by any statement, promise, or forecast which he knows to be misleading, false, or deceptive, or by any fraudulent concealment of a material fact, or by the reckless making (fraudulently or otherwise) of any statement, promise, or forecast which is misleading, false, or deceptive, induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding one year or to both."

Both Malaysia and Singapore are becoming increasingly aware that insurance intermediaries should not only be properly trained but also should have a sense of duty towards the public. It is thus possible that even ordinary agents may be "licensed" in the future; or at any rate there may well be minimum entry requirements for a person to act as an insurance agent.

THE PYRAMID SYSTEM

In many big companies, there is what is called a "pyramid system" in the agency structure. At the base are the trainee agents. Then there are agents, and above them agency supervisors. Then would come the Agency Managers and still above them would be the Divisional Managers. However, there are variations in this system. Nonetheless, what has been a subject of discussion and to some extent, discontent, is whether this system leads to exploitation of the trainee agents and agents. It can be foreseen that sooner or later some changes or modifications in the system particularly with regard to the sharing of commissions will be made.

In fact, there is even a school of thought that selling insurance through paid agents may not be the most desirable method of promoting insurance or of projecting the image of the insurance industry. It would therefore not be surprising if some insurance companies might experiment on having a system of full-time paid agents and thereby doing away with the undesirable consequences of high-pressure selling for the sake of earning commission. This would particularly apply to the Life Insurance industry.

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20. This section is similar to s. 63 of the English Insurance Companies Act, 1974.

CHAPTER V

LIFE ASSURANCE

A. INTRODUCTION

To the public, life assurance is perhaps the most well known of the branches of insurance. It has been seen in Chapter I that one of the reasons for the passing of the Insurance Act in Malaya was to prevent gambling in lives. Moreover, as death is inevitable, it is easy to understand that people should be anxious to cover themselves and their families in the event of death. It is therefore not surprising that life assurance is an area where agents are most active. Part of this activity is of course due to the fact that it is a more remunerative branch for agents.

One sees often in the newspapers that there is ample scope for further progress in the life assurance industry in Malaysia and Singapore. This fact is undoubtedly true. One can therefore safely predict that the incidence of life assurance will rise in the future, and new laws amending or modifying existing laws on life assurance will be found necessary from time to time.

B. PRESENT STATUTORY PROVISIONS

LIFE BUSINESS

It has been noted that under s. 2(1) of the Insurance Act, insurance is divided into a) life business and b) general business. Thus, the Insurance Act clearly recognises life business as an important part of insurance business. However, unlike Australia there is no special Life Insurance Act, and therefore one will have to look into the Insurance Act to know the various provisions relating to life assurance.

Like general business, life business can be carried on in Malaysia only by the following under section 3(1):

i) by a company as defined in the Companies Act, 1965, or a company incorporated outside Malaysia which has an established place of business in Malaysia.

ii) by a society registered under the Co-operative Societies Ordinance, or

iii) by an unincorporated company established in the United Kingdom before the year 1862 which has been carrying on business as insurer in Malaysia since before the 21st January 1963, and has an established

place of business in Malaysia.

Section 3(2) then lays down the other requisites with regard to the carrying on of life or general business.

PAYMENT IN MALAYSIAN CURRENCY OF LIFE POLICY MONEYS

Section 14(1) stipulates that any life policy issued as a Malaysian policy after 21st January 1963 is to be paid in Malaysian currency if the policy owner is a Malaysian citizen. This is subject to an express agreement to the contrary.

A "Malaysian policy" is defined in paragraph 2 of the First Schedule to the Insurance Act as a policy issued in the course of the insurer's business in Malaysia. For life business, it will also have to be a life policy, which, at the date of issue of the policy and (if the policy was issued before then) at the date of the establishment of the Register, where the policy owner's address is or was an address in Malaysia.

REGULATION OF PREMIUMS UNDER LIFE POLICIES

Under s. 15(1) a Malaysian insurer shall not issue a life policy of any description being a Malaysian policy if the premium is not in accordance with rates approved by a qualified actuary. Sub-sections (2) and (3) imposes duties on an actuary in approving life premium rates.

PROOF OF AGE

Under s. 15A a Malaysian insurer is required to issue with the policy a printed notice that proof of age of the life insured may be required prior to the payment of the sum insured, if the age of the insured is not admitted by the insurer.

Section 15B entitles an insured to apply to a High Court Judge (in chambers) for an order directing the insurer to accept the proof tendered by him if the insurer declines to accept the proof of age tendered by him.

The above two sections were added by the Insurance (Amendment) Act, 1975. These two sections have obviously been inspired by sections 81 and 82 of the Australian Life Insurance Act. The provisions are indeed very similar.

These provisions are to be welcomed as the insured or his estate may suffer where age has not been admitted by the company at the time the policy is issued. In a country such as Malaysia, where the

older people and those in the rural villages may not have in their possession a birth certificate for a variety of reasons, it would be fairer to admit the age of the insured from the outset.

It should however be remembered that age may be proved by means other than that of a birth certificate. For example, it may be proved by a statutory declaration from a doctor in attendance at birth or from a parent or even from anyone who has personal knowledge of the birth. Certain certificates depending on the religion of the person may be useful. Thus, for Christians, baptismal certificates are regarded as reliable.

In addition, documents such as naturalization certificates, passports, marriage certificates and death certificates of parents may also be submitted as proof of age. It is of course open to the particular insurance company to decide what documents are acceptable. Nonetheless, matters as to age should be amicably settled without the necessity of Court proceedings as contemplated in s. 15B.

MIS-STATEMENT OF AGE AND NON-AVOIDANCE OF POLICY

This aspect of life insurance has already been mentioned in dealing with non-disclosure and mis-representation.

The relevant statutory provision is s. 15C of the Insurance Act which was also introduced by the Amending Act of 1975. In view of its importance it is re-produced in full below:

> 15C.(1) A policy is not avoided by reason only of a mis-statement of the age of the life insured.
>
> (2) Where the true age as shown by the proof is greater than that on which the policy is based, the insurer may vary the sum insured by, and the bonuses (if any) allotted to, the policy so that, as varied, they bear the same proportion to the sum insured by, and the bonuses (if any) allotted to, the policy before variation as the amount of the premiums that have become payable under the policy as insured bears to the amount of the premiums that would have become payable if the policy had been based on the true age.
>
> (3) Where the true age as shown by the proof is less than that on which the policy was based, the insurer shall either –
>
> (a) vary the sum insured by and the bonuses (if any) allotted to, the policy so that, as varied, they bear the same proportion to the sum insured by, and the bonuses (if any) allotted to, the policy before variation as the amount of the premiums that have become payable under the policy as insured bears to the amount of the premiums that would have become payable if the policy had been based on the true age; or

(b) reduce, as from the date of issue of the policy, the premium payable to the amount that would have been payable if the policy had been based on the true age and repay the policy owner the amount of over-payments of premium less any amount that has been paid as the cash value of bonuses in excess of the cash value that would have been paid if the policy had been based on the true age.

(4) A policy issued before the commencement of this section shall not be avoided by reason only of any incorrect statement (other than a statement as to the age of the life insured) made in any proposal or other document on the faith of which the policy was issued or reinstated by the insurer unless the statement –

(a) was fraudulently untrue; or

(b) being a statement material in relation to the risk of the insurer under the policy, was made within the period of three years immediately preceding the date on which the policy is sought to be avoided or the date of the death of the life insured, whichever is the earlier.

It will be seen that s. 15C(1) (2) & (3) was more or less a reproduction of s. 83(1) (2) & (3) of the Australian Life Insurance Act. Section 15C(4) was more or less a reproduction of s. 84 of the Australian Life Insurance Act.

Some amendments were made to section 15C by the Amending Act of 1978. Thus, in sub-section (1) for the words "is not avoided" the words "shall not be called in question" were substituted. Thus, s. 15C(1) reads now as follows:

(1) A policy shall not be called in question by reason only of a mis-statement of the age of the life insured.

The sub-section as it stands makes it a little wider in scope and the amendment was probably made to cover cases where the policy was not avoided but nonetheless payment had been refused or withheld.

The Amending Act of 1978 introduced other provisions with regard to proof of age and with regard to incorrect statements in the proposal form. Thus, s. 15C(4) was amended, and s. 15C(5) was introduced.

The main changes in sub-section (4) was to insert the phrase "be called in question" instead of "shall not be avoided", and to prevent an insurer from avoiding a policy merely because it was "fraudulently untrue". Thus, the insurer must further show that "the statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policy holder with the knowledge that the statement was false or that it suppressed a material fact". In other words, even if a statement is fraudulently made a life policy can no

longer be called in question unless the policy holder had knowledge that the statement was false and the statement was on a material matter or that it suppressed a material fact.

HOME SERVICES POLICES

Definition

Under the First Schedule to the Insurance Act, a life policy is divided into "home service policy" and "ordinary policy". An ordinary policy is a policy which is not a home-service policy. A "home-service policy" is defined in clause 6(1) of the First Schedule as follows:

> 6(1)"home service policy" means a life policy in respect of which premiums are contracted to be paid at intervals of less than two months and are or have been ordinarily connected in the course of door-to-door collections made by persons employed for the purpose, but shall not include in relation to any insurer any description of policy which the Director General directs is not to be treated as a home-service policy.

The term "home-service policy" is similar to the term "industrial assurance policy" used in Australian law and English law. While in Australia and England it is a popular type of policy it is understood that it has not been successful in Malaysia and Singapore. As it is meant to help the poorer classes by collecting premiums from them from "door-to-door"[1], it is not as lucrative to agents as other policies. Moreover, it is time-consuming to collect and obtain premiums from door to door[2].

Special Provisions

It is however interesting to note that a number of new sections were introduced into the Malaysian Insurance Act for the protection of holders of such policies by the Amendment Act of 1975. These sections are based on sections 123 to 131 of the Australian Life Insurance Act, and have been numbered as 18B to 18G.

Section 18B allows a policy holder of a home-service policy to object to any term or condition of the policy after it is used. Section 18C imposes an obligation to insurers to return home-service policies and premium receipt books after inspection. Section 18D deals

1. Hence, they are also known as "door-to-door" policies.
2. In fact many life companies do not promote the sole of such policies. It is understood that some companies did train full-time agents to collect such premiums on such policies. However once they became proficient in the job, they found it lucrative to become ordinary life agents. Hence the companies have stopped such training.

with the penalties for falsification in any collecting book or premium receipt book.

Section 18E is an important section in that it protects a holder of a home-service policy from the evil effects of non-disclosure and misrepresentation because of something written or filled in by an agent of the insurer or servant of the insurer. It is in the following terms.

> 18E. (1) Where any agent or servant of an insurer writes or fills in any particulars in a proposal for a home-service policy with the insurer, then, notwithstanding any agreement to the contrary between the proposer and the insurer, any policy issued in pursuance of the proposal shall not be avoided by reason only of any incorrect or untrue statement contained in any such particulars so written or filled in unless the incorrect or untrue statement was in fact made by the proposer to the agent or servant for the purposes of the proposal.
>
> (2) The burden of proving that any such statement was so made shall lie upon the insurer.
>
> (3) Nothing in this section shall be deemed to allow the avoidance of any policy for any reason or in any circumstances for or in which the policy could not have been avoided apart from the provisions of this section.

However, by virtue of the provisions of the new section 44A which was introduced by the Amendment Act of 1978, a similar protection has in effect been given to all policies although the wording of the sections may be different[3].

Section 18F deals with the issue of premium receipt books to the owners of home-service policies. Section 18G further provides for the correct entries of premiums paid in the premium receipt book.

PARTICIPATING POLICIES

Under Clause 7 of the First Schedule of the Act, a participating policy is defined as a life policy conferring any right to share in the profits or surplus arising from the business of the insurer or any part of it. A non-participating policy means a policy not conferring any such right.

Participating policies are fashionable in Malaysia and constitutes a good selling point, especially in view of inflation. The insured feels that he is sharing profits whatever the changing conditions may be. Thus, except for annuities, terms assurances and contingent assurances, most ordinary policies would be participating policies. Some policies give a right of immediate participation while other policies give a right to participate in the profits at some future time. Section

3. This section has already been considered in Chapter IV in dealing with Agency.

41A which was introduced in 1975, lays down that every life policy shall state in distinctive type whether it is a participating or non- participating policy.

Any member of the public interested in sharing profits should ascertain carefully from the agent what his rights would be under the policy which is being sold to him.

INSURABLE INTEREST FOR LIFE INSURANCES

Section 40 of the Insurance Act lays down special provisions with regard to Insurable Interest in Life Insurance. These provisions have already been dealt with in Chapter III of this book.

LIFE POLICY MONEYS TO BE PAID WITHOUT DEDUCTION

Under s. 42(1) any policy moneys payable under a life policy or moneys payable on the surrender of a life policy shall be paid without any deduction unless the person concerned consents. Under subsection (2) this provision applies to all Malaysian policies, but shall not apply to any other policy issued before the 21st January, 1963 i.e. when the Insurance Act came into force. Sub-section (3) further provides that no set-off or counter-claim shall be allowed in recovering money under a life policy, except for sums due under the policy or under an agreement charging them on the policy.

SURRENDER OF LIFE POLICIES

Under section 43 a home-service policy can be surrendered only after it has been in force for six years. An ordinary policy can be surrendered after it has been in force for three years. In surrendering, the policy holder will have to give notice in writing, and thereafter he is entitled to receive the surrender value. This surrender value is determined in accordance with the insurance regulations. Regulation 10 of the Insurance Regulations is as follows:

> 10. (1) Subject to paragraph (2), on the surrender of a life policy under sub-section (1) of section 43 of the Act, the surrender value shall be an amount equal to ninety per cent of the insurer's liabilities in respect of the policy at the date of the surrender, those liabilities being valued as on the minimum basis except that the rate of interest used shall be five per cent per annum instead of four per cent.
>
> (2) Where the policy surrendered is not a paid-up and at the date of

the surrender six years' premiums or more have not been paid on it it, paragraph (1) shall apply with the substitution for the reference to ninety per cent of a reference to eighty per cent.

In practice, a policy holder should make himself familiar with the figures showing how much he would get on surrendering the policy. As a general rule, a life policy may not be worth surrendering unless half the period has run.

NON-FORFEITURE OF LIFE POLICIES

Section 43(2) of the Insurance Act protects life policies from being forfeited or being made to lapse by reason of non-payment of premium. Thus, for Malaysian policies, an insurer will have to use a system approved by the Director General. The policies themselves also contain provisions with regard to non-payment of premiums.

PAID-UP POLICIES

Under s. 43(3) where a life policy has been in force for three years or more, the policy owner may by notice in writing to the insurer elect to exchange the policy for a paid-up policy. This policy shall be a non-participating policy for an amount to be determined in the Insurance Regulations. Regulation 11 is as follows:

11. (1) On the exchange of a life policy under sub-section (3) of section 43 of the Act for a paid-up policy, the paid-up policy shall be for the amount obtained by dividing, as at the date of the exchange –
(a) the surrender value in dollars of the policy exchanged, less any sums due under the policy to the insurer; by
(b) the value of an insurer's liabilities in respect of a paid-up policy for one dollar payable on the like contingencies as the policy moneys under the policy exchange.

(2) The surrender value referred to in paragraph (1) (a) shall be calculated in manner laid down by regulation 10 for surrenders under sub-section (1) of section 43 of the Act, and the liabilities referred to in paragraph (1)(b) shall be valued on the minium basis.

Sub-section 4 further states that a policy issued in place of an earlier policy shall for the purposes of section 43 (including this sub-section) be treated as having been in force since the earlier policy began to be in force.

It should be noted that the above provisions as to surrender, non-forfeiture and paid-up policies are not to apply to:

(a) a policy securing the grant of an annuity for a term dependent upon human life; or

(b) a policy under which no policy moneys are necessarily payable, not being a policy which provides for the payment of policy moneys on a

death after a specified period.

PAYMENT OF LIFE POLICY CLAIMS WITHOUT PROBATE

The Insurance Act recognises the fact that it would be unfair to insist that the moneys on a life policy can only be paid on production of probate or letters of administration. Thus provision was originally made under s. 44 of the Act to allow some payment to be made on life policies where the moneys due did not amount to more than ten thousand dollars.

The wording of the section as it then stood did not seem to cover most of the policies where the sum insured was over $10,000-00. Accordingly, s. 44 was amended by the Amending Act of 1973 to cover all policies, whether the policy moneys was below or over $10,000. The sum which could be paid was originally nine-tenths of the amount. After 1973, it was changed to nine-tenths of the policy moneys or ten thousand dollars whichever is the lesser. Thus the maximum sum that will be so paid cannot be more than ten-thousand dollars.

The moneys are to be paid to a "proper claimant". Sub-section (5) defines a proper claimant as a person who claims to be entitled to the sum in question as the executor of the deceased, or the widower, widow, parent, child, brother, sister, nephew or neice of the deceased. For the purposes of the section an illegitimate child is to be treated as a legitimate child.

By the Amendment Act of 1978, the word "twenty" was substituted for the word "ten" in section 44(1) & 44(2). This is a very salutary change and is in keeping with the rising trend of prices. Thus, a proper claimant can now claim up to twenty thousand dollars without production of probate or letters of administration.

C. TYPES OF LIFE POLICIES

DEFINITION OF LIFE POLICY

Clause 5 of the First Schedule of the Insurance Act defines a life policy as follows:

> "Life policy" means any policy by which payment of policy moneys is insured on death (otherwise than by way of personal accident, disease or sickness only) or on the happening of any contingency dependent on the termination or continuance of human life, and includes a policy which is subject to payment of premiums for a term dependent on the termination or continuance of human life and a policy securing the grant of an annuity for such a term.

It has also been noted in the previous pages that clauses 6 and 7 of the First Schedule aforesaid refers to "home-service policy", "ordi-

nary policy", "participating policy", and a "non-participating policy".

In practice, therefore, most of the life policies in Malaysia would be ordinary policies, and may be participating or non-participating.

COMMON TYPES OF POLICY

There are several types of policies which are in general use. They may of course be known under different "labels". Also, the division given below should be interpreted broadly as some special features may be attached to any of them.

Whole Life (Whole of Life) Policies

In this type of policy the sum assured is payable only at the death of the life assured. The policy may be on joint lives. In such a case the sum assured will be paid when one of the lives mentioned in the policy dies. The premium for such a policy is cheaper than that of endowment assurance, and accordingly such policies are quite popular.

Endowment Polices

In talking of an "endowment policy" one usually means a policy where the sum assured is payable if the life assured does not die at a certain specified age or date or upon his death before such age or date. Thus, a thirty year old person may take a policy for twenty five years. He will get the policy moneys if he does not die at fifty-five, or his representatives will be paid if he dies before that date.

One may here note that many insurance companies issue whole life policies subject to a condition that the policy moneys will in any event be payable if the life assured reaches the age of eighty-five or ninety. Therefore technically speaking, such whole life policies would be endowment policies. However, in practice, they are treated as whole life policies.

It may further be noted that some endowment policies are known as "pure endowment" policies. Under such a policy, the sum assured is payable only upon attainment by the life assured of a certain age or upon his survival to a certain date. In such policies there is usually a provision that in the event of death before maturity, premiums which have already been paid shall be refunded.

Furthermore, some policies are known as "double endowment policies". They are policies which provide payment for an amount on the death of the life assured before a certain age or date, and of twice that amount on survival to such age or date.

Term Assurance Policies (Temporary Policies)

Such policies are cheap as they cover risk of death only for a limited period of time. One may for example insure oneself for the period of a certain trip abroad.

Annuity Policies

Under these policies the company undertakes to pay at regular periods of time during the life of the annuitant. Sometimes payment is made until the death of the last survivor of two persons. Sometimes, payment will be made over some other period substantially dependent upon human life.

OTHER TYPES OF POLICIES

Contingent Assurance policies

Under this type of policy, policy moneys are payable only if certain persons die in a certain order. The most usual type of contingent assurance is where policy moneys will be paid on the death of the life assured, provided he predeceases some other named person.

Policies with different types of premiums

Some policies are called a "single premium policy" as the premium is payable in one lump sum. On the other extreme are policies where the premium is payable throughout life.

Many other types available

What is important to remember is that many insurance companies in Malaysia are sophisticated enough to give a customer the type of policy he wants. The types mentioned above are by no means exhaustive. For example, a person may want a policy to cover the upbringing and education of his child in the event of his death. Such a policy will of course be available. It is however unnecessary in a book of this nature to dwell in detail on the various types of policies (and their variations) available. Any person interested in taking a life policy should consult any reliable agent or more than one agent belonging to several companies.

D. POLICY CONDITIONS

INTRODUCTION

Special conditions will be found printed on any life policy. Conditions on the policies may differ from company to company. In

most cases the substance may be similar but the wordings may be different. Policies issued by American and British companies differ usually both in substance and in wording. For example, English policies may not include the so-called "indisputability clause". It is therefore important for a customer to be shown the form of policy which he will obtain in due course and what the policy conditions are. It is of little solace to be told after the insurance contract is complete and the policy is thereafter issued that this is a "standard form" policy and that no changes can be made.

An attempt will be made below to consider some of the more interesting clauses from the legal point of view.

BASIS CLAUSE

Some insurance policies include the basis clause while many of them have a basis clause in the proposal form. The basis clause in a policy runs somewhat as follows:

> "This policy with the application and/or personal statement therefor shall constitute the entire contract between the parties."

The effect of the basis clause has already been discussed in Chapter III of this book and therefore requires no further elucidation.

THE INDISPUTABILITY CLAUSE

American policies almost always include an indisputability clause. This clause sometimes stands by itself or is coupled with the basis clause or the suicide clause. English companies are not fond of this clause as they feel that it is unfair to pay a person who has not told the truth at the expense of other policyholders. In some policies it is known as the "incontestability clause". An example of such a clause taken from a policy issued by an American company operating in Malaysia is as follows:

> "This policy (but not any supplementary contract granting Hospitalisation or Personal Accident Benefits attached hereto) shall be indisputable after it has been in force during the lifetime of the Life assured for two years from the date of commencement of risk except for non-payment of premium or in the case of fraud."

The period mentioned may differ from company to company which uses this clause. The effect of this clause has already been mentioned in Chapter III of this book. The reader is also reminded of the existence of section 15C in the Malaysian Insurance Act which in effect enacts a "statutory indisputability clause". Therefore, if the policy does not include an indisputability clause, then the provisions of section 15C (4) will apply.

THE SUICIDE CLAUSE

More or less all life policies include a suicide clause. The wording may of course differ. The following is an example of such a clause:

> "If the Life Assured within one year from the date of issue or reinstatement of this policy die by his own hand or act, whether sane or insane, merely a refundment of the premiums paid will be made. Nevertheless suicide shall not affect the bona-fide effects in the policy which third parties may have acquired for valuable consideration provided written notice of such interest shall have been given to the Corporation at least three calendar months previous to the death of the assured and that such third parties shall exhaust all other securities held by them before claiming under the policy."

Some of the ingredients of this clause may be examined.

It will be noticed that the above clause uses the phrase "die by his own hand or act". Some policies use the phrase "self-destruction" while others just use the word "suicide". As these words have not been defined they may sometimes lead to confusion. Where a boy and a girl enter into a suicide pact, one usually finds that the boy kills the girl first (in which he usually succeeds) and then attempts to kill himself (in which he may or may not succeed). Is the killing of the girl by the boy "suicide" or "self-destruction" or dying by "his own hand"?

In this example, it is not in dispute that the girl died because she was killed by the boy as a result of a "suicide pact"? But is it suicide? This is not an academic question if the girl is insured and the policy was taken before 12 months. If it is "suicide" the company can refuse to pay. On the other hand, if it is culpable homicide (i.e. death as a result of a crime) then the company may well have to pay.

It should also be noted that the law contained in the Penal Code was different from England until the Suicide Act was passed in England in 1961. Thus, under the Malaysian Penal Code suicide was never a crime; only attempted suicide was a crime under section 308. In England, after 1961, suicide is no longer a crime and this seems to imply that "attempted suicide" is also no longer a crime. On the other hand, in Malaysia, attempted suicide is still a crime.

Next it will be noted that the period of 12 or 13 months is usually mentioned. This is obviously because a person who takes a policy intending to kill himself would do so within 12 months. It is understood by insurance companies that suicide is usually the result of a temporary fit of passion or depression and that the instinct of survival which is very great in a human being usually disposes of such passion or depression within a short time.

Thirdly, it may be noted that the suicide clause usually protects

the bona fide interests of third parties. Thus, banks which have taken assignments of life policies would be protected if the assignee (insured) commits suicide within the prescribed period.

OTHER CLAUSES

There are a number of other clauses depending on the company which issues the policy. Some are common. Thus, one will normally see what is known as a reinstatement or non-forfeiture clause whereby the company undertakes not to forfeit the policy for non-payment of premium automatically. There will also be a clause relating to surrender values and paid up policy values.

As the nature and number of clauses differ from policy to policy, anyone taking a policy should read the terms and conditions carefully before entering into a contract of life assurance. Unfortunately, this step is rarely taken by the insured and is hardly encouraged by the insurers.

E. BENEFICIARIES IN A LIFE POLICY

NOMINATIONS

At one time it was thought that where a person is nominated as a beneficiary he or she has no right to recover direct from the insurance company as there is no privity of contract. Thus, in some countries as in India, insurance legislation expressly includes provisions with regard to nominations.

The position is not clear in Malaysia. Under s. 5 of the Civil Law Act which has been extensively dealt with in Chapter II of this book, the principles of English law would apply if such question or issue arose. This is because inspite of extensive changes made in 1975 and 1978 there are no statutory provisions in the Insurance Act.

With regard to English law one may first refer to the case of In *re Engelbach's estate; Tibbetts* v *Engelbach.*[4] In that case a father had effected a policy of pure endowment on the life of the daughter. The policy moneys were to be paid to her if she survived to a certain date; if she died before that date, premiums paid were to be returned to her father. The daugher survived. It was however held that the policy moneys belonged to her father's estate.

A slightly different approach was adopted by the British Court of Appeal in the English case of In *re Schebsman deceased; Ex parte*

4. [1924] 2 Ch. 348.

The Official Receiver.[5] It was held in that case that where two parties contract that one of them shall make payments to a third person, and the contract shows that it is intended that the third person shall retain any moneys so received by him for his own benefit, he is entitled to retain them. It should however be noted that the contract under consideration in *Schebsman'case* was not a policy of assurance; but nonetheless it is submitted that the principle in that case may well be accepted for insurance contracts as well.

In re Schebsman was followed by the Supreme Court of New South Wales in *Cathels* v *Commissioner of Stamp Duties.*[6] In that case it was held that a widow was entitled to a beneficial interest in moneys which she received on her husband's death under an accident policy which was taken by him and which carried an endorsement providing payment for her. It should however be noted that there were two dissenting judgments. Although the Australian case will be of less persuasive authority than an English authority, Malaysian Courts have approved of Australian decisions from time to time.[7]

Lastly, it might be mentioned that in *Beswick* v *Beswick*[8] the House of Lords overruled the decision in *Engelbach's case,* and approved of the decision in *Schebsman's case.* This case did not relate to a policy of assurance. However, from the principles accepted in this case it could be argued that where a payee is named in a policy but no trust is created in his favour, he may retain policy moneys received by him for his own benefit unless the policy otherwise provides.[9]

SPOUSES AND CHILDREN AS BENEFICIARIES

In the majority of instances, a person who is married or has children, would generally "nominate" the spouse (wife or husband as the case may be) and/or children as beneficiaries. In view of a line of recent Malaysian decisions which will be dealt with in greater detail in the next section it is now accepted law in Malaysia that such policies would create a trust by virtue of section 23 of the Malaysian Civil Law Act. In view of the importance of such policies they will be dealt with separately.

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5. [1944] Ch. 83.
6. (1959) 79 W.N. (N.S.W) 271.
7. For example in *The Chartered Bank* v *Yong Chan* (1974) 1 M.L.J. 157, the Federal Court followed the decision of the Supreme Court of Victoria in *Ardern* v *Bank of New South Wales* (1956) V.L.R. 569.
8. [1968] A.C. 58; [1967] 2 All E.R. 1197.
9. For this view, See Wickens, *Life Assurance Law in Australia,* 4th edn. 1969, p. 33.

It may however be pointed out at this juncture that such an interpretation, correct as it may be, has caused confusion and hardship especially to those who never knew of the existence of s. 23 aforesaid and never intended to create a trust policy. The confusion has been caused because many such policies were created without any formal "section 23 application" and at one time the insurance companies themselves or at least their agents did not realise that a trust policy had been sold. The hardship caused is mainly because surrender of the policy or taking a loan on the policy becomes difficult especially when children are included as beneficiaries.

One way out may well be to consider the relevant provisions in the Indian Insurance Act. Section 39 of the Indian Insurance Act recognises "nominations" and lays down what should be done to make such nominations effectual. Therefore there is no need to rely on English cases or on English equitable principles to allow a nominee to get the policy proceeds. Furthermore, s. 39 allows the wife and/or children to be nominees and specifically provides in sub-section (7) that a trust policy will not be created. The said sub-section is as follows: –

> "(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies or has at any time applied.
>
> Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not on the face of the policy, as being made under this section, and said section 6 shall be deemed not to apply or not to have applied to the policy."

It will be observed that section 6 of the Indian Married Women's Property Act, 1874, is similar to section 11 of the English Married Women's Property Act, 1882 on which the Malaysian s. 23 is based. It should further be noted that the Indian provisions do not cover a case where the husband is named as a beneficiary.[10]

F. SECTION 23 POLICIES (Trust Policies)

OTHER TRUST POLICIES

As mentioned in the previous section a policy which is expressed to be for the benefit of the husband or wife and/or children, a trust policy creates by virtue of section 23 of the Malaysian Civil Law Act. These policies are colloquially known as "trust policies".

10. This is because the Indian Married Women's Property Act, 1874, is based on the previous English Act which only covers married men.

This may give the mistaken impression that this is the only type of trust policy in force in Malaysia. Actually they are "trust policies" only in the sense that a statutory trust is created. Thus there may be other types of trust policies which are created by way of implied or express trust. It is however unnecessary to go into them in this book as they would be covered by the ordinary law of trust.

NATURE OF S.23 POLICIES

These policies are actually meant for "poor widows" although the wording of S. 23 is wide enough to cover husbands as well. It may therefore be profitable to reproduce S. 23 of the Civil Law Act.

> "23. (1) A policy of assurance affected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the subjects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.
>
> (2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.
>
> (3) The insured may by the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.
>
> (4) In default of any such appointment of a trustee, the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.
>
> (5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.
>
> (6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part."

As had been observed, this section is based on S. 11 of the English Married Women's Property Act, 1882. It is also the same as S. 73 of the Singapore Conveyancing and Law of Property Act, 1909.

The following points emerge from S. 23:

1) the policy must be effected by a man or woman on his or her own life.
2) it must be expressed to be for the benefit of his wife and/or children, or her husband and/or children.
3) a trust shall be created in favour of the objects named in the policy; and
4) the moneys payable under such policy shall not as long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.
5) a trustee or trustees may be appointed by the insured, failing which the insured will be the trustee of the policy.
6) in any event the High Court has the power to appoint trustees.
7) payment to the trustee or trustees shall be a valid discharge of the whole or part of the sum secured.

This type of policy has created many legal problems and some of them may be dealt with below.

POLICIES FOR THE BENEFIT OF A FIANCEE

Insurance Companies have encountered problems over some men who wish to take out a policy on their own life and name their fiancee as the beneficiary. The intention is to create a trust policy. In section 10 of the English Married Women's Property Act, 1870, reference was made only to "married men". In the Act of 1882, section 11 refers to "any man". The Malaysian section 23 also refers to "any man". One can therefore assume that the phrase covers both married men and unmarried men. At the same time it must be for the benefit of his "wife". A fiancee is not yet a wife. Many insurance companies do allow a s. 23 policy to be taken out in such circumstances but normally insist that the fiancee should be a named person. Perhaps this practice could be justified on the basis that "equity looks on that as done which ought to be done". If the man marries that named fiancee, then the policy will be valid as a s. 23 policy. If he does not marry that named fiancee then obviously it cannot be a s. 23 policy and a resulting trust will be created in favour of the life insured. The position is however not clear, and it is hoped that some decision on this point will be made in due course. Or the matter may be resolved by statute.

NO SPECIAL WORDS NECESSARY

The section does say that the policy of assurance shall be "expressed to be for the benefit of" the wife, husband, and/or children.

It is now settled law that express words are not necessary and that even the section need not be mentioned. Thus, *Mac Gillivray* at para 1482 states: [11]

> "In many cases the policy is expressed to be issued in terms of section 11 of the Act, but it is not necessary that the statute should be mentioned in order to create a valid trust under its protection. Express words of trust are not required and it is sufficient if the policy is merely expressed in terms showing that it is taken out for the benefit of the beneficiaries."

For English cases in favour of this view one may refer to *Cleaver* v *Mutual Reserve Fund Life Association*,[12] *Re Fleetwood's Policy*[13] and *Re Gladitz*.[14] See however the case of *Bown* v *Bown and Weston*[15] where Wallington J. expressed a different view.

A study of the Malaysian cases also show that Courts have taken the view that no special words are necessary to create a S. 23 policy. Thus, in *Re Man bin Mihat, deceased*[16] which is perhaps the earliest Malaysian case involving a S. 23 policy, we find that no express words were used and it was merely stated that the beneficiary named in policy was "Chik binti L. Man, wife of the assured". Suffian J. (as he then was) had no doubts that the policy would be a S. 23 policy if the parties were non-Muslims and he was mainly occupied with the problem whether Muslim law would prevent the policy from becoming a S. 23 policy. He then considered S. 25 of the Civil Law Act and held that the section did not disentitle the Muslim wife from taking the moneys beneficially. In *Re Kathiravelu deceased*[17] no special wording was used and S. 23 of the Civil Law Act was not expressly mentioned. The same observation may be made with regard to *Re Bahadun bin Haji Hassan, deceased*[18] which involved an endowment policy and the wife was merely named as a beneficiary. It was held that this was a S. 23 policy and the widow was entitled to the proceeds beneficially.

IDENTITY OF BENEFICIARIES

So far, there has been no local decisions with regard to the interpretation of the term "wife" or "children" used in S. 23 policies. However, problems have arisen with regard to these terms in England and Australia in connection with the equivalent of S. 23 policies.

11. *MacGillivray and Parkington on Insurance Law*, 6th edn. 1975, p. 612.
12. [1892] 1 Q.B. 147.
13. [1926] Ch. 48.
14. [1937] Ch. 588.
15. [1949] P. 91.
16. [1965] M.L.J. 1.
17. [1973] 2 M.L.J. 165.
18. [1974] 1 M.L.J. 14.

Wife

It has been felt that if the policy moneys are payable to the "wife" of the life assured then it may be argued that the life assured intended that it should be the wife who was living when the policy moneys become payable. The answer is however not very clear and certain English and Australian cases which are relevant to this point may be quoted.

i) In *Browne's Policy; Browne* v *Browne*[19]. The relevant words in that case were "for the benefit of his wife and children". Kekewich J. gave his decision in favour of the widow, the deceased's second wife.

ii) In *re Griffith's Policy*[20]. There the policy proceeds were to be applied "for the benefit of his wife, or if she be dead between his children in equal proportions". Joyce J. held that in view of the words "if she be dead", the assured must have meant the wife living at the time of the taking of the policy.

iii) *Lodge* v *Dowie*[21]. In this Australian case the policy was effected "for the absolute benefit of the wife of the assured should she become the assured's widow, failing which for the absolute benefit of such of the children of the assured . . . . ". Nicholas J. took the view that the word "wife" raised a presumption that it meant the wife at the date of the issue of the policy. It has however been pointed out that the learned Judge could have decided on narrower grounds as the words "should she become the assured's widow" indicated that the assured had his then wife in mind.[22]

Children

With regard to the words "children", we find again that there is no local authority on the point. Section 23 of the Malaysian Civil Law Act does not define what "children" means. This is because s. 11 of the English Married Women's Property Act (on which this section is based) also does not define what "children" means. However, in section 94(8) of the Australian Life Insurance Act it is expressly stated that the term "children" includes adopted children, step-children and ex-nuptial (i.e. illegitimate) children. It is respectfully submitted that even under Malaysian law as it stands, it should include children legally adopted. It should also include illegitimate

19. [1903] 1 Ch. 188.
20. [1903] 1 Ch. 739.
21. (1936) 36 S.R. (N.S.W.) 52.
22. Wickens, *op cit*, 43.

children as they are natural-born children. The position should however be made clear by statute and one obvious remedy would be to insert a re-phrased s. 23 of the Civil Law Act into the Malaysian Insurance Act itself.

IMMEDIATE VESTED INTEREST

The general effect of naming the husband, wife and/or children as beneficiaries is that, as we have seen, a trust is created. It can therefore be said that an immediate vested interest is usually created in their favour. Thus, if a wife is named as a beneficiary, and she dies before the moneys are payable, her estate will be entitled to receive them. Therefore an insured who wishes to avoid this situation can see to it that it is expressly agreed that payment of the policy moneys to the wife is made conditional upon her survival.

A recent case which is relevant as to the vesting of interests is that of *Barclay's Trustee* v *Inland Revenue Commissioners*[23] which was decided by the English House of Lords. In that case Mr. James Barclay (the deceased) had filed a request for the issue of three policies of $15,000 for the benefit of his son Stuart, failing which his son Norman, and failing which, his wife Florence. In view of the wording used, the House of Lords held that there was no immediate vesting in any of the three named beneficiaries because the donor intended that only one of them would take. There was however no doubt as to the donor's intention; namely, that the vesting should take place in his lifetime to the last survivor. This case therefore brings out the point that in certain cases there may be no immediate vesting.

TRUSTEES

Number of Trustees

In cases where a s. 23 policy is knowingly created by filling in a "s. 23 form", the number of trustees and the names of the trustees would be mentioned. Insurance companies usually encourage two trustees to be named. For example, where a trust policy is created by a man in favour of his children, the man (assured) and his wife would usually be named as trustees.[24]

However, as already pointed out, many s. 23 policies are unknowingly created and therefore in such cases by virtue of s. 23(4) the insured would be the trustee. Section 23(4) & (5) further deal with trustees in respect of such a policy and are as follows:

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23. [1975] 1 All E.R. 168.
24. See the Malaysian Trustees Act. Under the Act there can be a maximum of 4 trustees.

(5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.

(6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office, the receipt of the legal representative of the insured shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

Powers of Trustees

Some of the "section 23" forms used by Insurance Companies contain not only the names of the trustees but also the powers which they are conferred with.[25] It is noteworthy that it is often stated that these powers may be exercised "in their absolute discretion with or without the consent of the beneficiaries or any of them". Thus they can borrow monies, surrender or convert the policy. They can discontinue any double indemnity accident provision or any term rider provision or can apply to the company for an extended term assurance.

It is submitted that unless otherwise provided in some other law, trustees under a s. 23 policy, like other trustees, are governed by the Malaysian Trustees Act and the general principles of the law of trust. Under the general law of trust, it is doubtful whether a trustee can extinguish the trust irrespective of the rights of the beneficiaries (especially where they are children) with or without their consent. Where children are beneficiaries, then they cannot give their consent. Insurance companies should therefore require trustees in such cases to apply to the High Court for the permission of the Court to be obtained. At any rate, where the rights of a trustee are in doubt, legal advice may properly be sought.

ASSIGNMENTS

It has been seen in an earlier Chapter that life policies can be assigned.[26] There is however some doubt whether a "s. 23 policy" can or should be assigned. This is because the policy already creates a trust and in most cases the beneficiaries already have an immediate vested interest in the policy. Theoretically speaking, it may be pos-

25. English insurance companies are a little more conservative in conferring extensive powers to trustees under a s. 23 policy as they probably realise that it may not be wise or valid.

26. See Chapter III.

sible to assign a policy which is already subject to a trust, although it is doubtful as to what rights the assignee will have over such a policy. An interesting case in point is the local case of *Goh Chooi Leong* v *Public Life Assurance Co Ltd* [27]. In that case the deceased had taken out a policy with his wife Ng Geok Kwee named as a beneficiary. Although this point was raised but not decided at that time, it will be noted that this was a s. 23 policy. [28] Subsequently, he made a conditional assignment in writing to his "sworn brother" one Lim Choo Hock. A copy of the said assignment was filed in the Head Office of the defendant company and apparently no objections were raised. After the death of the assured, the company repudiated liability on grounds of misrepresentation and non-disclosure and successfully proved that the deceased was suffering from tuberculosis. The learned trial judge Gill J. accordingly dismissed the action.

The Defendant company also raised the issue that the policy created a valid trust in favour of the wife and as she never consented to the assignment, the assignment was void. However, the wife came to give evidence that she did consent. In view of the fact that there was non-disclosure or misrepresentation Gill J. apparently felt it unnecessary to decide the issue whether the conditional assignment was valid when there was already a valid trust. There is therefore no direct decision on this point either in Malaysia or in Singapore.

Another point that may be of academic interest is what would be the effect where a s. 23 policy creating a trust in favour of a particular person is later assigned to that person. This happened in the case of *Re Man bin Mihat deceased* (supra). Suffian J. (as he then was) was mainly concerned in that case as to whether a s. 23 policy could be created in favour of a Muslim wife. He, however, did make this remark with regard to the subsequent assignment:

> "I am further of the opinion that the subsequent assignment had made no difference because even if the policy had been assigned to a third person (here it was assigned to the wife herself) that person could only receive the policy moneys subject to the statutory trust in favour of the wife."

A subsequent assignment to the same person may however make some difference with regard to estate duty. It will be seen in the following paragraphs that a s. 23 policy usually confers the benefit of "non-aggregation". If such a policy were later assigned absolutely to the same person and the donor lives for five years, then it may be that the assignees may be totally exempted from estate duty.

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27. [1964] M.L.J. 6.
28. The significance of a s. 23 policy seems to have been first judicially recognised in Malaysia in the case of *Re Man Bin Mihat*, deceased (1965) M.L.J. 1. See also the remarks of Suffian J on the effect of a subsequent assignment.

ESTATE DUTY

Non-aggregation

One of the reasons why a s. 23 policy has become popular is because it will usually confer some estate duty advantages. A person buying such a life policy gets what is called the advantages of "non-aggregation". This means that the policy will be treated as a separate estate. Thus, for example, if a person's property is worth $1 million and he has a s. 23 policy for $100,000/-, estate duty will be levied separately on both sums and will not be lumped together. Thus, considerable saving of estate duty can be achieved by taking a s. 23 policy. This result is achieved by virtue of the proviso to s. 19(i) of the Malaysian Estate Duty Enactment, 1941. The sub-section and the proviso are reproduced below:

> 19(i) For determining the rate of duty to be paid on any property passing on the death of the deceased,all property so passing in respect of which duty is leviable, shall be aggregated so as to form one estate, and the duty shall be levied at the graduated rate on the principal value thereof;
>
> Provided that any property so passing, in which the deceased never had an interest, shall not be aggregated with any other property, but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof.

It is therefore important that the deceased must never have had an interest in the policy. Thus, a person may have taken a policy and named his mother as beneficiary. He then marries and changes the beneficiary to his wife. In law, the policy would then become a s. 23 policy, but it is arguable that he had an interest in the policy at one time; namely, when his mother was the beneficiary. Accordingly, the advantages of non-aggregation may not accrue.

It will also be seen from that section that the s. 23 policy will be an estate by itself. However, one of the questions is whether each policy will be considered as an estate by itself if there is more than one such policy. For example, if A takes out 3 life policies where his wife, son and daughter are respectively named as beneficiaries, the question is whether each policy will be regarded as one estate or whether the three policies will be aggregated together as one estate. It is respectfully submitted that each policy should form one estate, although it seems that the Estate Duty Department may not share this view. This is because s. 19(i) of the Enactment is based on the proviso to s. 4 of the English Finance Act of 1894, and until the loophole was plugged by the Finance Act of 1954, the English Estate Duty Office treated each policy coming under s. 11 of the Married Women's Property Act (equivalent to s. 23) as a separate estate. The

loophole was plugged in England because the Government became aware that some people were mis-using the existing provisions with regard to non-aggregation. The plugging was done by s. 33(2) of the Finance Act 1954. However, in a sense, one still enjoyed the benefits of non-aggregation, as the remainder of the estate would still be treated as a separate estate. As similar legislation has not been passed in Malaysia, the pre-1954 view of the English Estate Duty Office should prevail.[29]

Total exemption

The further question is whether a s. 23 policy can in some circumstances result in total exemption from estate duty.[30]

Section 13 of the Estate Duty Enactment is relevant in this regard, and the first part thereof is reproduced below:

> 13. Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person under a disposition not made by the deceased, or under a disposition made by the deceased more then five years before his death where possession and enjoyment of the property was ***bona fide*** assumed by the beneficiary immediately upon the creation of the trust and thence forward retained to the entire exclusion of the deceased or any benefit to him by contract or otherwise.

For the purpose of s. 5 of the Enactment which also deals with property passing on the death of the deceased, "disposition" is defined as including any trust, convenant, agreement or arrangement. As s. 23 policies create a trust, they can be considered as a "disposition".

The fact that a s. 23 policy may be totally exempted from estate duty by virtue of s. 13 of the Estate Duty Enactment was appreciated by Abdul Hamid J, who stated with regard to that section:

> "In the light of this section, I am of the view that the position regarding policy money effected under s. 23 of the Civil Law Act is the same as in England. Such policy money would not by virtue of s. 13 of the Estate Duty Enactment attract estate duty if the person seeking the benefit of the exemption of tax can establish that the requirements of the section are fully complied with."

It thus seems that total exemption will be obtained if:

a) the s. 23 policy was taken more than five years before the death of the assured;

29. Note that further loopholes were plugged in England from time to time. In fact England has repealed their estate duty legislation. The relevant law is now called the *Capital Transfer Tax Act*.

30. That is, apart from the fact that the policy is below the minimum figure for levy of estate duty. It is presently, $50,000/-.

b) that the beneficiary *bona fide* assumed possession and enjoyment of the property immediately upon the creation of the trust; and

c) thereafter it was retained by the beneficiary to the entire exclusion of the deceased.

There is of course little doubt that a life policy is "property". The main question however is how a person can assume enjoyment and possession of the insurance policy. The answer to this question may be found in the Privy Council decision of *Commissioner for Stamp Duties of the State of New South Wales* v *Perpetual Trustee Co Ltd.*[31] That case involved a settlement of shares and the question there also was whether the beneficiary had assumed *bona fide* possession and enjoyment of the property immediately upon the making of the gift. The following passages may be quoted:

> Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question, therefore, must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.
>
> Did he assume it and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: viz. (i) the settlor had no enjoyment and possession such as is contemplated by the section; and (ii) such possession and enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants was had by him solely on behalf of the donee. In his capacity as donor he was entirely excluded from possession and enjoyment of what he had given to his son.
>
> Did the donee retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever? Clearly, yes. In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift. Indeed this was ultimately conceded by the appellant.

The important point in the above passages is that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty.

It is therefore possible for a s. 23 policy to obtain complete exemption from estate duty though for practical purposes it is safe to say that generally speaking they would at least result in non-aggregation.

31. [1943] 1 All E.R. 525.

CONCLUSION

In concluding this section on s. 23 policies it should be pointed out that such policies are bound to raise many problems from time to time. These problems would generally cover "gray areas" with regard to which no set answer can be given. A lot will depend on the facts and surrounding circumstances. One important factor would be the actual wording of the documents concerned; particularly the life policy itself. It is to be hoped that some of them could be solved by having new legislative provisions. What form such legislation should take will of course be a problem in itself.

G. LIFE POLICY CLAIMS

CLAIMS PROCEDURE

The death of the assured will usually switch on the machinery relating to claims under the life policy. First, the death of the assured will be informed to the branch or the Head Office or the Central Office of the assurance company. The company will ascertain the position with regard to its premium payments, and whether there is any indebtedness attached to it. Advice to the claimant will be given in due course. Many claimants have often been disappointed to hear that nothing is payable on the policy. This often happens where the policy has lapsed and the beneficiary has no idea that this has occured.

If there is a claim, claims papers will be filled and the Claims Department of the Company will either admit the claim or carry further investigations into the claim. In some cases after investigation, the company may well repudiate the claim on one or more of several possible grounds. These may include fraud, misrepresentation, non-disclosure or lack of insurable interest. Where claims are admitted the Claims Department will ask for production of evidence of title and estate duty clearance on the policy.

It is unnecessary in this book to go into the practical aspects of claims but some legal aspects relating to claims under life policies may be considered.

DOCUMENTARY EVIDENCE

Among the documents asked for would be the death certificate. This can give rise to problems where such a certificate cannot be obtained. This may be due to no fault of the claimant or claimants. A good example would be where a Malaysian life policy covers a person

involved in a helicopter crash in Indonesia. Let us assume that the helicopter crashed either into impenetrable dense jungle or into the sea. In such circumstances the body and the helicopter may never be found. It would be impossible to expect the Indonesian Authorities to issue a death certificate, and the claimant may well be told by a stubborn claims officer that nothing can be done unless a death certificate is obtained, or seven years has elapsed. This is because claims officers generally know a little bit of law and roughly understand that a man may be presumed to be dead if he has not been heard of for seven years.[32] In such circumstances, the only course open to the claimant would be to take legal advice and institute appropriate legal proceedings in a competent court of law to establish the death of the assured.

It should also be noted that in cases of accidental death or death by violent causes medical reports will be called for. In the latter case, the Claims Department would probably ask for a Post Mortem Report, Police Report and notes of evidence at the Coroner's Inquest (if any).

PROOF OF TITLE

Insurance companies will also ensure that payment is made to the right person and that payment can be made in law so that the company can be legally discharged from any further liability after payment is made.

Accordingly, in cases where the deceased left a will, Grant of Probate will be asked for. In cases where the deceased died intestate Grant of Letters of Administration will be asked for.[33] It may here be pointed out that in Malaysia there is also the Small Estates (Distribution) Act, 1955[34] which deals with estates below $25,000/-. Jurisdiction over these estates would be vested in the Collector or Assistant Collector of Land Revenue for a district.

If the life policy has been assigned the insurance company would check whether it has been conditionally assigned or absolutely assigned and where proper, the claim would be paid to the Assignee. If the policy is subject to a trust, the claim would be paid to the trustee upon production of the Trust Deed. Note of course that production of the Trust Deed would not arise in the case of Section 23 policies which create statutory trusts. Moreover, payment to Assignees or

32. See the Evidence Act.
33. See the Probate & Administration Act. See also the Distribution Ordinance.
34. (Revised - 1972).

Trustees may require estate duty clearance especially where the assured has continued to pay the Premiums. [35]

It has already been noted that under Section 44 of the Malaysian Insurance Act (as amended), an advance of part payment up to nine-tenths of the total claim payable on the life policy to $20,000 (whichever is less) may be made. The said advance is payable to a "proper claimant" and therefore the insurance company concerned will have to be satisfied that the claimant comes within that term. Evidence may therefore be asked for as to the relationship of the claimant to the insured. It should further be noted that this payment of advance or part-payment under Section 44 is not obligatory but discretionary. However, an insurance company with any social sense should alleviate the suffering of those left behind and pay in all deserving cases.

ESTATE DUTY REQUIREMENTS

In Malaysia (as in Singapore) an insurance company is obliged to ensure that any debt claimed which is liable for estate duty assessment should get estate duty clearance. Penalties are prescribed in the Malaysian Estate Duty Enactment for any insurance company which fails to observe estate duty requirements.

Reference should be made to Section 50(ii) of the Estate Duty Enactment, 1941. Section 50(ii) is as follows:-

> "(ii) No sum payable on a policy of life assurance, upon which sum estate duty is leviable in the States of Malaya, shall be paid by or on behalf of any Life Assurance Company unless the sum secured by such policy is included in the schedule referred to in sub-section (ii) of Section 45 or in a certificate issued pursuant to sub-section (v) of this section."

In view of the complexities of the law the main obligations of an insurance company with regard to estate duty clearance may be summarised as follows:-

1. As a general rule, where insurance monies becoming payable on the assured's death form part of his 'free estate', payment may only be made by the company upon production of:-
   (a) A Grant of Representation by the executor or administrator (this will include an Order for Distribution issued under the Small Estates (Distribution) Ordinance, 1955); or
   (b) a Certificate from the Collector of Estate Duty to the effect that the policy monies are not liable to duty or that payment or

35. The Estate Duty Enactment should be consulted and the views of the Estate Duty Office should be ascertained in all controversial matters.

any duty has been completed or postponed.

2. Where policy monies are payable to persons other than personal representatives of the assured's estate, payment may be made by the company only upon production of a Collector's Certificate under section 50(v) of the Estate Duty Enactment, 1941. This requirement may, however, be dispensed with, by the application of Section 44 of the Insurance Act, 1963, if the total sums payable on death by the insurer concerned do not exceed $20,000. In this event payments may be made by the insurer before production of a Grant of Representation or Collector's Certificate subject to the following safeguards:-
   (a) the insurer must first decide who is a 'proper claimant' to the policy monies (see sub-section (5));
   (b) before making any such payment, the insurer must give not less than seven days notice of such intention in writing to the Collector of Estate Duty, with particulars of the name, date of death and last address of the assured, the amount payable and name and address of the payee;
   (c) the insurer must retain one-tenth of the total sum payable until the sums payable under the policy are included in a schedule attached to the grant of Representation or a Collector's Certificate. If the Grant of Representation or Collector's Certificate is not received by the insurer within twelve months thereafter, he must deposit the retained balance with the Treasury, in accordance with sub-section (4) of Section 44.
3. In any case where the requirements of Section 44 of the Insurance Act, 1963 are not strictly complied with or are inapplicable, any insurance company which makes payments on the death of an assured person without requiring production of a Grant of Representation or Collector's Certificate, may render itself liable to the penalty set out in Section 50(v) of the Estate Duty Enactment 1941.[36]

INSURABLE INTEREST

It has come to the notice of some life companies in Malaysia that there is a habit of insuring ailing old relatives by persuading him or her to buy life policies in their own name. For example, a niece may insure her ailing aunt who is almost penniless. The policy is to be taken out by the aunt but the premiums will be paid by the niece.

36. Here again the Enactment as well as the current practice of the Estate Duty Office should be consulted. Only some matters may be covered in what is stated above, and being a summary may not be entirely accurate.

When the aunt dies, after a short time (usually less than a year), the insurance company will be faced with the problem of denying liability on the ground that there is no insurable interest.

Legally speaking, a niece would not have an insurable interest on a penniless aunt as she is not wholly or partly dependent on this aunt. However, it appears that the aunt is the owner of the policy and it could be argued that there is nothing to prevent a penniless woman from taking a life policy and that furthermore there is nothing to prevent someone else from paying the premiums. This raises certain problems, and undoubtedly the practice should be stopped. It is therefore to be hoped that some life companies will contest such matters in what is called a "test case" so that the question of lack of insurable interest may be determined by a competent court of law. The above practice really amounts to gambling and a decision on this point would be most welcome.

CHAPTER VI

MOTOR INSURANCE

A. INTRODUCTION

Motor Insurance, like Life Insurance, is a branch of insurance which is popular and well known to the public. Indeed, it is a branch of insurance from which few people can escape if they own any sort of motor vehicle. This is because third party insurance is compulsory in Malaysia.

Motor Insurance has also created many problems in law as one often finds that motor insurers are in the habit of denying or repudiating liability on all kinds of grounds. This phenomenon has been partly accountable in the past to the fact that motor insurance is supposed to be an area where insurance companies suffer loss. However, the situation should be alleviated as motor insurers have now been allowed to increase their premium rates recently.[1]

The recent Insurance (Amendment) Act, 1979, will also have some effect in the realm of motor insurance. It has been the intention of the government to ensure that the principle of "cash before cover" applies to insurance. In other words, the idea is to ensure immediate payment of premiums by potential policy holders. Under the new provisions the Act will now define the time from which the insurer is on risk and the policy holder is accorded protection. In presenting the Bill before Parliament, the Deputy Finance Minister indicated that the "cash before cover" scheme would initially apply only to motor insurance. However, this obviously is an area where the government will be treading carefully and gradually to avoid unforeseen impracticalities.

In the Chapter dealing with Contract and the Law of Insurance (Chapter III) the question of non-disclosure and misrepresentation has been generally dealt with at considerable length. However, in view of the fact that a good deal of the unhappiness and litigation surrounding motor insurance is based on alleged non-disclosure and misrepresentation, it may be useful to consider this question again in relation to motor insurance only. An attempt will however be made

1. See the 16th Annual Report of the Director General for Insurance for the year ended 31st December 1978.

to avoid discussing cases hitherto discussed.

B. NON-DISCLOSURE AND MISREPRESENTATION

THE PROPOSAL FORM

Unlike life insurance, motor proposal forms are filled in more casually as it is regarded as a somewhat irritating ritual which one has to go through in purchasing a motor car, motor cycle or any other motor vehicle. Especially where the car dealer also happens to be an insurance agent, one will find that the filling in of the proposal form is done by some clerk in the car dealer's office who has little or no knowledge of the significance or importance of the questions in the proposal form for a motor insurance policy. To him it is just another chore.

Proposal forms differ from company to company. Most of them have a composite proposal form which can be used for any type of motor vehicle. Others have special forms for the different types of policy required. For example, some insurance companies may have a special proposal form for motor cycle insurance.

A perusal of the forms used in Malaysia would indicate that the motor insurer would like to know the following among other things:

a) Age of the insured.
b) Occupation of the insured.
c) For what purposes the vehicle will be used.
d) Will passengers be carried; and if so for hire or reward.
e) Whether there has been any previous motor insurance.
f) Whether any insurer has declined insurance , or refused to renew, or cancelled any motor insurance policy.

Inspite of the decision in *Pacific & Orient Underwriters (M) Sdn Bhd* v *Choo Lye Hock*,[2] it is still debatable whether any mis-statement of age or occupation will not amount to a misrepresentation. It will be recalled that in that case it was held that such statements were not "answers" to questions and therefore there could be no misrepresentation. Thus, in *Broad* v *Waland*,[3] it was held that there was misrepresentation where a person had stated his age as 21 when he was in fact 19½ years old.

Similarly, the occupation of a person may be a material fact which would affect the judgment of any prudent motor insurer. Thus, in *Holmes* v *Cornhill Insurance Co Ltd*,[4] it was held that the

2. [1977] 1 M.L.J. 131. See Chapter III, under the heading "Misrepresentation".
3. (1942) 73 Ll.L.Rep 263 K.B.
4. (1949) 82 Ll.L.Rep. 575 K.B.

insurer was entitled to repudiate liability as the proposer had described himself as a "dealer" when he was in fact a bookmaker.

The purpose for which the vehicle will be used is of importance because it will enable the insurer to decide what type of policy should be issued, and the rate of premium that should be asked for. For example a vehicle for carrying laundry and a vehicle for carrying logs (assuming both are commercial vehicles) will obviously merit different consideration by the insurers in issuing a policy.

The question whether passengers will be carried for hire or reward is also of importance, for the company would then know that it is running higher risks in issuing the policy.

The names of previous insurers has been held to be a material fact which ought to be disclosed. In the well known case of *Dent* v *Blackmore*[5] the insured had disclosed the name of one previous insurer but not the name of another previous insurer. McCardie J. held that in view of the *basis clause* the insurers could deny liability as the answer was untrue. In any case, he felt that it was non-disclosure of a material fact and liability could be denied on that ground also.

The question whether any insurer has declined insurance, or refused to renew a policy, or cancelled a policy, is also of importance as the answers to them will apparently be regarded as material. Thus, in *Ong Eng Chai* v *China Insurance Co Ltd*,[6] one of the undisputed facts was that the insured had been given notice of cancellation by another insurance company. The reason for the cancellation was that the company had discovered that the previous insurance company of the plaintiff had treated his vehicle as a Total Loss. Hashim Yeop A. Sani J. had no difficulty in holding that the company could avoid the contract for non-disclosure of a material fact.

SOME RELEVANT CASE LAW

Most of the Malaysian cases have been dealt with in some place or other in Chapter III of this book. Thus, some important decisions from other jurisdictions may be considered.

Dawsons Limited v *Bonnin and Others*[7]

This decision of the House of Lords is well known as it upholds the sanctity of the basis clause. However, it should also be remembered that this case deals with non-disclosure and misrepresentation in motor insurance. In that case a firm of contractors in Glasgow had insured a motor lorry at Lloyds against damage by fire and third

5. (1927) 29 Ll.L.Rep. 9 K.B.
6. [1974] 1 M.L.J. 82.
7. [1922] 2 A.C. 413.

party risks. One of the questions asked in the proposal form was at what address the vehicle would usually be garaged. The answer was "Above address", thereby meaning the firm's ordinary place of business in Glasgow. This was not true as the lorry was usually garaged in a farm in the outskirts of Glasgow. The inaccurate answer was given inadvertently. The lorry was then destroyed by fire at the garage. The House of Lords held that the mis-statement in the proposal form did not relate to a material fact but in view of the basis clause the insurers could deny liability. This decision therefore brings out the fact that as in other types of insurance, if there is a basis clause, every answer in a motor propsal form will be converted into a condition.

Trustee of G.H. Mundy (A bankrupt) v *Blackmore and Others*[8]

In this case the insured (a bankrupt) had taken a policy for a Bentley car. While driven by him it collided into a telegraph pole, caught fire, and was completely burnt out and destroyed. The insured had stated that his cars (including eight other cars) had only suffered from "minor accidents", and one had run off the road in France due to tyre bursting. It was discovered that in addition to what had been disclosed there was another accident where the damage amounted to about $133. Tomlin J of the English High Court held that this was a material fact which should have been disclosed and therefore the underwriter was entitled to avoid liability.

Babatsikos v *Car Owners Mutual Insurance Co Ltd.*[9]

This is an Australian case decided by the Court of Appeal of the Supreme Court of Victoria. One of the questions asked in the proposal form was as to how long the insured had held a driver's licence. The answer was "3 years and 4 months". He was also asked whether a learner's permit or provisional licence holder would ever drive the vehicle. The answer was "No". The Court stated the following principles which are worth noting:

a) The burden of proving the materiality of the statement is on the defendant (who is denying liability)
b) The test of materiality was whether a prudent insurer would be influenced in his acceptance of the risk or in his assessment of the premium if the question had been answered correctly.
c) That the Magistrate was justified in holding that misrepresentation was not material, for he had bot been satisfied on a balance of probabilities that the length of time for which the plaintiff had had a licence

8. (1928) 32 LL.L Rep. 150.
9. [1970] 2 Lloyds Rep. 314.

was a matter that a prudent insurer would have been influenced by, in deciding whether to accept the risk or in deciding the question of premium.

C. TYPES OF POLICIES

Most companies use three main types of policies:

a) Private Car Policy.
b) Commercial Vehicle Policy.
c) Motor Cycle Policy.

Certain companies may also have what is just known as a "Motor Car Policy". Such a policy would, for example, be used where the car is a private car, but has been rented out. It is however important for the insured to find out what type of a policy has been issued to him and why.

Then again, the cover may be third party cover or a comprehensive cover. Some third party covers also include "passenger liability". At the same time, it must be remembered that while the clauses included in the various types of policy are similar, they are not the same for different companies. Thus, what is inside a Private Car Policy for one company may not be the same in a Private Car Policy issued by another company.

D. TERMS AND CONDITIONS

GENERAL OBSERVATIONS

It is difficult to generalise what are the terms and conditions contained in any policy. In the first place, even if a "standard form" policy is used, certain clauses may be deleted or added. It is therefore important to find out what is deleted and what is added. What is added may be in type or may be by virtue of endorsements which are slips of paper attached to or pasted to the main policy. The case of *Pang Lim* v *China Insurance Company*[10] is a good example of the effect of an unnoticed deletion. In that case, the plaintiff had asked for a "first class policy". He was issued a comprehensive policy, but unknown to him, Section II, sub-section 2(b) had been deleted so that it would not cover any loss or damage suffered while driving another person's car. The company argued that it was indeed a "first class" policy as that was the "usual policy" issued by the company. It moreover proved that such a policy (with that deletion) had previously been issued to him and he had accepted the same. Both the High Court and the Federal Court held against him. It was pointed out that the deletion was clearly typed on the policy, and it must

10. [1975] 2 M.L.J. 239.

have the effect meant by the insurers. Furthermore, he obtained substantially the policy he had asked for.

It should also be remembered that certain types of coverage can be obtained if extra premium is paid. For example, one can have the "riot clause" to cover riots, civil commotions etc. One can also obtain, for example, special coverage for windscreens. Accessories can also be covered. It may be part of the value given or in addition to the value given. Thus, if one insures his car for $30,000-00, then his air-conditioning equipment may be part of that $30,000-00 or valued separately. In the latter event, additional premium (which is negligible) will have to be paid but in case of total loss, additional payment will be made.

It is important to read every policy that is issued. It should not be assumed that they must be the same or similar even though that is generally true. It should be noted that there may be distinct differences in coverage with regard to private car policies, commercial vehicle policies, and motor cycle policies. This is because they are different in nature and different with regard to the type of loss or damage that may be incurred. In the paragraphs below an attempt will be made to discuss the main terms and conditions which one would come across in motor policies; and wherever possible, the differences in the different types of policies will be pointed out.

LOSS OR DAMAGE TO THE VEHICLE AND ACCESSORIES

What is labelled as "SECTION I" in a motor policy explains the coverage for loss or damage to the motor vehicle, its accessories and spare-parts. This part of the policy will be deleted in a third party policy as third party policies will not cover loss or damage to one's own vehicle.

The interpretation of some parts of Section I has given rise to some trouble. For example, among other things, that section covers "burglary, housebreaking and theft". The term "burglary" does not exist in the Malaysian Penal Code. It is probably used in Malaysian policies as the terms have been copied from English policies and "burglary" exists in English law. At one time it more or less meant "housebreaking by night" and this is what the term probably means in the Malaysian context. But, it must be noted that after the English Theft Act, 1968, burglary means theft in any building, be it a dwelling house or not, and be it day or night. Accordingly, it is high time that this English term be deleted from Malaysian policies and insert instead what it is really intended to mean.

The word "theft" is defined in the Malaysian Penal Code. But the

problem which has arisen is whether theft includes "robbery".[11] In certain circumstances it would. "Robbery" under the Penal Code is of 2 kinds; robbery by theft or robbery by extortion. This question arose in the case of *Wong Kon Poh* v *New India Assurance Co. Ltd.*[12] In that case the insured was a young labourer. He had bought a new Yamaha motor cycle and had taken a comprehensive policy on it. One day he was robbed of his motor cycle and $5-00 in his pocket by 4 unknown persons. He informed both the police and the insurers almost immediately. The insurers repudiated liability on the ground that robbery was not theft. The magistrate's court dismissed his claim as it considered that robbery was distinguishable from theft, and the High Court upheld that decision. On further appeal to the Federal Court, the appeal was allowed. The Federal Court took the view, *inter alia,* that theft being an essential element of robbery, robbery is still theft, although in aggravated form. Moreover, on any reasonable construction the policy must be considered as including "robbery" within the coverage of "theft".

Another problem area with regard to Section I is the cost of removal of the damaged vehicle. The operative phrase is "cost of . . . . . removal to the nearest repairers and of delivery within the country where the loss or damage was sustained." As the geographical area to which the policy applies would cover Singapore and part of Thailand, one of the questions would be whether the insurance company would pay for the cost of removal if a Malaysian car which is damaged in Singapore has to be brought back to Malaysia. From the wording, it would seem not. The insurance company would have to pay for the cost of removal only within the country where loss or damage was sustained.

LIABILITY TO THIRD PARTIES

This question is covered by "SECTION II" in motor policies.

It should be noted from the outset that as commercial vehicles have to carry passengers which may include persons employed by the insured, the coverage in a commercial vehicle policy is wider. Thus, such a policy would cover (subject to the exceptions): –

a) death of or bodily injury to any person
b) damage to property

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11. See s. 378 of the Penal Code for the definition of theft; See also s. 383 for extortion and s. 390 for robbery.
12. [1970] 2 M.L.J. 287.

The word "property" obviously means property not belonging to the insured. However, in a Private Car Policy or Motor Car Policy the coverage for third party liability would be:

a) death or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the insured and excluding liability to any person being a member of the insured's household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment.
b) damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured or any member of the insured's household.

The extent of the above coverage has given rise to complex legal problems. It will be noted that clause (a) above uses the phrase "arises out of and in the course of employment of such person by the insured" as opposed to the phrase "in pursuance of a contract of employment". In other words it would appear that a person employed by the insured would not be covered, but a person who dies or is injured "in pursuance of a contract of employment" will be covered.

Problems would arise where a workman dies or is injured while being driven in his employer's lorry or van. The insurance company would be able to repudiate liability under the first part of clause (a) as the death or injury took place in the couse of employment of the insured. However, both British and Singapore Courts have got around clause (a) by holding that under the next clause of SECTION II the authorised driver would also be the "insured" and he is to be indemnified by the insurance company; and therefore if the authorised driver is sued and is found liable, the insurance company would have to pay the injured workman as he would then be covered by the phrase "in pursuance of a contract of employment". In other words, *vis a vis* the authorised driver (who may be another workman) and the injured workman, the injured workman is being carried "in pursuance of a contract of employment".

Authority for the proposition that the authorised driver must also be considered as the "insured" is to be found in the English case of *Digby* v *General Accident Fire and Life Assurance Corporation Ltd.*[13] The substance of that case was whether or not the policy holder can be called a third party within the meaning of those words in a policy of motor insurance. The effect of the majority decision

13. [1942] 2 All E.R. 319.

was that a motor policy is necessarily extended to insure an authorised driver against claims by parties injured by his negligence and therefore in such a clause the authorised driver becomes the insured and the insurance company are the insurers. This case was followed by the Singapore Court of Appeal in *Manap Bin Mat* v *General Accident Fire and Life Assurance Corporation Ltd.*[14]

Digby's case (supra) was followed and extended in *Richards* v *Cox.*[15] That case directly dealt with the liability of the insurance company where an employee is injured by the negligence of the authorised driver. The essence of the decision was that as the "authorised driver" is also the "insured", the policy would not cover persons employed by the insured driver, but it would cover persons employed by the company or person taking out the policy. Therefore upon a proper construction of the policy the liability of a driver to the injured employee was covered by the motor insurance although the person injured was also in the employment of the principal insured.

Though there is no Malaysian decision on this point, there is a Singapore decision which follows the principles laid down in the above English decisions. It is that of *Chan Kum Fook* v *The Welfare Insurance Co Ltd.*[16] The facts of the case briefly were that the first and second plaintiffs were employees of the Century Engineering Co. which was the owner of a motor van driven by one Yong Chan Seng, a driver employed by the company. They were driven to a worksite and due to his negligence an accident was caused whereby they received injuries. The plaintiffs in due course obtained judgment against the company and the authorised driver. The plaintiffs then sought recovery from the insurance company (the defendants). The learned judge (Tan Ah Tah J.) had to consider the effect of the same clause in the policy. He followed the above English decisions as well as another English decision, viz, *Izzard* v *Universal Insurance Company Ltd.*[17] and held that the insurance company was bound to indemnify the authorised driver.

The significance of these cases is therefore to realise that for successful recovery from the insurance company in such circumstances, it is important to sue the authorised driver as well.

EXCEPTIONS TO SECTION II

It will be found that a Commercial Vehicle Policy usually con-

14. [1971] 1 M.L.J. 134.
15. [1942] 2 All E.R. 624.
16. [1975] 2 M.L.J. 165.
17. [1937] A.C. 773.

tains more exceptions to Section II of the policy. Among the exceptions, it is stated that the company shall not be liable in respect of:

> ii) death of or injury to any person in the employment of the Insured out of and in the course of such employment.
>
> iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.

The phrase "arising out of and in the course of such employment" should be given the meaning attached to it under common law as it is not defined in motor insurance law. It is submitted that the special and extended meaning given to it under the Workmen's Compensation Act would be too wide in interpreting a motor policy. Mention may also be made of the case of *Tan Keng Hong* v *New India Assurance Co Ltd.*[18] where the above clauses came up for consideration.

The facts of the case may be briefly summarised. On June 1, 1963 a forester in the employment of the Forestry Department in Malaysia was being given a lift in a lorry owned by the 2nd appellants. The 2nd appellants had a timber concession in a jungle at Bukit Tinggi and a saw mill about 32 miles away at Seremban. The 1st apellant was the driver of the lorry. On the day of the accident, while the lorry was on its way to the saw mill at Seremban, it was stopped by the deceased who was a forester in the employment of the Forestry Department. The deceased asked for a lift into Seremban and the 1st appellant driver told him to get into the lorry. In the course of the journey the lorry overturned and the forester was killed.

The administrators of his estate sued both the appellants and obtained judgment for $21,600 damages and costs on the ground that death had been caused by their negligence. The respondent insurance company had been brought as a third party into that case as they were the insurers and the appellants claimed an indemnity from them. Both the High Court and the Federal Court held that the respondent insurers were not liable to indemnify mainly for the reason that the deceased forester had not been carried in the lorry by reason of or in pursuance of a contract of employment. The facts showed that he was going to Seremban for private purposes. The learned trial judge found that he was merely getting a free lift into town. There was also the evidence of the driver that he gave the deceased forester a free lift as otherwise the latter might be annoyed and create diffi-

18. [1978] 1 M.L.J. 37. The decision of the Federal Court which was affirmed by the Privy Council is reported in [1974] 1 M.L.J. 156.

culties for his employers in the future.

The Privy Council pointed out that there was nothing to suggest that the forester's contract of employment with the Forest Department made any provision for him to obtain lifts in timber lorries for his own convenience. In fact it was conceded that he was not being carried in the lorry *in pursuance of his contract of employment.* It was however contended that he was being carried *"by reason of his contract of employment."* In reply to this argument, Lord Salmon, delivering the judgment of the Board stated:

> "If that ingenious and novel argument is sound, it would open up a very wide and hitherto unsuspected escape route from the clause in insurance policies designed to exclude from the risks insured, the risk of the death of or injury to passengers in the assured's motor vehicle."

In the view of the Privy Council, the words "by reason of his contract of employment", must be interpreted in conjuction with the words "in pursuance of". In other words, because of the contract of employment, the deceased must have the right to travel as a passenger in the motor vehicle concerned. In the present case, there was no term in the deceased forester's contract of employment, express or implied, which required or entitled him to travel in the lorry of the 2nd appellant.

The Appeal therefore failed.

TOWING

Insurance companies understand that lorries, trucks etc. may have to tow other vehicles from time to time. Thus, towing is allowed to some extent in a commercial vehicle policy. The policies usually allow the insured vehicle to tow any *one* disabled mechanically propelled vehicle and the Company will indemnify the insured for any liability in connection with such towed vehicle provided the towed vehicle is not towed for reward. Also, the insurance company will not be liable for the towed vehicle itself.

Therefore, if any vehicle may be used for towing and if any charges are going to be made, then this should be made clear. The insurance company can then give a special type of policy to suit the particular insured or have the commercial vehicle policy suitably worded. Also, it should be noted that what is allowed to be towed is "one disabled mechanically propelled vehicle". Thus, the vehicle which is towed must be a mechanically propelled vehicle which is disabled. It seems therefore that towing a trailer may not be permissible. This should be made clear. In fact it is usually made clear in the

last portion of the policy which deals with "Limitations as to use".

GENERAL EXCEPTIONS TO THE POLICY

Most motor policies have the same kind of general exceptions. However, there may be significant differences and it is therefore repeated that this part of the policy like any other part, should be carefully read.

All policies will say that loss or damage will be paid for if it is used in accordance with the "Limitations as to Use". This aspect will be dealt with more fully later.

Most policies also say that the loss or damage must have been incurred while in the charge of an authorised driver. Some policies may have an extra clause saying that whether the insured or any other person with his permission is driving, they must not be under the influence of liquor or drugs.

From the legal point of view the interesting clause in the "General Exceptions" is usually numbered "2" and covers a wide variety of situations including the following:

a) flood, typhoon, hurricane, volcanic eruption, earthquake or other convulsion of nature.
b) invasion, the act of foreign enemies, hostilities or warlike operations (whether war be declared or not).
c) civil war, strike, riot, civil commotion, mutiny, rebellion, revolution, insurrection, military or usurped power.

What is not realised by ordinary members of the insuring public is that each of the words stated above are wide in itself and that the said clause would not even cover ordinary situations such as "floods" or "riots". The term "flood" would even include ordinary floods caused by heavy rain which may well occur in many parts of Malaysia from time to time. The word "riot" can also be interpreted very widely. In simple language, there would be a riot if five or more persons assemble for some unlawful purpose which leads to violence or threats of violence.[19] Many law lecturers themselves would be quite surprised to know that their comprehensive policy does not cover a situation where students throw stones at some protest or rally and deliberately or accidentally hit their cars. This would be a "riot". In fact, it may even be used in an unusual situation such as hijacking. For example, if five or more persons attempt to hijack an aircraft and in the process they start shooting and some motor vehicles are damaged or burnt, the insurance company can deny liability on the

19. See s. 146 of the Penal Code. See also s. 141 for the meaning of "unlawful assembly".

ground that there was a "riot".[20]

AUTHORISED DRIVER/S

In dealing with "General Exceptions" in the above paragraphs we have seen that to be covered by a motor policy, the loss or damage must be incurred while an "authorised driver" is driving. Who is an authorised driver for the purpose of a policy is usually spelt out in the policy itself. Many policies would designate the insured and any other person who is driving on the insured's order or with his permission as the "authorised driver". However, some policies may be more restrictive and designate named persons as the authorised driver (usually two in number).

In a motor cycle policy, it is even possible that only the owner would be the authorised driver. What is important to realise is that in the event of a third party being injured, and judgment is obtained by the third party, the insurance company might have to pay by virtue of the provisions of the Road Traffic Act; but later the company has a right to be reimbursed by the insured. It is therefore important to know who are "authorised drivers" within the meaning of a certain policy. It should further be noted that even the liability of the insurance company to pay first and get reimbursement later is not clear. A good example is the case of *Ahmad Sandara Lela Puta & Anor* v *Queensland Insurance Co Ltd*[21] where the authorised driver was designated as the policy holder only. The policy holder was one Poon Sam, but at the time of the accident it was driven by one Poon Kok. The injured third party obtained judgment by default against Poon Kok and Poon Sam and sought to recover the damages from the defendant insurance company. The learned judge Ajaib Singh J. considered the implications of s. 80 of the Malaysian Road Traffic Ordinance 1958, and held that as the policy covered only the insured and no one else, the insurance company may not be made to indemnify the injured third party. He relied on the English case of *Herbert* v *Railway Passengers Assurance Co*[22] and concluded as follows:

> "In the present case the insured and the defendant company were in no way infringing any provision in the Road Traffic Ordinance by agreeing between themselves that the defendant company should not be liable in respect of any accident while the motor cycle was being driven by any per-

20. For an interesting article explaining the legal implications of the term "riot" see, M.J. Kemble, "Riot – A Principle of Construction", *New Law Journal*, Nov: 18, 1976; 1133.
21. [1975] 1 M.L.J. 269.
22. [1938] 1 All E.R. 650.

son other than the insured himself. At the time of the accident the motor cycle was being driven not by the insured but by some other person and, therefore, as the motor cycle was being used outside the limits of the policy the defendant company was well within its rights in repudiating liability. The defendant company was not under any risk in respect of the motor cycle within the terms and conditions of the policy at the time of the accident so that the judgment which the plaintiffs obtained against the insured was not a judgment in respect of a liability covered by the terms of the policy within the meaning of section 80(1) of the Road Traffic Ordinance, 1958."

The earlier decision of *Letchumi & Anor* v *The Asia Insurance Co Ltd*[23] further illustrates the importance of the concept of the authorised driver. In that case one Ng the insured/owner had hired the taxi to one Lim. Lim had re-hired the vehicle to one Quek, and while Quek was driving there was a fatal accident. The representatives of the deceased obtained judgment against Quek and sought to be indemnified by the insurance company under s. 80 of the Road Traffic Ordinance. Both the High Court and the Federal Court dismissed the claim.

On the facts it was pointed out that the claimants would have to establish that Quek was driving with the permission of Ng (the insured/owner). The evidence showed that Quek did not even know Ng. It was also established that the hirer (Lim) had been expressly prohibited from allowing the taxi to be driven by any other driver.

However, it is interesting to note that Ong C.J., in his judgment thought that that insurance company would have to indemnify under s. 80 if both Lim and Quek were sued, as Quek could be considered as the agent of Lim.

LIMITATIONS AS TO USE

Some Observations

It will be recalled that under the General Exceptions, an insurance company will not pay under a motor policy if the loss or damage is sustained when the vehicle is used in a manner contrary to the "Limitations as to Use". It is therefore important to find out the exact scope of the Limitations as to use which is contained at the end of every policy.

It will of course be noticed that the wording may differ from company to company and will also differ for the different types of policies. For example, the limitations to use in a Private Car Policy will be different from the limitations to use in a Commercial Vehicle Policy.

23. [1972] 2 M.L.J. 105.

In a private car policy, one would find words similar to what is stated below:

> "Use only for social domestic and pleasure purposes and for the insured's business.
> The policy does not cover use for hire or reward, tuition, driving test, racing, pace making, reliability trial, speed-testing, the carriage of goods other than samples in connection with any trade or business or use for any purpose in connection with the Motor Trade."

In a Commercial Vehicle policy one would find words similar to what is stated below:

> "Use in connection with the Insured's Business.
> Use for the carriage of passengers (other than for hire or reward) in connection with the Insured's business.
> Use for social domestic and pleasure purposes."
>
> The Policy does not cover:—
>
> a) Use for hire or reward or for racing pace-making reliability trial or speed testing.
> b) Use whilst drawing a trailer except the towing of any one disabled mechanically propelled vehicle.

Social, domestic and pleasure purposes

Generally speaking, motor policies cover use for social, domestic and pleasure purposes. These words have given rise to some controversy from time to time. However, as most motor claims are either settled or go to arbitration there is no reported decision by a Malaysian Court involving the interpretation of these words. There is however, one Singapore decision. In *Tan Ah Leng* v *The American Insurance Company*[24] the Plaintiff Tan Ah Leng was injured by a car owned by one Yeo Chin Choo. The said car was insured with the Defendant Company. The Plaintiff then recovered damages from Yeo Chin Choo. He then claimed the damages awarded from the Defendant Company (insurer), but the Defendant company refused to pay because among the limitations to use it was stated that the car was to be used only for "social, domestic and pleasure purposes". It was contended that the car was at the time used for hire or reward as it was on its way to fetch an employee of Pan Am World Airways under an agreement with the insured Yeo Chin Choo who was the sole proprietor of Airport Hire Cars. Wee Chong Jin C.J. held that

24. [1975] 2 M.L.J. 13.

the vehicle was on hire at the time of the accident and therefore the claim was dismissed. The said case was distinguished by the learned Chief Justice from the unreported decision of the Singapore Court of Appeal in *Safety Insurance Co Ltd* v *Koh Kim Kwee* (Civil Appeal No. 41 of 1971). In that case there was a similar limitation clause, and the car was being used as a pirate-taxi. Just before the accident happened the insured had dropped some school children. It was held that at the time of the accident, he was using it for his own purposes.

A recent English case concerning this clause is *Seddons* v *Binions.*[25] In that case an accident occurred while the father was sending an employee of his son to the dentist in a car belonging to his son. After that the father was to go home for lunch. In the course of the journey the vehicle was involved in an accident thereby killing one person. The son's insurance company attempted to recover half of the damages from the father's insurers on the ground that at that time the father (who was allowed to drive a car not owned by him) was using the car for social, domestic and pleasure purposes. It was held by the Court of Appeal that in such cases the solution to the problem could best be reached by asking the question: what was the essential character of the journey in the course of which the accident occurred? They accordingly found that the father was using the son's car for a business purpose; i.e. taking the employee home or to the dentist and therefore the claim should fail.

Hire or reward

It has been seen that the phrase "social, domestic and pleasure purposes" is related with the limitation that the vehicle is not to be used for "hire or reward". While the word hire is commonly understood, the word "reward" may be wider than it is thought to be. Suppose a car is being used by the wife of the insured to go to a tupperware party and that she is going to get some tupperware as a present. It could very well be argued that the car is being used for "reward".[26]

Carriage of goods other than samples

Most Private Car policies will prohibit the carriage of goods other than samples in connection with any trade or business. This however may be ambiguous where the policyholder's business does cover the

25. [1978] 1 Lloyds 381.
26. The insurance company would probably also claim that it is not being used for the insured's business, as it is being used by the insured's wife.

carriage of goods. An interesting case in this regard is the Singapore case of *Seri & Another* v *Oriental Fire and General Insurance Co Ltd.*[27] In that case an accident occurred while the vehicle was carrying some cakes. It was shown by evidence that although the insured declared himself to be a clerk, he was employed as a bar boy in the evenings and during the day he delivered cakes. One of the grounds on which the claim was dismissed was that the car was being used not in connection with the insured's declared business of a clerk, but for the carriage of goods in connection with his catering business. It therefore also involved the question of misrepresentation.

Use in connection with the motor trade

Most Private Car Policies would also state that the vehicles cannot be used for any purpose in connection with the motor trade. This phrase came up for consideration in the local case of *Official Administrator* v *China Insurance Co Ltd.*[28] In that case one Chellappah was knocked down by a jeep owned by one Wong, and driven at that time by one Lee. Wong had a motor insurance policy with the above insurance company. It also transpired that Lee was driving the vehicle as he had been repairing the car for Wong and was taking the jeep out for a test run. The Official Administrator had obtained judgment against Lee and was attempting to be reimbursed by the Insurance Company under Regulation 8 of the Motor Vehicles Third Party Risks Regulations. The Insurance company denied liability mainly on the ground that at the time of the accident the jeep was not being used for the business of the insured but for a purpose in connection with the motor trade of Lee. It was held by Buhagiar J. of the Malaysian High Court that the jeep was not being used as alleged and its use was within the limitations as to use in the policy. The learned judge stated:

> "If the policy holder himself had carried out the test after the repairs had been completed, I do not think there could be any doubt that the jeep was not being used in connection with the motor trade and I can see no difference between the policy holder carrying out the test himself and authorising or giving permission to somebody else to use the jeep for the purpose of testing it out for him."

A similar decision was reached in the later case of *China Insurance Co Ltd* v *Ang Bay Kang*[29] by the Federal Court sitting at Singapore. In that case also the insured had sent her car for repairs to a garage.

27. [1969] 1 M.L.J. 126.
28. [1957] M.L.J. 59.
29. [1969] 1 M.L.J. 142.

After the repairs, an employee of the garage took it out for road testing. The insurance company denied liability on the ground that it was being used for purposes in connection with the motor trade. Both the trial Court and the Federal Court held that such a use could not be construed as a use in connection with the motor trade. Choor Singh J., delivering the judgment of the Court stated:

> "It seems to us to be obvious that every motor car owner who sends his car to a garage for repairs wants to be sure that it is in good running order when he receives it back and for this purpose he gives, either directly or by implication, authority to the garage proprietor to test the car after repairs and when the car is being tested on the road, it is used for and on behalf of the owner i.e. the policy holder, the purpose being, as already stated, to make sure that it is in good running order. Such use, in our opinion, cannot be said to be a use "for a purpose in connection with the motor trade" in the proper sense of the expression."

It may be noted that the Federal Court considered and approved of the Malayan High Court decision of *Official Administrator* v *China Insurance Co* (Supra).[30]

Use whilst drawing a trailer

It has been noted in considering the terms and conditions in a motor policy that Commercial Vehicle policies usually allow the towing of a disabled mechanically propelled vehicle. Thus, in the limitations as to use, one would find that the policy does not cover use whilst drawing a trailer except the towing of any one disabled mechanically propelled vehicle. It is however not clear as to what a "trailer" means, inspite of the definitions contained in the respective Road Traffic Legislation of W. Malaysia, Sabah & Sarawak.[31] For example, some vehicles may just tow something with wheels attached to it, or tow a "trailer" as generally understood. This would be something on wheels but at the same time also contains a receptacle which allows things to be carried in it. Moreover, complications may arise because the limitations to use also say that the vehicle can be used in connection with the insured's business. Suppose the insured is a manufacturer and he has to carry goods in a trailer which is towed behind. Would such use be against the limitations as to use? These

30. Note that in practice many garages would have a sort of Motor Repairer's Policy which would cover such situations. In such a case, the insurance company of the motor repairer would probably pay. At the same time, it would seem that the insurance company of the owner of the vehicle can also be made liable.

31 See also the compulsory third party insurance legislation referred to in footnote 34 of this Chapter.

are obviously gray areas which may give rise to disputes or litigation.

MAINTENANCE OF VEHICLE IN EFFICIENT CONDITION

Motor Policies have "conditions" printed at the back of the policy. They are hardly read by anybody, but are of great importance. One important condition is that the Vehicle should be maintained in an efficient condition. This means that not only must the engine and other mechanisms such as brakes and steering wheel be in good condition, but also objects such as tyres must be in good condition. If therefore an accident occurs because the tyres are bald, the insurance company would have good reasons for denying liability.

These "conditions" apply whether the policy is a comprehensive policy or a third party policy. This point was settled in the case of *New India Assurance Co Ltd* v *Yeo Beng Chow*.[31A] In that case a third party policy was taken out for a lorry. As all motor policies are designed to cover comprehensive risks also, the usual practice is to delete "SECTION–I" of the policy. The said lorry was involved in an accident, and the insurance company gave notice repudiating liability on the ground that the lorry was not in an efficient condition as required under condition 3 of the policy. The Federal Court held that being a third party policy where SECTION–I had been deleted, the "conditions" did not apply with full force & therefore condition 3 had no effect. Therefore the insurance company was liable whether the lorry was in an efficient condition or not. The reasoning of Ong C.J. in the Federal Court appeared to be that as SECTION–I was deleted the policy no longer covered loss or damage to the lorry. Therefore the duty to maintain the vehicle in an efficient condition had been cut down. He thus took the view that condition 3 had been "mutilated". The insurance company then appealed to the Privy Council.

Viscount Dilhorne in delivering the judgment of the Board, stated as follows:

> "In their Lordship's opinion Condition 3 could and did survive the deletion of Section I. It was a condition precedent to the liability of the appellant company and the policy was issued subject to it. Its language is clear and not ambiguous and any reader of it must have known that it imposed an obligation on the insured to take all reasonable steps to maintain the vehicle in an efficient condition."

Viscount Dilhorne also expressed his views as to what "efficient condition" meant:

31A. [1972] 1 M.L.J. 231.

"Motor Vehicles are intended for use on the roads. A vehicle in an efficient condition is for use on the roads, that is to say, roadworthy, and the converse is equally true. A vehicle which is not roadworthy is not in an efficient condition."

TAKING OVER AND CONDUCTING SETTLEMENT OF CLAIM

Many insured feel that once they have informed the insurance company of the accident, then there is nothing left for the company but to pay. The insurance company of course feels quite differently and expects the insured to do much more.

Thus the insured must keep the insurance company informed of what is happening. Under Condition 4, every letter, claim, summons and process must be forwarded to the company. Similarly the company must be informed of any prosecution, inquest, fatal inquiry or offer of composition.

Condition 5 is even more important as it deals with situations where the insured is in no mood to defend any claim, but the action is brought against him. The insurance company knows that if the claim is not defended then ultimately they will be liable and will have to pay. They realise that it is at least wise to dispute the quantum of damages. How are they to do so? Condition 5 allows them to take over and conduct in the name of the insured the defence or settlement of any claim and have full discretion in the conduct of any proceedings.

What insurance companies have been doing is to come to a settlement of the claim with the injured third party, and thereafter allow the third party to obtain judgment. The insurance company is thus obliged to pay under s. 80 of the Road Traffic Ordinance and does pay. It will then seek for reimbursement from the insured who may then say that the settlement was reached without his consent and therefore he should not reimburse.

This question arose in the recent decision of the Malaysian High Court in *Chong Kok Hwa* v *Taisho Marine & Fire Insurance Co Ltd.*[32] In that case a suit was brought against the insured and the driver by the third party in a motor accident. The insurance company defended the suit and paid the sum of $3,000-00 as damages for personal injury and $250-00 as costs to the third party under a consent judgment entered against the insured and the driver. They then sought to recover from the insured on the ground that there was a breach of condition in that no notice had been given to the insu-

32. [1977] 1 M.L.J. 244.

rance company. The insured contended that notice had been given but this was not found in his favour. He further contended that the insurance company had no authority to engage solicitors to conduct the defence of the action instituted by the injured third party and that the company had settled the claim without his consent and approval. With regard to this contention, the learned judge (Ajaib Singh J.) stated:

> ". . . . . I need only refer to another condition in the policy which states that the respondents should be entitled if they so desire to take over and conduct in the appellant's name the defence of settlement of any claim and should have full discretion in the conduct of any proceedings. In my view this condition is wide enough to allow the respondents to take over the proceedings and to engage solicitors of their own choice at any stage in any action which might be instituted against the appellant arising out of an accident involving the insured lorry without any reference to the appellant and to settle the action as they deem fit. The respondents were in no way bound to obtain the prior approval or consent of the appellant before settling the claim of the injured third party. The policy is in the usual form as a commercial vehicle indemnity policy and nowhere does it state that the respondents should obtain the prior approval or consent of the appellant before settling a claim by an injured third party."

The above views of the learned judge with regard to condition 5 may have gone too far. What is meant by "any stage" in any action? Does this allow the insurance company and the third party to come to an agreement first, and then the third party files a suit at the instigation of the insurance company and receive judgment? Can the Insurance company refrain from informing the insured at all, and even accept the writ or summons on behalf of the insured and allow the third party to receive judgment? It seems that one must draw a line somewhere to see that condition 5 is not misused by the insurance company.

The Singapore High Court was faced with these questions in the unreported decision of *Lee Lian Hong* v *London & Pacific Insurance Co Berhad* (Civil Appeal No. 17 of 1978). In that case the insurance company had agreed with the third party to settle their claim at a certain figure and costs were also agreed. The third party was then asked to file a suit and judgment was allowed to be received in their favour. The summons issued against the defendant (insured) was never served on the insured. It was served on the insurance company and accepted by the company. Justice A.P. Rajah felt that the insurance company had exceeded its powers by accepting the summons meant for the insured without the consent of the insured.

After this decision, insurance companies may well be advised to

tread more warily in relying on condition 5. While it is in their interests to defend the claim, they might come in as a party defendant with the permission of the court rather than accepting service on behalf of the insured without his instructions. As a defendant in their own right the insurance company can defend the proceedings. In any event, "collusion" between the third party and the insurance company should be avoided.

In this connection it should be noted that the question of reimbursement by the insured will not arise if the insurance company pays before the judgment is obtained. Authority for this is the case of *Lee Chau* v *Public Insurance Co*[33] decided by the Federal Court of Malaysia.

E. THIRD PARTY INSURANCE AND THE ROAD TRAFFIC ACT

COMPULSORY COVER

The present law relating to compulsory third party motor-insurance in W. Malaysia is contained in the Road Traffic Ordinance, 1958.[34] The relevant sections are sections 74 to 90. These sections are more or less the same as that contained in the relevant Ordinances for Sabah and Sarawak. Hence, in this Chapter, the W. Malaysian sections will be specifically referred to.

From the outset it should be noted that third party insurance is not "compulsory" for every motor vehicle. For certain types of organisations which own vehicles, "security" can be furnished. In other words, the purpose is to see that the third party is secured in the sense that payment will be forthcoming.[34A]

Under s. 74(1) no person shall use or cause or permit any other person to use a motor vehicle unless there is in force a policy of insurance covering third party risks spelt out in the Ordinance.

The type of policy required is spelt out in s. 75 of the Ordinance and is as follows:–

33. [1969] 2 M.L.J. 167. See also *Gan Chwee Leong* v *New India Assurance Co Ltd* [1968] 1 M.L.J. 196. In that case also there was no judgment, and there was no undertaking by the insured to pay the third party's claims.

34. Ordinance No. 49 of 1958. Reprint of 1970. See the Motor Vehicles (Third Party Risks) Ordinance (Cap 130) for Sarawak; See also the Road Traffic (Third Party Insurance)Ordinance (Cap 129) for Sabah. See also the Road Traffic Ordinances of both States.

34A. Note also that the Malaysian Legislation is similar to the Motor Vehicles (Third Party Risks & Compensation) Act of Singapore. Therefore the law in Malaysia & Singapore are more or less the same.

a) must be a policy issued by an authorised insurer,
b) covers third parties in respect of death or of bodily injury,
c) such death or injury must arise on a road.

The policy is not required to cover:

a) death or bodily injury of a person in the employment of the insured,
b) liability in respect of the death or of bodily injury to persons being carried in or upon or getting on to or alighting from the motor vehicle at the time of the occurrence of the accident.

Note: The exceptions to (b) above are where

i) the vehicle is one in which passengers are carried for hire or reward, and
ii) the vehicle is one in which passengers are carried by reason of or in pursuance of a contract of employment.

Therefore, what is strictly covered by the Ordinance and is known as the "Act Cover", is very limited. Broadly speaking:

i) it will cover third parties only for death or bodily injury.
ii) it will not cover property damage to the insured's vehicle or to the vehicle of the third party.
iii) it will not cover passengers in the vehicle belonging to the insured unless the vehicle is one in which passengers are carried for hire or reward or passengers are in it by virtue of a contract of employment.
iv) the death or injury must occur on a road.

Items (i) and (ii) above need no explanation.

Item (iii) should be carefully understood. Thus, when taking out a "third party policy" it should be ascertained whether it is strictly an "Act cover" policy or also covers passenger liability. It is understood that in Malaysia most "third party policies" do cover passenger liability as well. Payment of a relatively small extra premium will cover passenger liability. In this connection it should be remembered that both in Malaysia and Singapore there is no legislation where insurance of passengers is compulsory. In England, there is the Passengers Liability Insurance Act, 1971 which provides for compulsory cover.

With regard to the interpretation of item (iii) we have also seen in the preceding sections of this Chapter that while employees of the insured cannot sue the insured as they are expressly excluded, this can be got around by suing the authorised driver as then the employees who may be in the vehicle are there because they are employed by the owner/insured and not by the authorised driver; and are there-

fore in the vehicle by virtue of "a contract of employment".

With regard to item (iv), the Ordinance defines a road as any public road and any other road to which the public has access.

PUNISHMENT FOR NOT HAVING THIRD PARTY INSURANCE

Section 74(2) states that a person not having a policy under s. 74 (1) can be punished up to 3 months imprisonment or to a fine not exceeding $1,000-00 or to both. What type of policy is required is spelt out in s. 75 and has been explained above.

The question as to when a person acts in contravention of s. 74 (1) has given rise to some problems of interpretation as Singapore and Malaysia Courts do not seem to agree with each other.

In the Singapore case of *P.P.* v *Albert See*[35] the defendant (a learner driver) had a policy of insurance for a motor cycle covering third party risks and was still valid at the material time. The policy contained a proviso that the holder of the policy must be one who is permitted to drive under the licensing or other laws and is not disqualified for so driving. It so happened that he was found driving without a valid provisional license and also had no "L" plates displayed although he was a learner driver. He was accordingly convicted under s. 3(2) of the Motor Vehicle (Third Party Risks and Compensation) Act of Singapore which is *in pari materia* with s. 74 (2) of the Road Traffic Ordinance. The trial magistrate referred the case to the High Court on a question of law.

The learned Chief Justice distinguished the case from that of *R* v *Tan Hong Heng*[36] on the ground that the proviso in the policy in that case was differently worded. He pointed out that in that case and the English cases the proviso refers to a "holding" of the licence and the disqualification for "holding", while in the present case the proviso did not refer to the holding of a licence to drive, but to the permission to drive and to disqualification from driving.

The learned Chief Justice also noted that his judgment would appear to conflict with the Malayan decision in *Tan Kwang Chin* v *P.P.*[37] where a person who had a provisional driving licence which had expired two days previously had driven a car with the permission of the owner. He had been convicted by the trial magistrate but the conviction was set aside on Appeal. The words of the proviso were

35. [1971] 1 M.L.J. 47.
36. [1965] 1 M.L.J. 124. A Singapore decision (Chua J.)
37. [1959] M.L.J. 252.

the same as in *Albert See's case* (supra).[38] The reasoning of the learned Chief Justice may be gleaned from the following passage towards the end of his judgment:

> "It may well be that an insurance company would not insist upon the proviso clause in the policy because the driver had merely forgotten to renew his driving licence and it is to be hoped that no insurance company would so insist, but the question to be decided in every case before a Court under s. 3 of the Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960 is whether or not, as a matter of construction, a particular policy covers the defendant at the time he was driving the motor vehicle described in the policy and not whether or not the insurance company would regard itself as being on risk if an accident occurs."

The test adopted by the learned Chief Justice seems to be that *as a matter of construction* there must be a policy which covers the defendant against third party risks and not whether a particular insurance company regards itself as being on risk and agrees to pay.

The above case of *Albert See* was considered in the later Malaysian case of *P.P.* v *Lim Ching Chuan.*[39] In that case the defendant was charged under s. 74(1) of the Road Traffic Ordinance for not having a policy as required under it. He produced an insurance policy which was still valid at the material time. It contained a proviso which was more or less the same as in *Albert See's case.* The learned magistrate found him guilty and convicted him relying on *Albert See's case.* The case was brought on Revision as it was found to be inconsistent with the earlier Malayan decision of *Tan Kwang Chin* (supra).

The learned judge Mohamed Azmi J. held that there was no evidence that the defendant had not been permitted by law to drive or had been disqualified from so driving. Therefore he would come under the proviso only if there was any enactment or regulation which prohibited him from so driving. Accordingly, he had not contravened a term of the insurance policy. He further held that subordinate Courts in Malaysia are bound by decisions of the Malayan High Court. Although decisions of the Singapore High Court have a persuasive authority on Malaysian Courts, magistrates and presidents of subordinate courts are bound to follow decisions of the High Court in Malaysia.

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38. In *Tan Kwang Chin's case,* Syed Shah Berekbah J, followed the decision of Rigby J. in an unreported Penang case (Criminal Revision No. 9 of 1956).
39. [1972] 1 M.L.J. 27.

THE CERTIFICATE OF INSURANCE

This is obviously an important document as the general idea is that every user of the road who is covered by third party insurance should be able to show by producing the certificate that he has the requisite insurance. In fact, s. 75(4) makes it imperative that the insurer do deliver the certificate to the insured. Otherwise, the policy will be of no effect.

Moreover, under s. 80, a certificate of insurance has to be delivered before there can be any duty on the part of insurers to satisfy judgments against persons insured.

Similarly, the surrender of the certificate back to the insurer is important. Under s. 80(2)(c)(i) the insurer will not be liable to pay a third party if the certificate has been surrendered to them, or the person to whom the certificate was delivered makes a statutory declaration that the certificate had been lost or destroyed. A reading of s. 80(2)(c)(ii) & (iii) further seems to imply that there is an obligation on the part of the insurer to obtain the surrender of the certificate if the policy has been cancelled or is no longer in force. This is because the insurer is allowed to commence within 14 days legal proceedings in respect of the failure to surrender the certificate.

In practice insurers do not find it worthwhile to prosecute, and the same feeling is also shared by the police. Insurers have therefore devised a sort of "short cut" method whereby they inform the Registrar of Vehicles or an equivalent officer that a certain policy has been cancelled or is no longer in force and that the particular insured cannot be traced or found and therefore the surrender of the certificate cannot be obtained. What is the legal effect of these letters no one knows. All that can be said is that as the law now stands it seems that if the police do not take action, the insurers should take legal proceedings on their own.

RIGHTS OF THIRD PARTIES AGAINST INSURERS

To put it in simple language the Road Traffic Ordinance contemplates that the insurer pays first to the third party once he obtains judgment against the insured person. This is the main object of section 80. This obligation arises even if the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy.

It is however important to note that to make the insurer liable on the said judgment, certain things will have to be done. Thus, before or within seven days of the commencement of the proceedings notice

must be given to the insurer. As the language used is "notice of the proceedings" it would seem that mere notice that an action will be brought would not be sufficient. English authorities may be consulted on this point.

The insurer would not also be liable to pay as long as execution is stayed pending the appeal.

What is more important to note is that the insurer is entitled to obtain a declaration that it is entitled to avoid the policy on the ground that it was obtained by non-disclosure of a material fact or by a representation of fact which was false in some material particular. Such an action for a declaration must have been commenced before or within 3 months after the commencement of the proceedings in which the judgment was given. Actions to obtain a declaration have been taken by insurers from time to time. The case of *Tan Kang Hua* v *Safety Insurance*[40] is a good example where the insurer failed to obtain such a declaration.

Then s. 81(1) further enumerates situations where the insurer would continue to be liable. Thus the insurer would continue to be liable if the insured became bankrupt. The same would apply if the insured were a company and it went into liquidation.

Section 81(2) deals with a situation where the insured dies a bankrupt. In such a case the insured's rights against the insurer under the policy would be transferred to the third party. However, the Ordinance only confers rights on the third party against the insurer if the insured becomes bankrupt. It does not enlarge the terms of the policy between the insured and the insurer. Therefore the insurer may still be entitled to avoid liability against the third party.[41]

ARBITRATION AND THIRD PARTIES

Most motor policies will contain an arbitration clause. Such a clause may or may not be binding on a third party. An interesting case on this point is that of *New Zealand Insurance Co Ltd* v *Sinnadorai*.[42] In that case the insurance company had issued a motor policy to the deceased insured. The insured died in a motor accident and in that accident one of the lady passengers had sustained injuries and she sued the estate of the insured. She then obtained judgment and attempted to enforce it against the insurance company. The In-

40. [1973] 1 M.L.J. 6. This case has been mentioned in Chapter III.
41. On this point see the English case of *McCormick* v *National Motor and Accident Insurance Union Ltd* (1934) 49. L1.L. Rep 361.
42. [1969] 1 M.L.J. 183.

surance Company relied on the usual arbitration clause and applied for stay of proceedings under s. 5 of the Arbitration Ordinance, 1950. Chang Min Tat J. dismissed the application. On appeal by the company to the Federal Court it was held that the lady passenger could not invoke s. 81(1) of the Road Traffic Ordinance as that applies only when the insolvency of the insured arises. Otherwise, the rights of third parties must be based on s. 80(1). As a passenger is not covered by the compulsory insurance, she was bound by the arbitration clause as her only remedy was by way of "subrogation" as she was claiming through or under the insured.

It would therefore appear that if a "third party" is covered by the Ordinance ther he may not be affected by the Arbitration clause.

INEFFECTIVENESS OF CERTAIN TERMS IN POLICY AGAINST THIRD PARTIES

The Road Traffic Ordinance also gives protection to third parties by declaring in sections 78 and 79 that certain conditions and restrictions in the policy will have no effect on the liability to third parties.

Section 78 states that any condition in a policy stating that no liability shall arise, or any liability so arising shall cease in the event of some specified thing being done or omitted, shall not affect the claims of a third party under s. 75(1) of the Ordinance.

Section 79 further states that where a certificate of insurance has been delivered to the insured the following exceptions or conditions will have no effect in relation to the claims of third parties. They are:

a) the age or physical or mental condition of persons driving the motor vehicle; or
b) the condition of the motor vehicle; or
c) the number of persons that the motor vehicle carries; or
d) the weight or physical characteristics of the goods that the motor vehicle carries; or
e) the times at which or the areas within which the motor vehicle is used; or
f) the horse-power or value of the motor vehicle; or
g) the carriage on the motor vehicle of any particular apparatus; or
h) the carriage on the motor vehicle of any particular means of identification other than any means of identification required to be carried by or under Part II of this Ordinance; or
i) the driver of the motor vehicle at the time of the accident

being under the influence of intoxicating liquor or of a drug; or

j) the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle; or

k) the motor vehicle being used for a purpose other than the purpose stated in the policy.

F. THE MOTOR INSURERS BUREAU

THE ENGLISH EXAMPLES

We have seen in the preceding section the limits of third party compulsory insurance under the Road Traffic Ordinance. One very obvious limitation was that the third party victim may not recover at all if there was no policy of insurance in force, or even if there is a policy of insurance, for some reason it did not cover that particular accident. Thus, a Committee for Compulsory Insurance was set up in England and its report was published in July 1937. The major recommendation was to set up a Central Fund to pay claims for third party accident victims who for some reason could not recover under the then English Road Traffic Act, 1930.[43]

The first Motor Insurer's Bureau Agreement came into existence at the end of 1945. It was entered into between the Minister of War Transport and the companies dealing with motor-insurance. The Motor Insurer's Bureau was a company incorporated under the English Companies Act, 1929.

Under the original agreement, there was no provision for untraced drivers. However, the Motor Insurers Bureau had a system of *ex gratia* payments. This was formalised in 1969 by another Agreement. Then, in 1971, another agreement was entered into between the Secretary of State for the Environment and the Bureau.

INTRODUCTION IN WEST MALAYSIA

The introduction of the Motor Insurers Bureau in West Malaysia was to a great extent influenced by judicial prodding. In *New India*

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43. See Donald B.Williams, *The Motor Insurers Bureau*, London, 1972; p. 2. The Committee was known as the "Cassel Committee" as it was set up under the Chairmanship of Sir Felix Cassel, K.C.

Assurance Co Ltd v *Simirah*[44] an unfortunate situation was brought about whereby a third party who suffered injury did not recover inspite of the provisions for compulsory insurance under the Road Traffic Ordinance, 1958. In that case, the husband of the respondent had been knocked down and killed by a car driven by one Chong. The Insurance company refused to pay on the ground that the policy was issued to the previous owner, one Chua. Although the insurance documents had been handed over by Chua to Chong, this did not amount to an assignment in law. The contention of the company was no doubt valid, and Thompson L.P. brought out in his judgment the necessity of something like the English Motor Insurers Bureau in Malaysia. He pointed out how the widow and three young children would have to face the future just because it had been thought that there was a valid policy in force and there was not. The learned Lord President then stated:

> " Things like this should not happen in a civilised society. It may be legal justice, it is not social justice.
>
> Hitherto, in this country as elsewhere, the State has recognised to some extent the unfortunate position of victims of road accidents by the requirement of compulsory third party insurance. Experience, however, has shown that that is not enough and that there are cases like the present where by reason of legal technicalities an innocent victim fails to obtain any compensation.
>
> I express the prophecy that sooner or later we shall have to accept the position that compensation for injuries resulting from road accidents should become the subject of some form of social insurance and should not be left to depend on the vagaries of application of the general law relating to negligence.
>
> In the meantime, however, in the United Kingdom insurance companies have recognised the existence on their part of some sort of social duty in the matter by setting up the Motor Insurers Bureau which in cases like the present one will, subject to the fulfilment of certain simple conditions by way of safeguard, pay compensation. The time has long passed when insurance companies in this country should follow this example and I would express the view that if they are not prepared to do so voluntarily, pressure should be put upon them to do so by Government."

Thus, on the 15th January 1968, an agreement was entered into between the Honourable Minister of Transport of the Government of Malaysia and the Motor Insurers' Bureau of West Malaysia in Kuala Lumpur. The Motor Insurers' Bureau is a company incorporated under the Companies Act of Malaysia.

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44. [1966] 2 M.L.J. 1.

NATURE OF THE W. MALAYSIAN M.I.B.

It should be noted from the outset that Malaysia was ahead of Singapore in introducing the Motor Insurers Bureau. Singapore introduced it only on 22nd February 1975.

However, as the Malaysian Agreement was in 1968, it came into existence before the agreement to pay victims of untraced drivers came into force in England in 1969. Hence, the Malaysian M.I.B. agreement does not cover payment for victims of untraced drivers. It is similar to the English M.I.B. agreement which came into force in 1946.

Nonetheless, there is nothing to prevent the M.I.B. from making *ex gratia* payments to victims of untraced drivers.

MAIN POINTS IN THE AGREEMENT

Necessity of a Judgment

The Bureau's liability to pay will arise only if there is a judgment given by a Court in W. Malaysia in respect of any liability which would be covered by compulsory insurance under the Road Traffic Ordinance. It thus covers "Act liability" only.

At the time of the accident giving rise to such liability, there must not be in force a policy of insurance as required by the Ordinance or such policy is ineffective for any reason other than the inability of the insurer to make payment.

Such judgment must remain unsatisfied for at least 28 days. "Judgment" as defined in the Agreement shall mean judgment in favour of the person who suffered bodily injury, his dependants or legal personal representative.

It will be seen that if the above conditions are satisfied, and the other conditions precedent set out below are satisfied, then the Bureau "will . . . . . pay or cause to be paid."

In other words the Bureau is obliged to pay. There is no option.

Other Conditions precedent

Under clause 6 of the agreement, the following shall be the conditions precedent to the liability of the Bureau; namely:—

> "6. The following shall be conditions precedent to the liability of the Bureau, namely:—

(a) That written notice of proceedings be given by registered post before commencement of such proceedings:–
   (i) to the insurer in any case in which there was in force at the time the accident occurred a policy of insurance purporting to cover the use of the vehicle, the existence of which is known before the commencement of proceedings to the person bringing such proceedings (hereinafter called "the plaintiff").
   (ii) to the Bureau in any other case.

(b) That a copy of any summons, declaration or any statement of claim which may be issued shall be supplied to the insurer or the Bureau, as the case may be, and that the plaintiff shall not seek to obtain judgment before the expiry of thirty days from the date the copy of such summons, declaration or statement of claim shall have been supplied to the insurer or the Bureau, unless within the said period of thirty days the person against whom the plaintiff has taken proceedings issues any process which would lead to the dismissal of such proceedings for want of prosecution.

(c) That if so required by the Bureau and subject to full indemnity from the Bureau as to reasonable costs the plaintiff shall take all reasonable steps to obtain judgment against any person against whom he may have a remedy in respect of or arising out of the injury of death giving rise to the aforesaid proceedings.

(d) That the plaintiff shall comply with all requirements of the Bureau in relation to any matter which might give rise to a claim against the Bureau in terms of this agreement, provided that the plaintiff shall not be bound by the terms of this paragraph unless the requirements of the Bureau are in all the circumstances reasonable. In the event of any dispute as to the reasonableness of any requirement, the decision of the Minister shall be final and binding on all parties concerned.

(e) That the judgment or judgments (including such judgments as may be obtained under paragraph (c) of this clause) shall be ceded to the Bureau or its nominee.

(f) That the plaintiff shall give credit to the Bureau for any amount paid to him by or on behalf of the defendant in respect of any liability for injury to or death of any person, arising out of the event which occasioned the claim against the Bureau. In the event of such amount including a sum in respect of loss of or damage to property, the amount of which is not separately specified then the amount of the credit to the Bureau shall be in the same proportion as the amount of the claim for injury or death of any person bears to the total claim where such claims included an amount in respect of loss or damage to property.

Exceptions

The M.I.B. Agreement does not apply to vehicles where security

is given under s. 77 of the Road Traffic Ordinance. It also does not apply to Vehicles which have entered W. Malaysia through the frontier with Thailand unless such vehicle is registered in accordance with section 6 of the Road Traffic Ordinance of W. Malaysia or with section 6 of the Road Traffic Ordinance, 1961 of the Republic of Singapore.

PROCEEDINGS AGAINST THE MOTOR INSURER'S BUREAU

As West Malaysia has a Motor Insurer's Bureau Agreement covering uninsured drivers only, the question as to in what circumstances the MIB can be sued with regard to payment for victims of *untraced drivers* (hit and run drivers), does not arise.

Strictly speaking, as the MIB is the creature of an Agreement between the Minister of Transport and the Motor Insurers, if the Bureau does not pay as required under the Agreement then the Minister would have the right to obtain specific performance of the Agreement.

However, in practice, the question which sometimes arises is, in what circumstances the MIB can become a party to litigation brought by the victims of uninsured drivers. Since the decision of *Gurtner* v *Circuit* [45] it is now settled law that in certain circumstances the Bureau can apply to be added as defendants to the plaintiff's action under the normal rules of civil procedure as it might be liable under the terms of agreement with the Minister of Transport to satisfy any damages awarded to the plaintiff. Moreover, there may be circumstances where the MIB may wish to counterclaim for a declaration that the plaintiff had not complied with certain clauses of the Agreement.

The more difficult question is the other way around where the third party victim wishes to add the MIB as a party defendant or sue the MIB where a judgment remains unsatisfied by the MIB. A relevant case in point is that of *Hardy* v *MIB*.[46] In that case, the Plaintiff had received serious bodily injury by a van which was driven while the vehicle was uninsured. Moreover, the insurers had repudiated liability because of the criminal acts of the driver. In fact the driver was convicted of larceny and grievous bodily harm. The plaintiff obtained a judgment against the driver which remained unsatisfied. The Bureau did not pay because they considered that they were not liable to pay for criminal acts, as such criminal acts would not be

45. [1968] 2 W.L.R. 668.;
46. [1964] 2 O.B. 745.;

covered by a policy of insurance. Accordingly, the plaintiffs sued the MIB for the unsatisfied judgment. Both the County Court Judge and the Court of Appeal held that the plaintiffs as the injured third party could have recovered against the insurers under the provisions of the then Road Traffic Act although the driver by reason of his intentional act, could not have enforced it. The Bureau was accordingly liable to the plaintiff by reason of the Agreement with the Ministry of Transport.

Hardy's case is also important because it brought out the point that there is actually no privity of contract between the third party and the MIB as the Agreement is between the Minister of Transport and the Bureau. Accordingly, under the general principles of contract law, a third party would not be able to sue under that contract. However, Lord Denning M.R. pointed out that it is hoped that no one will ever raise this defence against such third party. In fact, in England, the MIB no longer raises this issue as to privity of contract.

This point arose accidently in the recent case of *Persson* v *London Country Buses*[47] which concerned the liability of an untraced driver. The English Court of Appeal mentioned that the issue on privity had been inadvertently taken before the trial judge. James L.J. then stated:–

> "It is in accordance with the publicly declared policy of the bureau that the bureau does not rely on the absence of privity of contract and that policy has to be fully adhered to before us."

Unfortunately, there are no decisions in Malaysia or Singapore as to in what circumstances the MIB can be sued for a judgment unsatisfied by it.

It might also be pointed out that if part of a judgment has been recovered, then the Bureau should normally pay the balance due under the judgment. Such balance would include the costs taxed pursuant to the Judgment. The Bureau will not normally pay interest on the judgment debt and further costs but there seems to be no legal basis for that practice. However, it seems the Bureau will have to meet a claim for interest if it is included in the judgment debt under the provisions of the Civil Law Act.

In conclusion it might be pointed out that the attitude of the MIB is very important in settling claims against it. It ought to be remembered at all times that the MIB was set up to ensure social justice, and therefore members on the Board of the MIB should always

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47. [1974] 1 W.L.R. 569.

have the real purpose of the MIB in mind in deciding the rights of victims of uninsured drivers.

It is also to be hoped that the present MIB agreement will be extended to cover not only Sabah & Sarawak, but also payment of compensation to victims of untraced drivers as well, as in Singapore and England.

G. SOME ASPECTS OF MOTOR CLAIMS

NOTICE OF CLAIM

The first sentence of Condition 4 of the Policy is usually in the following terms:

> "In the event of any occurrence which may give rise to a claim under this Policy the Insured shall as soon as possible give notice thereof to the Company with full particulars."

It will be seen that the phrase used is "any occurrence which may give rise to a claim." Thus, when there is an accident and the insured claims, no problem of construction arises as there is a claim which has been made. However, there are situations where an accident (usually of a minor nature) has happened and the company is not notified as the insured innocently thinks that no claim will arise. On many occasions it may well happen that at the time of the accident the person injured or the owner of the car which is damaged may well feel for a variety of reasons quite happy not to pursue the matter further. The insured therefore does not notify the company. The third party concerned may then change his mind and report to the police and may follow it up with a claim to the insurance company. The insurance company will then invoke the above clause and repudiate liability on the ground that it has not been informed of the accident.

In such an event the question will arise whether the insured has broken the above condition. The stipulation is that he must give notice to the company of "any occurrence which may give rise to a claim". At the time of the occurrence he feels or is led to believe that there will be no claim. If the test is subjective, then the insurance company cannot blame the insured. If the test of objective, the insurance company could argue that what the insured thinks is not relevant. Is it an occurrence which a reasonable man would think may give rise to a claim? If so, then the insured must notify the company. No decision can be found as yet in Malaysia, Singapore or England on this point.

As to the notice to be given, Condition 2 makes it clear that every notice is to be in writing and shall be delivered to the company. Some insured may inform their insurance agent orally intending that the agent convey the occurrence of the accident to the company. Such notice would not be effective. A relevant case in point is that of *Chong Kok Hwa* v *Taisho Marine and Fire Insurance Co Ltd.*[48] In that case, the accident took place on November 13, 1968. According to the insurance company they got notice of the accident only on November 11, 1970. The insured stated that he informed the agent of the insurance company on or about the day of the accident. The company contended that their agent had no authority to receive any claim on their behalf. In any event both the trial judge and the appellate judge found as a fact that notice was in fact sent only in November, 1970.

RIGHT OF REPAIR, REINSTATEMENT OR REPLACEMENT

In comprehensive policies where the insurance company is to pay for loss or damage to the Motor Vehicle, the company is also given the option to repair it, or reinstate it, or replace it. The maximum amount which the company will spend is the amount specified in the Schedule.

It is understandable that the company will not incur more money in doing any of the above than that for which the car is insured. This is because of the accepted principle that if there is under-insurance the insured is his own insurer. However, unfairness arises where inspite of the value mentioned in the policy and the premium paid on that value, the insurance company may refuse to pay the amount on the ground that it is not the market value. Insurance companies perhaps justify this practice as what is stated in the policy is the "Insured's Estimated Value" and not the real value. The unfairness of this practice lies in the fact that the insurance company acts as judge and jury. Say for example, a car is estimated by the owner as being worth $35,000-00. He insures it for $30,000-00 stating that sum as the "estimated value" and pays premium for that sum. If there is an accident and the car is a total loss the company will have it valued by its own valuer who will probably say the market value is about $28,000-00. Then the insurance company will deduct the amount stated in the excess clause which is the amount of which the insurance company will not pay if there is an accident. Suppose the ex-

48. [1977] 1 M.L.J. 244. This case has been discussed with regard to the taking over of the conduct of proceedings by the insurance company.

cess clause mentions the sum of $1,000-00. Then the insurance company will probably offer $28,000-00 *minus* $1,000-00 i.e. $27,000-00 as the sum they are due to pay for a total loss. Unless one wishes to go to arbitration it is difficult to argue with the company on the amount which is offered and the insured is in the difficult position of taking a few thousand less now or a few thousand more two or three years later. It will thus be seen that in practice the options given to the insurance company may not always work out fairly in favour of the insured.

If of course the company feels that it is cheaper to repair or reinstate the car they will do so. The insured cannot demand payment as a total loss. The option is in the hands of the insurance company only.

PAYMENT FOR INJURY TO INSURED

Private Car Policies or Motor Car Policies usually provide payment for bodily injury received by the insured. There are two points to note.

Firstly, the company will pay only if the injury is directly connected with the Motor Vehicle, or if the injury is caused while in or mounting into or dismounting from the vehicle. Even then, the injury must be caused by violent, accidental, external and visible means.[49]

Secondly it only covers 6 kinds of injury (including death); namely:

1) death
2) loss of sight of both eyes
3) loss of both hands or both feet or one hand together with one foot
4) loss of one hand or one foot together with loss of sight of one eye
5) loss of sight of one eye
6) loss of one hand or one foot

Thus, in simple language it means that the motor insurer will pay only for death or a severe type of mutilation or severance involving eyes, hands and feet only. Even then, the amounts to be paid are trivial. For the first 4 types of injury enumerated above the payment will usually be $10,000-00 and $5,000-00 for the last two. Insurance

49. This phrase will also be found in personal accident policies. It will be explained more fully in dealing with personal accident insurance in a later Chapter of this book.

companies justify the scope of injury and the scale of compensation on the ground that it is only a motor policy and not a personal accident policy.

While the above view is understandable there seems to be no logic in not paying for injuries which may be more severe or serious than some of those mentioned above. For example, a person losing one hand and one foot will get $10,000-00, but a person who is completely paralysed as the result of a motor accident and is in a far worse position will get nothing. It is unfortunate that these things are never explained to the insured. In fact even educated persons do not understand these niceties of interpretation, and there have been cases where some of them were completely taken aback to be told that they would not be paid a cent because the injuries they received as a result of the accident did not come within one of the 6 categories mentioned above.

ARBITRATION

Lastly, one might point out that one of the conditions in a motor policy usually states that "All differences arising out of this policy" shall be referred to arbitration. The words "All differences" will include differences as to liability as well as to quantum. Thus, in a motor policy, the insured has no choice but to go to arbitration. He can of course resort to the courts at a later stage after the award is made. Insurance companies are usually reluctant to waive the arbitration clause so that they may be saved bad publicity in the sense that court cases attract more publicity. This may lead to unfairness as the insured will be dragged into an arbitration which may even be more costly than going to court;[50] and also will have to get involved in further proceedings in court once the award is passed if either party is dissatisfied with the award.

Finally, the limitation period for arbitration should be carefully studied. Most policies will state that the arbitration is to take place within 12 months.

50. Especially where the claim can be fought out in a Subordinate Court.

CHAPTER VII

FIRE INSURANCE

A. INTRODUCTION

Fire Insurance is becoming increasingly popular in Malaysia because of the growing number of high rise buildings as well the growing number of luxury and semi-luxury residential buildings whose owners have spent almost a lifetime in saving for purchasing them, and are acutely aware of the consequences of a fire loss.

Unlike England, and like Singapore, there are no laws which require compulsory fire insurance for certain types of building. However, the Government is not unaware of fire hazards and modern legislation relating to buildings often contain provisions as to such hazards. A good example is the Street, Drainage and Building Act, 1974. Section 78 of that Act provides for the removal of roofs and walls made of grass, leaves, mats, attaps and other combustible materials, if so required after 90 days notice.[1]

B. NON DISCLOSURE AND MISREPRESENTATION

THE PROPOSAL FORM

The contents and the number of the questions contained in a proposal form differ from company to company. However, they are all similar in that the main questions directed are towards the description of the premises and the existence of fire hazards, if any.

CONSTRUCTION CLASSIFICATIONS

Fire insurance companies have construction classifications on which they base their premiums or "tariff". For example, a building made fully of brick and a building built partly of brick and wood would come under different classes and will normally attract different premium rates. Similarly buildings containing machinery may attract higher premium rates. The insuring public should bear this in mind as any mis-description of the premises will become a misrepre-

1. *Malaysia Acts*, (Act 133). Part V.

sentation of a material fact if it causes the insurer to place it in a different class which attracts less premium.

CONSTRUCTION OF WALLS AND ROOFS

Questions with regard to the materials used for walls and roofs will be seen in a fire proposal form. The reasons for such a question are of course obvious. An interesting case with regard to walls is that of *Dawsons Bank Ltd* v *Vulcan Insurance Co Ltd*[2] decided by the Privy Council. The insured in that case were merchants in a town in Burma and described the building as:

> ". . . . Said buildings are constructed of brick walls and cement flooring in the ground storey, timber walls and flooring in the upper storey with shingled roof. Used as retail shop for hazardous and non-hazardous goods in the ground floor and above dwellings."

The premises were destroyed by fire and the insurance company denied liability as it was found that while the back wall of the premises were undoubtedly made of brick, the front wall was undoubtedly built of timber. The side walls were partly of brick and partly of timber. The Privy Council held that there was a material misdescription of premises as the insurance company would have classed the building under Class III instead of Class II, and a higher premium would then have been charged.

The question of roofing material came up in the old English case of *Re Universal Non-Tariff Fire Insurance Co*[3] where the insurance company denied liability as portions of the roof consisted of tarred felt. However, the insurance company was held liable as the misdescription was not a material one. Nonetheless, it can easily be seen that misdescription of the roof may amount to a material misrepresentation in many cases.

Fire proposal forms often contain a question as to whether there are any adjoining premises. As many forms also contain a sketch plan at the back, the insured is supposed to show the building and the adjoining buildings in that plan. A Malaysian case involving the non-disclosure of adjoining premises is that of *Wong Lang Hung* v *National Employees' Mutual General Insurance Association Ltd.*[4] In that case, one of the questions in the proposal form was as follows:

> "8. Are the premises attached to other buildings? If so state construction and occupation of adjoining buildings."

2. (1934) 50 L.L. Rep. 129. P.C.
3. (1875) 44 L.J. Ch. 761.
4. [1972] 2 M.L.J. 191. (High Court at Sibu)

The answer to that question was a simple "No". The insured was also a simple uneducated woman. The agent filled in the answers and it seemed that the sketch plan was drawn by someone else. However, as both the answer to the question as well as the sketch plan were inaccurate, the learned judge apparently took the view that there was a material misdescription.[5]

NON-DISCLOSURE OF MACHINERY

The proposal form often contains a question as to what appliances for manufacturing are used and if so the nature of the same is to be stated. This is probably because some appliances or machinery may create a fire hazard directly or indirectly. If this is asked, then it must be answered, for if there is the usual basis clause in the form, an inaccurate answer will entitle the insurance company to repudiate liability. It is however not clear whether the basis clause will afford a complete answer to the insurer in denying liability in Malaysia in view of the somewhat unsatisfactory decision of the Federal Court in *Abu Bakar* v *Oriental Fire and General Insurance Co Ltd.*[6] The proposal form in that case contained the following questions:

> "For what purposes are the premises occupied? (e.g. dwelling, shop, godown etc). If variously tenanted, please state the trade or business carried therein."

The following answer was given:

> "Sundry shop downstairs, dwelling first floor".

The form also contained a list of property to be insured, and there was a reference to "Machinery and Utensils". The space next to those words was marked with a dash, thereby indicating that there was no machinery and utensils to be insured.

Fire broke out in the front part of the ground floor causing considerable damage to goods in it. It then appeared after the fire that there were 4 electrically operated grinding mills at the back of the ground floor for grinding curry powder, coffee etc, and there was a signboard in front of the shop indicating that these grinding mills were available for the use of customers. The insurance company denied liability on the ground of misdescription of premises thereby meaning that the 4 grinding mills had not been disclosed. The President of the Sessions Court found that there was a misdescription and lack of good faith – *uberrimae fides*.

5. It should however be noted that the insurance company successfully denied liability because of other misrepresentations as well.
6. [1974] 1 M.L.J. 149.

In the Federal Court, Azmi L.P. and H.S. Ong F.J. took the view that the test was whether the non-disclosure of the grinding mills amounted to non-disclosure of a material fact. It was doubted whether such non-disclosure amounted to that. In any event, even if material, it was one which the proposer did not and could not in the particular circumstances have been expected to know. Or, if its materiality could not have been apparent to the reasonable man, his failure to disclose should not be regarded as a breach of duty.

Gill F.J., in a dissenting judgment, took a different view. He relied on the legal effect of the basis clause. He considered the existence of the grinding mills as a material fact. But in any event, because of the basis clause, he felt that the question of materiality did not arise.

HAZARDOUS GOODS AND INFLAMMABLE GOODS

A proposal form also contains questions about the contents of the premises; and even if it is not directly asked, it is clear that the insurance company is worried about the existence of hazardous goods on the premises. In *Wong Lang Hung's case (supra)*[7] one of the questions asked was:

> "6. Are any hazardous trades carried on or hazardous goods stored? If so, give details."

The answer was "No".

It transpired in evidence that one of the tenants of the insured had kept a 4 gallon kerosene tin in her house. This was because he had to use a pump and it had to be operated by petrol. He therefore kept a 4 gallon army-type container and stored the benzine which was placed in one of the rooms of the house. The learned judge found *inter alia* that the answer to question 6 above was incorrect and they related to material facts. The insurers were allowed to repudiate liability on other grounds also.

The English case of *Hales* v *Reliance Fire and Accident Insurance Corporation*[8] may also be mentioned. In that case the proposal form contained the question "Are any inflammable oils or goods used or kept in the premises". The insured replied "lighter fuel". In fact, after the policy he stored some fireworks in the premises. A fire started in the box where they were kept and as a result of the explosion which followed, the shop and property was also damaged. McNair J.

7. Cited above in connection with the question of adjoining premises.
8. [1960] 2 Lloyds Rep 391, at 396.

agreed with the contention that the expression "inflammable oils or goods" did include fireworks.

GENERAL OBSERVATIONS

In conclusion it may be emphasised that the questions in a proposal form should be carefully studied and answered. Any circumstances connected with the premises which appear to effect the risk would be material facts.

Thus, it has been held in certain cases that even the previous convictions of the insured may be a relevant factor which should be disclosed. In *March Cabaret Club & Casino Ltd* v *The London Assurance*[9] one of the grounds under which the insurance company denied liability after a fire occurred was that the main director of the Company (the other director being his wife) had not disclosed that he had been convicted of handling stolen property and this was non-disclosure of a material fact. Mr. Justice May of the English High Court agreed that non-disclosure of the conviction was indeed non-disclosure of a material fact.

The recent case of *Woolcott* v *Excess Insurance Co Ltd*[10] also reinforces the view that a person's previous convictions may amount to a material non-disclosure of facts. That was also a case of fire insurance. The insurance company repudiated liability after there was a fire on the ground that the plaintiff did not disclose his criminal record in his proposal for insurance. The plaintiff admitted that he had been convicted for robbery, but contended that that fact was known to the insurance brokers. The defendants therefore issued a third party notice against the brokers and they were added as a party. It was held by Caulfield J. that the plaintiff's criminal past affected the risk and ought to have been disclosed by him. It was however held that on the facts the knowledge of the brokers could be imputed to the defendants. The defendants were therefore not allowed to deny liability, but were held entitled to be indemnified by the brokers.[11]

C. NATURE OF FIRE INSURANCE

PRINCIPLE OF INDEMNITY

A contract of fire insurance is a contract to indemnify the in-

9. [1975] 1 Lloyds Rep 169.
10. [1978] 1 Lloyds Rep 633.
11. There are of course other aspects of non-disclosure and mistepresentation. Some of them will be dealt with in dealing with the terms and conditions in a fire policy. The reader is invited to read standard English text books on the subject for further information.

sured if there is a loss by fire. Thus, there must be an insurable interest at the time of loss by fire. It is generally agreed that the English Life Assurance Act, 1774 which has been "received" into Malaysian law is also applicable to fire insurance. Under that Act, there must be an insurable interest. It is also agreed that unlike life insurance, the insurable interest must exist not at the time of the insurance but at the time of the loss.[12]

In strict law, when a person is indemnified, it means that he gets back for the loss he has actually suffered. However, this may not be true where a fire policy is a valued policy. One may therefore briefly consider what these policies are.

VALUED POLICIES

Where a policy is a valued policy, it means that the insurance company and the insured have agreed upon a certain value with regard to the property insured. Furthermore, that agreed value conclusively establishes the sum which is to be paid for the purposes of indemnity. It should be noted that the mere fact that the value is stated in the policy and premium is paid on that amount does not make the policy a valued policy. There should be express language as to the conclusive nature of the value stated in the policy.

While problems may not arise in the case of a total loss with regard to a valued policy, it may arise where there is a partial loss. In such a case, under the principle of indemnity, the insurance company would be entitled to reinstate the property to its original state irrespective of the valuation. However, where the property is not reinstated it seems that the insurance company would be bound by the agreed value.

A well known English case in point is that of *Elcock* v *Thompson*[13] where a mansion was insured for loss by fire. The agreed value was £106,850-00. Subsequently, part of the building was damaged by fire. The value of the mansion before the fire was actually £18,000-00. After the fire, its value was £12,600. The property was not reinstated and there was a dispute as to how much the insurance company should pay. Morris J. (as he then was) stated *inter alia:*

> ". . . . . It would be strange and unnatural if an agreed value were to apply only in the event of complete destruction and not in the event of partial destruction."

12. The reader may refer back to Chapter III of this book where the question of insurable interest has been dealt with more fully.
13. [1949] 2 K.B. 755.

He also felt that the depreciation could not be determined by the proportion to the whole structure of the part burnt out; which was 21%. It was accordingly held that the insured was entitled to the percentage of actual depreciation arising from the fire; which was 30%. Thus the insurers had to pay £32,055-00.

MEANING OF FIRE

It has been noted that a fire policy is meant to indemnify loss by fire. The word "fire" in a policy is apparently used in its popular meaning. It seems to be settled law that to be a "fire" within the meaning of a fire policy, there must be actual *ignition.* In view of the complications arising out of fire by explosion and other matters, the policy itself usually makes it clear as to what type of fire payment will not be made. For example, most policies will state that no payment will be made for a fire arising out of spontaneous combustion, heating, fermentation or by explosion, though it will (in most cases) cover fire by lightning.

One of the older cases relating to the above point is that of *Austin* v *Drew.*[14] In that case due to the negligence of a servant in not opening a register, smoke and heat from a fire which was being used to refine sugar damaged some sugar which was being refined. The said fire was insured under a policy covering loss by "fire". It was held that the loss did not fall within the policy as there had been no ignition of the sugar.

At the same time, if there is ignition, then even if the property is burnt by a fire which was never intended to burn it, the insurance company will still have to pay for it is a "fire" within the meaning of the policy. In *Harris* v *Poland*[15] a woman had insured her jewellery under a comprehensive policy including loss by fire. She had hidden the jewellery in the grate of the sitting room. She then forgot about the jewellery and lit the fire. The jewellery was damaged, and it was contended by the insurers that there was no loss by "fire" since the damage had been caused by a fire which was intentionally lit and it was in a place where the fire was intended to be; i.e. in the grate. It was held by the English High Court that there was a "fire". Atkinson J. in the course of his judgment stated:

> "In my judgment, the risks against which the plaintiff is insured include the risk of insured property coming unintentionally in contact with fire and

14. (1815) 4 Camp 350.
15. [1941] 1 K.B. 462.

thereby being destroyed or damaged, and it matters not whether the fire comes to the insured property or the insured property comes to the fire". (p. 208).

DOCTRINE OF PROXIMATE CAUSE

Another basic principle to be remembered in connection with fire insurance is that to be a loss by "fire" it should be caused by the direct action of fire upon the subject matter of the insurance. In such a case, one is applying the doctrine of "proximate cause".

In general, where the loss is the necessary consequence of the fire, it is regarded as a loss by fire even though fire may not have touched the property damaged. Thus, if a fire takes place in a shop for sundry goods, the insurance company will pay even for the goods which may not be actually burnt, but nonetheless is affected by the smoke or heat and thereby causing damage. Similarly, where loss is caused because parts of a building collapses as a structural weakness was the consequence of the fire, the insurance company will pay for such loss.

However, it should be noted that this doctrine of proximate cause may be limited or circumscribed by the terms of the policy. For example, if a house is blown up by the fire brigade to stop the fire from spreading, then the insurance company should pay for such loss if there is a fire policy. However, there may be a clause in the policy which excludes such loss. Similarly, where looting takes place in respect of a building which is being burnt by fire, then there should be payment by the insurance company as the loss is directly due to the fire. Here again, there will probably be a clause limiting or excluding such payment.

D. POLICY TERMS AND CONDITIONS

FIRE AND/OR LIGHTNING

Most fire policies cover loss or damage by fire and/or lightning to the property described in the Schedule to the policy. The nature of fire has been explained. Lightning, requires no explanation.

MATERIAL MISDESCRIPTION AND MISREPRESENTATION

This aspect has also been dealt with in dealing with the answers to a proposal form. We have seen that misdescriptions as to property

can be fatal to a fire claim. It should further be noted that fire policies also include a condition against "misrepresentation" which may or may not overlap with "misdescription". At the same time the condition as to "misrepresentation" may also overlap with other conditions. For example, one of the conditions in a fire policy is that the insured shall give notice to the company of any insurance or insurances already effected, or which may subsequently be effected.

One serious misrepresentation would be where the insured does not disclose that there have been previous losses by fire. A leading case on this point is that of *Condogianis* v *Guardian Assurance Co Ltd*[16] decided by the Privy Council. The insured had stated that he had made a claim against Ocean Insurance Co Ltd. That was true. He however failed to state that he had made another claim against another insurance company in respect of a burning car. The Judicial Committee held that although the answer was literally true, it was nevertheless false when taken in relation to other relevant facts which were not stated.

It is also important to disclose that there have been other insurers (if any) and also whether any company has refused to insure the insured, or has refused to renew any policy. In *Locker and Woolf Ltd* v *Western Insurance Co Ltd*[17] the insured had answered "No" to a question in a fire proposal form asking whether any insurance had been declined by any other company. In fact, while the abovenamed persons had been trading in partnership (before they floated a company) an insurance company had declined insurance of their motor vehicles. In due course a fire took place and the insurer's repudiated liability under the fire policy on grounds of non-disclosure of a material fact. The Court of Appeal held that the insurers were entitled to do so.

The later case of *Arterial Caravans Ltd* v *Yorkshire Insurance Ltd*[18] again highlights this aspect of non-disclosure. In that case, the plaintiff, Arterial Caravans Ltd was formed in 1955, and its sole director was one Mr. Sutherland. It was a "one-man company" and became dormant about 1957. Another company of which Mr. Sutherland was sole director was incorporated in 1956, and was known as Sutherland (Tenulite) Ltd. This company was also a "one-man company". It had a fire policy regarding its premises and in 1965 a serious fire occurred. The insurers had paid a claim of £52,000-00. The

16. [1921] 2 A.C. 125 P.C.
17. (1936) 54 Ll. L.Rep at p. 374
18. [1973] 1. Lloyds Rep. 169.

company went into voluntary liquidation in 1968. In the same year, Mr. Sutherland had re-activated the dormant plaintiff company. He then insured the premises which were the same premises occupied by Sutherland (Tenulite) Ltd. The previous fire loss suffered by that company was not disclosed. Thereafter fire damaged the premises of the plaintiff company. The insurers repudiated liability on the ground that the previous loss by fire suffered by Sutherland (Tenulite) Ltd on the same premises had not been disclosed and that that fact was a material fact. The insurers won their case. Mr. Justice Chapman stated as follows with regard to non-disclosure:

> ". . . . It is all the same business all the way through the history, although at one stage it was run by an individual, it was then run by one company, it was then run by another company – starting again, it is true, after a disastrous liquidation. It started again in a small way, but it was substantially the same business. It seems to me it was highly material that the insurers asked to cover this business against fire should be told that substantially the same business, its predecessor in the company history, had had a very serious and substantial fire some three years before. That is the first issue which arises in this case."

The same question arose in the recent case of *Marene* v *Greater Pacific Insurance*.[19] The Plaintiffs had insured their premises in Melbourne against loss by fire. A fire occurred a day after the cover note was issued. The defendants repudiated liability on the ground that the fact that the business had four very serious and substantial fires had not been disclosed. The plaintiffs argued that the business which suffered the earlier fires was not the same as the business which suffered the fire in question, as there had been a change in management and the labour force was entirely different. Moreover, the business had moved to Melbourne and therefore the fire occurred at different premises. It was held both by the Supreme Court of New South Wales as well as by the Privy Council that the fires were material facts which ought to have been disclosed.

LOSSES NOT COVERED

Every fire policy enumerates certain types of losses that would not be covered. In most policies one would find that it does not cover the following:

a) Loss by theft during or after the occurrence of a fire.
b) Loss or damage to property occasioned by its own fermentation, natural heating or spontaneous combustion, or by its

19. [1976] 2 Lloyds Rep 631.

undergoing any heating or drying process.

c) Loss or damage occasioned by or through or in consequence of

   1) the burning of property by order of any public authority, and
   2) subterranean fire.

Loss or damage caused by nuclear materials or radioactivity is also not covered, but is hardly relevant to an ordinary Malaysian situation.

Furthermore the following losses would also be generally excluded:

a) Earthquake, volcanic eruption or other convulsion of nature.
b) Typhoon, hurricane, tornado, cyclone or other atmospheric disturbance.
c) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war.
d) Mutiny, riot, military or popular rising, insurrection, rebellion, revolution, military or usurped power, martial law or state of seige or any of the events of causes which determine the proclamation or maintenance of martial law or state of seige.

EXPLOSION

The insurance policy would not cover situations where explosives explode and cause a fire. However more difficult situations would arise where there is an explosion not caused by an explosive. For example, where there is a fire in a petrol station and the petrol explodes and causes further fire damage. In such a case there may not be payment for the fire loss suffered in consequence of the explosion, but fire loss not connected with the explosion would be paid. However, fire caused by an explosion of gas used for illuminating or domestic purposes would be paid. The insured is advised to read the terms of his policy carefully with regard to explosions as the wording may differ from policy to policy.

An interesting case in this regard is that of *In Re an Arbitration between Hooley Hill Rubber and Chemical Company Ltd etc.*[20] Manufacturers of explosives had insured their buildings for fire loss and one of the clauses in the policy was as follows:

20. [1920] 1 K.B. 257.

> "This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such fire was not caused directly or indirectly thereby or was not the result thereof."

Thereafter a fire broke out and after much damage had been done a quantity of TNT (dynamite) which had been exposed to the heat exploded and inflicted further damage. It was held by Bailhache J. and the English Court of Appeal that as to the damage caused by the explosion the insurers were exempted from liability, although the explosion occurred in the course of a fire.

With regard to explosion by gas, it has been seen that the policy usually makes it clear by referring to gas used for "illuminating or domestic purposes". Thus gas used for lighting, or gas used for cooking, would come under the policy.

ALTERATION OF RISK

Most fire policies would state that the risk ceases if the following events occur unless the sanction of the company is obtained by an endorsement on the policy. They are:

a) If the trade or manufacture be altered, or the nature of the occupation of the building or other circumstances be changed.
b) If the building becomes unoccupied for a period of more than 30 days.
c) If the property insured be removed to some other place.
d) If the interest in the property passes other than by will or operation of law.

It will be seen that item (a) above is perhaps the most important for businessmen. A recent case on this point is that of *Farnham* v *Royal Insurance*[21] where farm buildings had been insured. The insurance was originally on a farm tariff, but following a survey, the defendant insurers re-classified the risk to that of carriers and transit ware-housing. The new rate was accepted by the brokers acting for the plaintiff. In fact, the plaintiffs had made an agreement to store metal cargo containers on the land, and were allowing repairs on the containers to be carried out on their premises. A fire occurred in one of the barns and it and its contents were damaged. The defendant insurers repudiated liability on the ground that there was a breach of warranty as there had been an alteration in the risk. It was held by

21. [1976] 2 Lloyds Rep 437.

Ackner J. of the English High Court that there had been a breach of warranty as alleged.

Item (b) is not un-important. Thus householders going on long holidays should inform the insurance company. Also an old house may be vacant for a long period for purposes of renovation. In such cases, thieves or other trespassers (such as drug addicts) may use the premises and a fire may be caused.

Item (c) is significant because the removal of the insured property may signal an intention to cause fire by arson. It is not unknown for businessmen to remove their wares before the building is burnt by fire. There would of course be the usual precaution to put some non-valuable items to show that something was indeed burnt.

Item (d) is apparently put in as the fire policy is by its very nature a personal contract. Insurers would like to know if there is a change in ownership by sale, gift etc.

E. SOME LEGAL ASPECTS OF FIRE LOSS

CLAIM FORM AND PROOF OF LOSS

Most fire policies contain a clause as to when and how claims are to be made. Briefly put, the claim should be made within 15 days. As insurance companies have their own forms, the claimant usually gets a form from the agent or the company and fills it in. In practice details will not be given in the claim form as the claimant is illiterate or half-educated. Thus the adjusters acting for the fire insurance company will ask for details.

The insuring public can suffer a lot from the malpractice of adjusters. It is quite possible for adjusters to expect some remuneration from the claimant although this is quite improper. Unless honest and reliable adjusters are employed fire claims will remain an unsatisfactory subject as it is today, and in the end it is the reputation of the insurers that will suffer.

The insurance company naturally expects full particulars of loss. If the insured is pushed on to an adjuster, then it is the adjuster's business to get full particulars. This is what is termed "proof of loss". In many instances, vouchers, invoices, and other proofs as to loss is asked for, but a good deal of them may have been burnt in the fire. Moreover, it is not fair to expect Malaysian insured or other Asian insured to file and keep vouchers, invoices etc. It is not in their nature. It may be kept for a short period but not for a number of years. Furthermore, certain businesses by their nature do not involve vouchers and invoices. For example, a person running a small sundry

store or a grocery may well acquire goods for resale without there being any vouchers or invoices. In such cases insurance companies and adjusters must understand that there must be other ways of proof and that the law does not expect the impossible (*lex cogit non ad impossibilia*). In certain circumstances, the most that one can do would be to furnish a statutory declaration stating the particulars of loss.

A relevant decision with regards to proof of loss is the Privy Council decision of *Hiddle* v *National Fire and Marine Insurance Co of New Zealand.*[22] In that case almost the entire stock in trade of the insured was destroyed. The stock book and the stock sheets were also destroyed by the fire. The insured sent a statutory declaration that they suffered a loss amounting to £2,250 as per a detailed statement which set out the main items only. Both the Supreme Court of New South Wales and the Privy Council held that the plaintiff should be non-suited. The Privy Council apparently took the view that what was forwarded was not an "account" at all.

The above decision brings out the fact that it is important for the insured to give as much detail as possible in claiming for loss by fire.

FRAUDULENT CLAIMS

In fairness to fire insurance companies, it is not unusual for the insured to put in a fraudulent claim after a loss by fire is incurred. However, fraudulent claims should be distinguished from "exaggerated claims". A good example of the latter is illustrated by the well known case of *Norton* v *Royal Fire and Life Assurance Company.*[23] In that case a grocer had insured his stock-in-trade and furniture. He made a claim for £274 and reduced it to £187. Ultimately, legal proceedings had to be filed and the insured admitted that he had put in an exaggerated claim as his friends had advised him to put a little on to everything. The learned Judge, in directing the jury stated:

> ". . . . . That is not right. But whether it is fraudulent in the sense of intending to defraud may appear to you to deserve consideration. It is one thing to do it with intent to get all out of the company; no doubt it is wrong to put forward an exaggerated claim; but it is a question whether it is a fraudulent claim in the sense of endeavouring to get and knowingly getting far beyond the value. That would be a distinct fraud."

The jury found for the plaintiff and gave him his revised claim for £187.

22. [1896] A.C. 372. P.C.

23. (1885) 1. T.L.R. 460. Q.B.

A good example of a fraudulent claim is to be found in the local case of *Teh Say Cheng* v *North British & Mercantile Insurance Co Ltd.* [24] The Plaintiff had insured against fire with the defendant for $80,000-00. Thereafter a fire broke out and the plaintiff claimed a loss of $67,003-42, although he could prove a loss of only $5,993-75. It was held *inter alia* that the plaintiff having deliberately made an excessive claim, this was a fraud on the defendants and was entitled to recover nothing under the policy.

The above decision is clearly correct for most policies contain an express condition that the company does not have to pay in the case of fraudulent claims.

LOSS BY ARSON

Many fraudulent claims may be made as a result of arson i.e. by deliberate burning. Insurance companies would be in a difficult position in such cases as they may not be able to prove arson. In such a case they may be wise not to allege it as it might open them to a claim for libel, although it is arguable that any communication in this regard may be covered by qualified privilege.

Arson has indeed become a major bugbear for fire insurers and in many countries arson investigation is becoming more and more sophisticated. It is to be hoped that corresponding advances will be made in Malaysia and Singapore with regard to investigations for arson. [25]

Again, there may be evidence of arson, but it may not be due to the wilful act of the insured, or done with the connivance of the insured. This is because some fires may be due to pyromaniacs and "fire-bugs". The former have a compulsive urge and usually derive sexual satisfaction from the results of their actions, whereas the latter merely enjoy watching the resultant activity and confusion. In addition to this, of course, they may be malicious burning; where, for example, the owner of one business decides to burn down another flourishing but competing business.

In cases where arson by the insured is suspected, there might be corroborative evidence such as his financial position, or the existence of previous fires which have not been disclosed. In such cases, it may be less "messy" to repudiate liability on grounds of fraud or non-dis-

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24. (1921) F.M.S.L.R. 248.
25. With regard to modern methods of investigation. See "Arson Investigation" by K. Gugan; Vol 68 (1971), *Journal of the Chartered Insurance Institute.*

closure. In any event, the same objective is achieved as far as the insurer is concerned.

REINSTATEMENT OR REPLACEMENT

When there is a loss by fire, an insurance company is usually given an option under the policy to reinstate or replace the property damaged. However, in no case is it bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of the loss or damage, nor more than the sum insured thereon.

Reinstatement may often be done in the case of a partial loss. Restoration in many cases means that the property destroyed will have to be replaced by new property, and by the replacement the insured may be put in a better position than before the fire. A good example is where old machinery is replaced by new machinery. Therefore, where the insured is paid an amount representing the cost of reinstatement, he will in such cases be more than fully indemnified. In such cases some allowance will have to be made for there to be full indemnity only. In *Ewer* v *National Employers' Mutual General Insurance Association Ltd*[26] the insured claimed for the price of new tools. MacKinnon J. stated:

> "These things were not new; they were second hand, but according to (the insured) they were efficient and he could use them in his business. If the law were otherwise, that might be very reasonable, but all he can recover is the reasonable value of the second-hand goods that have been destroyed."

However it should be noted that the question of measuring relative values of old and new property may not be an easy one. There may be situations where no allowance can be made because the position of the insured is in no way improved by the reinstatement.

The recent case of *Leppard* v *Excess Insurance Co Ltd*[27] shows some of the difficulties in assessing the cost of reinstatement. In that case the plaintiff had insured a cottage for £14,000 under a fire policy issued by the defendants. The cottage was a total loss by fire on October, 25, 1975. The Plaintiff claimed £8,694 on the basis that this sum represented the cost of reinstatement after taking betterment into account. The insurance company however argued that the actual loss of the insured was the market value of the property at the time of the fire i.e. the agreed value of £3,000, which was the reali-

26. [1937] 2 All E.R. 193.
27. *New Law Journal, 1979*; 443.

stic value of £4,500, minus the site value of £1,500. The Court of Appeal agreed with the insurance company that the insured was entitled to £3,000 only, for if he were to receive £8,694-00, he would be receiving more than an indemnity. He would be having a bonus and the insurance policy did not provide for him to have such a bonus. The policy was an indemnity policy. It entitled him to the amount of his loss and nothing more.

ARBITRATION

A clause in the insurance policy usually stipulates for arbitration proceedings. However, arbitration is required only if there are differences as to the "amount" of loss or damage. Thus, it was held in the local case of *Safety Insurance Co Sdn Bhd* v *Chow Soon Tat* [28] that if the insurer has denied liability throughout, the arbitration clause does not apply. It should however be noted that where the arbitration clause applies, arbitration proceedings must be pending within 12 months of the happening of the event. In other words, the insured has to worry about the time limit even if there is an arbitration clause. Also, for arbitration to be pending, it seems that parties must actually have taken steps towards the hearing of the arbitration i.e. the arbitrator should have seisin of the case and at least the "Points of Claim" should have been filed.[29]

In Malaysia, it is now possible to extend the time for arbitration in deserving cases. This is possible under s. 28 of the Arbitration Act (Revised 1972). The authority for this proposition is also the case of *Safety Insurance Co Sdn Bhd* (Supra).

F. CONSEQUENTIAL FIRE LOSS POLICY

IMPORTANCE OF SUCH POLICIES

In Singapore, insurance for consequential fire loss is not popular. This is because most people feel that even having a fire policy is unnecessary.

In any event, having an extra consequential fire loss policy is regarded as a luxury. It is however, important for businessmen to understand that without such a policy they may be in serious trouble if fire partially or totally destroys their business premises. For example, if it is a factory, then it will take considerable time to reconstitute the factory. Even if it is a restaurant it will take some time to

28. [1975] 1 M.L.J. 193.
29. There seems to be no direct authority on this point.

replace the burnt chairs and tables and to re-do the plastering of the walls etc. Therefore in Western Countries such as U.K. such a policy has become popular as it is understood that it can save a businessman from possible bankruptcy.

SCOPE OF COVER

The consequential loss which is contemplated by the policy can be put under four headings –

(a) Loss of Profit
(b) Standing charges
(c) Increased cost of working
(d) Increased cost of reinstatement

In considering these items other terms must also be understood. For example, loss of profit under the policy is usually loss of gross profit due to (a) reduction in turnover and (b) increase in costs of working. It is therefore important to understand what "turnover" is.

LOSS OF PROFIT

In some policies the indemnity is on gross profit. In some policies it may be upon net profit. Therefore the insured has to study what he gets for loss of profit under a particular policy.

The loss of profit is usually based on reduction in turnover and increase in cost of working. In respect of reduction in turnover it is calculated as a sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall, in consequence of the damage, fall short to the Standard Turnover.

INCREASED COST OF WORKING

Increased cost of working is calculated as an additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which but for that expenditure would have taken place during the Indemnity Period in consequence of the damage, but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided.

It will therefore be noted that the increase in cost of working will also include rent of temporary premises and the extra costs of labour or materials required for the purposes of the business.

STANDING CHARGES

Standing charges may or may not be defined in the policy. Under this head it will cover such items of expenditure which continues to be payable in respect of the fire and consequential interruption of business. Thus it will include the usual taxes, insurance premiums, salaries of employees who cannot be easily retrenched, directors' fees, interest on loans, etc.

This head contemplates losses attributable to interruption of business. Thus, if the fire does not interrupt the business then nothing will be paid. Also, if the business was running at a loss before the fire then also nothing would be paid.

INCREASE COST OF REINSTATEMENT

Some policies will contain reimbursement for loss due to what is called increase cost of reinstatement. This is because under present trade conditions the cost of reinstatement may have increased because the cost of materials and the cost of labour have increased after the fire. Furthermore, when a certain type of building catches fire, it may not be possible to reinstate the building as it originally stood, because it is now against the existing building laws or by-laws. The reinstatement may involve restrictions as to how it is to be built. In such a case the cost is bound to increase. If the policy covers this head then the insured will get the increased cost of reinstatement.

It must however be pointed out again that the cover for consequential loss may differ from policy to policy and that the insured should consult or go through an insurance broker so that he will understand what he is getting for the premium which he is paying.

CHAPTER VIII

EMPLOYERS' LIABILITY INSURANCE

A. GENERAL PRINCIPLES OF EMPLOYERS' LIABILITY

INTRODUCTION

Most employers are aware that they can be liable for any loss or injury suffered by their workmen during the course of their employment. They may also be aware that the liability may be under the Workmen's Compensation Act or for common law liability for negligence. But beyond that, knowledge of the scope of their liability becomes blurred and hazy.

Few realise for example that they can also be liable in common law for vicarious liability where one of their workmen has inflicted or caused damage or injury to another workmen, or where damage or injury is caused to members of the public who may have suffered injury on the work or shop premises or in the factory premises. Moreover few would realise the extent and nature of liability which is known as "breach of statutory duty". The ignorance is compounded by the fact that many employers may not even know where the dozens or perhaps hundreds of regulations that cover their type of work may be found. This is because some of them may not even be found in the Acts of Parliament (and amendments to them) but in the host of rules and regulations issued under some Act of Parliament and which unfortunately for them has the force of law, but at the same time may not be easily available or easily understandable. It is therefore important that an employer should be covered fully by insurance for the various types of liability which may befall on him.

TYPES OF LIABILITY

The main liability of an employer in respect of his workmen or members of the public may be of four kinds:

(a) liability under the Workmen's Compensation Act.
(b) liability for common law negligence.
(c) liability for breach of statutory duty.
(d) liability as an occupier of the premises.

LIABILITY UNDER THE WORKMEN'S COMPENSATION ACT

Nature & Scope

Malaysia has fairly adequate legislation for Workmen's Compensation. The relevant legislation for West Malaysia is F.M. Ordinance No. 85/1952 (Reprint No 12/1968). That for Sabah is Ordinance No. 14/1955 (Reprinted 1966) and for Sarawak (Cap 80) (Reprinted 1966).

These legislation cover compensation for death as well as for injury. With regard to injury, it may be total disablement or permanent partial disablement or temporary partial disablement. The F.M. Ordinance defines partial disablement and total disablement as follows:

> ". . . . "partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in his disablement and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was able to undertake at the time of the accident:
>
> Provided that every injury specified in the First Schedule shall be deemed to result in permanent partial disablement;
>
> . . . . "total disablement" means such disablement whether of a temporary or permanent nature as disables a workman for all work which he was capable of undertaking at the time of the accident resulting in such disablement:
>
> Provided that permanent total disablement shall be deemed to result from the permanent total loss of sight, or from any combination of injuries resulting from a single accident and specified in the First Schedule where the aggregate of the losses of earning capacity specified in the said Schedule against these injuries amounts to or exceeds one hundred per centum."

Permanent partial disablement is further explained in the First Schedule to the Ordinance and is as follows:

THE FIRST SCHEDULE
(Sections 3 and 8)

INJURIES DEEMED TO RESULT IN PERMANENT PARTIAL DISABLEMENT

Injury	Minimum percentage of loss of earning capacity
Loss of an arm above or at the elbow	70
Loss of an arm below the elbow	60

Injury	Minimum percentage of loss of earning capacity
Loss of a leg above or at the knee	60
Loss of a leg below the knee	50
Permanent total loss of hearing	50
Permanent total loss of hearing in one ear	20
Loss of sight of one eye	30
Loss of thumb	25
Loss of one phalanx of thumb	10
Loss of index finger	10
Loss of any finger other than index finger	5
Loss of great toe	10
Loss of all toes of one foot	20

Note – Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent at least of the loss of that limb or member.

Liability for Compensation

Under s. 4(1)(a) of the Ordinance an employer is liable for any personal injury to the workman arising out of and in the course of employment.

Section 4(1)(b)(c) & (d) further amplify the meaning of "arising out of and in the course of the employment". Thus, generally speaking, when the workman is travelling to and from work, that would fall under the above phrase. Similarly, accidents on the work premises in rescuing or protecting persons would also come under that phrase. It is also interesting to note that the Ordinance is meant to safeguard workers who may be lazy or indolent or careless or even those who may disobey orders to some extent. In other words, the negligence of the workman would not normally debar him from a claim under the Workmen's Compensation laws. Accordingly, section 4(1)(d) states as follows:

> "(d) An accident happening to a workman shall be deemed to arise out of and in the course of his employment notwithstanding that he was at the

time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if –

(i) the accident would have so arisen had such act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and

(ii) such act was done for the purposes of and in connection with employer's trade or business."

Compensation for occupational diseases

The Ordinance also gives compensation for what is called "occupational diseases" in certain circumstances. The occupations and the diseases are more clearly explained in the Second Schedule.[1]

Applicability to certain types of workmen only

The Act applies only to "workman" defined under the Act. The definition is as follows:

"2.(1) In this Ordinance, unless the context otherwise requires, the expression "workman", subject to the proviso to this sub-section, means any person who has, either before or after the commencement of this Ordinance, entered into or works under a contract of service or of apprenticeship with an employer, whether by way of manual labour or otherwise, whether the contract is expressed or implied or is oral or in writing, whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period."

Then, the Ordinance further lays down that certain types of persons would not be workmen. They include, *inter alia,* persons employed otherwise than by way of manual labour whose earnings exceed $400-00 per month; casual workers; domestic servants; members of the armed forces; civil servants; police officers, out-workers, and tributers.

Insurance

An important feature from the insurance angle is that employers can be made to insure their workmen. Also, in the case of bankruptcy, the workman has his remedies against the insurers.

Liability for workmen employed by contractors

As it often happens, some workmen may belong to contractors

1. While the F.M. Ordinance has been referred to above, it should be noted that the principles contained in the Sabah and Sarawak legislation is similar.

and may be injured on the worksite. In such cases, it is laid down that the "principal" shall be liable to pay to any workman as if that workman had been immediately employed by him. However, this does not prevent the workmen from recovering against the contractor instead of the principal.

Improvements in Workmen's Compensation Legislation

It may be noted here that in view of the changing times, improvements in the above legislation is required. In fact, Singapore has gone ahead of Malaysia in this connection. Considerable changes have been brought about in Singapore by the new Workmen's Compensation Act, 1975. The Singapore Act has speeded up the payment of compensation. Moreover, unlike the previous Act, the new Act ensures that the full amount of assessed compensation will be payable regardless of whether dependency is full or partial. The maximum compensation payable for death or disability has also been increased. Insurance is also made compulsory.

However, there are two features in both the Singapore and Malaysian workmen's compensation that may require change. The first feature is with regard to the coverage of the workmen. At present both sets of legislation cover only manual workers whatever their salary may be. Otherwise, it is limited to $400 and $750 in Malaysia and Singapore respectively. These figures may well require revision in view of inflation.

The other feature is that although under the present law an injured workman can claim compensation both under the Ordinance and under common law, he cannot claim common law damages once he has accepted compensation under the Workmen's Compensation Ordinance. In certain cases this may be due to ignorance, and especially in cases where damages under common law could be much higher, he should be given the chance to recover under common law as well, provided that what has been obtained can be deducted from the damages awarded. In practice certain matters will have to be further worked out as the insurance angle will come in. For example, he might have already been paid by an insurer whose liability exists only under workmen's compensation. In such a case the question will arise how the remainder of the damages will be satisfied.

Some Malaysian cases on Workmen's Compensation

There are of course quite a few cases relating to liability under the workmen's compensation legislation of Malaysia. A few interesting cases are referred to below.

Jacob Samuel Pillay v *Han Yang Plantations Ltd*[2]

That was a pre-war case under the Johore Workmen's Compensation Enactment and was heard in open Court by the Workmen's Compensation Commissioner. In that case a hospital dresser on a rubber estate was assaulted by an attendant employed in the hospital. As a result of the assault the dresser lost an eye. The dresser was in a position of authority over the attendant and prior to the assault had recommended his dismissal. There was no evidence of any previous assault upon a hospital dresser in the course of his employment, but there was some evidence of occasional disorderly behaviour on the estate by persons of the race to which the assailant belonged.

The question was whether the injuries received were the result of an "accident" arising "in the course of" and "out of" his employment. The learned Commissioner referred to a number of English cases and held that the injury received fell within the scope of the Enactment.

Kuppusamy v *Golden Hope Rubber Estates Ltd*[3]

The deceased was employed by the respondent company as a weeding labourer. She had returned to her house because she had brought the wrong tool. She did so without the permission of anyone and this was against the rules of the estate. At home she fell down and sustained injuries from which she died. The arbitrator held in favour of the children of the deceased who were claiming workmen's compensation. The High Court set aside the award. However, the Federal Court held that though she was doing something she was forbidden to do, it was for the purposes of and in connection with her employer's trade and business and therefore must be deemed to have arisen out of and in the course of her employment within the meaning of section 4 of the Workmen's Compensation Ordinance.

Palaniayee & Anor v *Toh Whye Teck Realty Ltd & Anor.*[4]

In this case a rubber tapper had been employed to assist a mandore in felling old or diseased trees. The mandore used for the purpose a mechanical chain saw. The tapper was killed by the fall of a tree which fell in his direction. The trial judge dismissed the claim. On Appeal, the Federal Court held that the mandore had not done

2. (1938) M.L.J. 67.
3. (1965) M.L.J. 178.
4. [1973] 2 M.L.J. 49.

all he should to see that the deceased was out of the danger area and therefore failed in the duty of care he owed to the deceased. However, there was contributory negligence on the part of the deceased and both of them were equally to blame. This case shows the reluctance of judges in modern conditions to hold that a workman who has died was solely to blame.

Haji Che Su Bin Haji Awang v *Chan Cheong*[5]

This was an appeal against the decision of the arbitrator under the Workmen's Compensation Ordinance where a sum was awarded in favour of the workman. The Appeal to the High Court turned principally on the question whether the respondent was a "workman" within the meaning of the Ordinance. It was held by the High Court that even if it could be said that the question whether the respondent was a workman was a point of law, it is not every point of law that gives a right of appeal; it must be a question of law of public interest. The Appeal was therefore dismissed.

EMPLOYERS' LIABILITY FOR COMMON LAW NEGLIGENCE.

The Tort of Negligence

Under this head, the liability of the employer is indeed wide. He may be liable to his own workmen for his negligence, or for the negligence of another workman. It should be noted that in ordinary language it more or less means that an employer has to exercise reasonable care towards his workmen. He is not expected to guarantee their safety. Thus in common law, the employer is required to provide (i) safe plant and machinery, (ii) a safe place of work, (iii) a safe system of work and (iv) a competent staff.

With regard to (i), it should be remembered that the machinery and plant need not belong to the employer, and if at the time of using it, it is defective, responsibility may rest with the employer. Thus a ship's machinery and plant used by a stevedore become the machinery and plant of the latter for the purposes of defining common law liability. However an employer is not bound to provide the newest or most perfect machinery and the fact that his machine is less safe than those generally in use is not in itself evidence of negligence.

The duty in (ii) above is related to (i). In making the place of work safe, the duty extends to the ways and works (premises) of the master.

5. [1978] 1 M.L.J. 73.

The duty in (iii) above is important and its breach is usually alleged in negligence actions against the employer. The term "safe system of work" covers all acts which are normally and reasonably incidental to the day's work. It will thus include the physical layout of the job, the sequence in which the work is to be carried out, provisions for the setting up of necessary warnings and notices, and the issue of special instructions. The duty is in fact a little more than providing a safe system of work. It also means that reasonable care should be taken that the system is followed. It is also important for employers to remember that they must anticipate that their workmen will have moments of inadvertence and that they would not always be intelligent and careful and adhere to safe practices.

With regard to (iv) above it means that an employer has a duty to select and engage only those who are fit and competent.

The doctrine of common employment

It was mentioned above that an employer in Malaysia is also liable for injuries caused to his workmen not only by his negligence, but also by the negligence of other workmen in his employment. This is because the doctrine of common employment was abolished in England since 1934 and also no longer exists in Malaysia to-day.

Vicarious liability of the employer

The employer is also liable for injury caused by his workmen to others under the doctrine of vicarious liability. This liability is a species of common law liability. However an important qualification to this principle is that the workman in question must have acted in the course of his employment. A considerable body of case law exists as to whether a workman is acting in the course of his employment or not. Thus if a servant does an act negligently which he was employed to do carefully, the act would be in the course of employment and the master would be liable. There have been cases where a workman has been considered to be acting in the course of his employment although he acted against express instructions.

However, Courts have been careful not to give too wide a meaning to the phrase "in the course of employment". An instructive case is the Singapore case of *Keppel Bus Company Ltd* v *Sa'ad bin Ahmad*[6] which ultimately went to the Privy Council. In that case, the respondent (plaintiff) was assaulted by a servant of the appellant (defendant) whilst travelling as a passenger on the bus owned by the appellant. In that case, the servant was the conductor of the bus, and

6. [1974] 1 M.L.J. 191.

a quarrel arose between him and the respondent (plaintiff) arising out of his behaviour towards a lady passenger. The question there was whether the conductor did what he did in the course of his employment. At the trial in the Singapore High Court, the trial judge gave judgment in favour of the respondent (plaintiff). The Court of Appeal of Singapore also dismissed the appeal. On further appeal to the Privy Council it was held that the respondent (plaintiff) could not recover as the conductor was not acting in the course of his employment. The judgment of both the Singapore Courts were set aside.

Another instructive case with regard to the vicarious liability of an employer is that of *Chin Keow* v *Government of Malaysia & Anor.*[7] That case concerned the vicarious liability of the government for the negligence of the doctor who was running a government clinic. The facts briefly were that the deceased had been given an injection of procaine penicillin by the doctor and she died within an hour. The trial judge found for the claimant (daughter of the deceased). On appeal to the Federal Court, the appeal was allowed and the trial judge's finding of negligence was rejected. The appellant then appealed to the Privy Council *in forma pauperis.* The Privy Council held that the doctor was negligent and the government was held responsible to pay damages. Important pronouncements were made with regard to the negligence of doctors. It was held that where there is a situation which involves the use of some special skill or competence, the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not have the highest expert skill. On the facts the doctor had failed in his duty to make appropriate enquiry before the penicillin was given as any enquiry made would have revealed that the deceased had hitherto suffered adverse reaction to the giving of penicillin.

Some relevant cases on the negligence of employers

Eng Lye Hup Co Ltd v *Chua Said Choo & Anor.*[8]

This was a Federal Court decision from Singapore. The appellants were employers of the deceased. The deceased was a mason and had been employed for over two years. His work entailed climbing up and down ladders. On the day of the accident, he was climbing up and down ladders. He fell from the ladder and died. The trial judge held that the employers were liable as they could have foreseen the ladder slipping while someone was using it, and therefore some pre-

7. [1967] 2 M.L.J. 45.
8. [1968] 1 M.L.J. 231.

cautions could have been taken. One such precaution would be to hold on to the bottom of the ladder to prevent it moving or slipping while any person went up or down the ladder. On Appeal the Federal Court reversed the finding mainly on the ground that the facts did not justify the taking of any precautions against the ladder slipping as there was no evidence that it was one taken by other persons in like circumstances. This case therefore shows that in alleging an unsafe system of work, the general practice in the same or similar trades may be a factor to be considered.

Sukumaran v *Building Construction Co (Malaya) Ltd*[9]

In that case the plaintiff was employed by the defendants who were a firm of building contractors, as surveyor. He was struck by a piece of piping which fell from a boring machine. The defendants admitted negligence but also alleged contributory negligence. The trial judge, Abdul Aziz J. held that as the plaintiff was standing in a place where he had no work to do and as it must be assumed that he was aware of the risk, he had therefore contributed 50% towards the injuries that he had suffered.

Tan Choon Seng v *Yang Kam Hah*[10]

This is another case concerning a safe system of work. The plaintiff/respondent was employed by the defendant appellant as a lorry attendant and was engaged together with the driver of the lorry in loading logs into the lorry. In the process the plaintiff was struck by a log on the right foot as the ramp over which the logs would be pulled up also fell. The evidence showed that the ramp shifted because of rain. It was held by the High Court that in the circumstances the defendant had failed to provide an effective supervision to ensure that loading works would stop when conditions became wet and dangerous. The Federal Court upheld the finding of negligence. Both Courts also found that the plaintiff was not contributorily negligent in continuing the work after it had started to rain as he was acting for the benefit of the defendant's business.

Aikbee Saw Mill Ltd v *Mun Kum Chow*[11]

This case also concerns the provision of a safe system of work by the employer. The plaintiff/respondent and another workman were engaged in loading planks on a lorry of the defendants. The workers

9. [1969] 1 M.L.J. 233.
10. [1970] 1 M.L.J. 175.
11. [1971] 1 M.L.J. 81.

did not use cross-bars in loading the planks and had not been instructed to do so. Some of the planks which had been stacked on the lorry toppled over and struck the plaintiff. The learned trial judge held that as the nature of the work was dangerous there was a duty on the part of the defendants/appellants to provide a reasonably safe system of work. He therefore gave judgment for the plaintiff/respondent. On appeal to the Federal Court the appeal was dismissed. The Federal Court held that the evidence in the case showed that no instructions had been given to the workers to use cross-bars but rather they were left to their own devices to load the planks. Accordingly the Federal Court also rejected the defence of contributory negligence, as the plaintiff/respondent could not be said to be negligent in not using cross-bars.

EMPLOYERS' LIABILITY FOR BREACH OF STATUTORY DUTY

Nature and Scope

An injured workman may base his action against his employer's breach of *statutory duty* just as he may base it upon one of the four *common law* duties of care.

It should be noted that statutory duties are intended not to replace the common law duties of employers, but to supplement them. Thus an injured workman may sue both for breach of statutory duty and at common law. In certain cases he can still rely on and obtain damages for the former if he loses on the latter. In certain cases, the courts may find that there is no breach of statutory duty but that there has been negligence at common law.

Every breach of statutory duty does not provide an action for damages. However there are many which would give rise to such an action. A good example would be where a workman is injured because the employer has contravened one of the many provisions in the Factories & Machinery Act, 1967. The statutory duties imposed on an employer would depend on the type of business. Thus a building sub-contractor may or may not come within the Factories & Machinery Act but may have to observe the many regulations relating to safety in the construction of buildings.

Thus a Malaysian employer should endeavour to understand the Acts & Ordinances, and the Rules and Regulations made under those Acts and Ordinances. For example, among the rules and regulations relevant to Factories and Machinery in Malaysia would be the following [12] :–

12. All Rules & Regulations should be checked from time to time as some of them may have been repealed, amended, or replaced.

1. Factories and Machinery (Steam Boiler and Unfired Pressure Vessel) Regulations, 1970.
2. Factories and Machinery (Electric, Passenger and Goods Lift) Regulations, 1970.
3. Factories and Machinery (Fencing of Machinery and Safety) Regulations, 1970.
4. Factories and Machinery (Persons-in-Charge) Regulations, 1970.
5. Factories and Machinery (Administration) Regulations, 1970.
6. Factories and Machinery (Certificates of Competency-Examinations) Regulations, 1970.
7. Factories and Machinery (Notification, Certificate of Fitness and Inspection) Regulations, 1970.
8. Factories and Machinery (Safety, Health and Welfare) Regulations, 1970.

With regard to breaches of statutory duty the view taken by both Singapore and Malaysian Courts is that they usually impose an "absolute duty" on employers. Thus, workmen who fail to prove negligence may recover for breach of statutory duty, subject of course to the rules of contributory negligence.

Some relevant cases on breach of Statutory Duty

Lim Thong Eng v *Sungei Choh Rubber Co Ltd*[13]

This case is most interesting because it involves a situation where there was no master and servant relationship. The plaintiff in the case was held to be an independent contractor, and accordingly the defendant owed him no duty of care at common law. It was therefore held that the claim in negligence failed. The Court then went on to consider whether he had a claim for breach of statutory duty under Rule 30 of the Machinery Enactment. That rule required moving parts of the machinery to be "shielded and fenced". The plaintiff was a short man with a short reach and his hand apparently got caught in feeding rubber into the rollers.

The Court held that the sub-rule concerned imposed an "absolute duty" on the machine owner. It was also found on the facts that both the contractor and the "Kepala" were equally aware of the danger when an operator stands to one side of the platform guard when feeding rubber into the rolls. Nothing had been done to prevent a danger which was not only foreseeable but well known. It was further held that the fact that the Inspector of Machinery was satis-

13. (1962) M.L.J. 15.

fied with the platform guard as an adequate safety appliance was entirely immaterial. The plaintiff therefore succeeded in his claim.

Seng Chong Metal Works v *Lew Fa*[14]

The respondent/plaintiff was a machine operator employed by the appellant company and had suffered injuries while operating a press brake machine. As a result of the accident his left hand had to be amputated. He sued his employers for breach of statutory duty under the Machinery (Driven Machinery) Regulations, 1959, regulation 31. Both the trial Court and the Federal Court found that there was a breach of such duty and damages were awarded. It was also found that the plaintiff was not guilty of any contributory negligence. It was held that although without some sort of inadvertence on the part of the workman the accident could not have happened, nevertheless, in this case the fundamental cause of the accident was the failure to comply with the regulation by failing to supply a proper guard. The policy of the law was to protect workmen operating potentially dangerous machinery, and any inadvertence on the part of the respondent/plaintiff did not go so far as to constitute contributory negligence.

Tan Sin Chong v *Hong Foundry*[15]

This case was also related to the Machinery (Driven Machinery) Regulations, 1959. The plaintiff was operating a power press machine at a foundry. He received certain injuries and sued the employers (owners of the foundry) for alleged failure to provide a hand guard under the said regulations. The defendants denied there was breach of any such duty. The answer to liability would greatly depend on the evidence, and the trial judge (Ismail Khan J) held as follows:

i) the defendants were liable as no safeguard was provided.
ii) the plaintiff did not remove the handguard, therefore no contributory negligence would be attributed to him.
iii) the plaintiff was only an apprentice and there was no evidence to warrant the inference that he would not have used the handguard if one was provided; and
iv) the defendants were solely liable.

14. [1966] 2 M.L.J.63.

15. [1968] 1 M.L.J. 62.

Gan Kim Thye v *The Union Omnibus Co Ltd*[16]

This was a claim for damages for personal injuries sustained by the plaintiff who was employed as a bus conductor by the defendants. The plaintiff alleged that the injuries were caused by negligence or alternatively by the breach of statutory duty of the defendants, their servants or agents. This allegation was based on the fact that he had to work 80 hours a week in breach of the Employment Ordinance and as a result he had a stroke and consequent paralysis. It was held that there was no breach of statutory duty and even if there had been one, the plaintiff had not proved that the injuries sustained by him were as a result of or caused by such breach.

The claim in negligence also failed as the plaintiff failed to show that the injuries sustained by him were caused by the negligence of the defendants.

EMPLOYERS' LIABILITY AS OCCUPIERS

Introduction

An occupier of premises may be liable to various classes of persons who enter the premises and receive injury therein. Most employers also occupy substantial premises. This is particularly true in the case of manufacturers. Therefore employers as occupiers may be liable in common law to those who suffer injury while on their premises. The law in Malaysia and Singapore is still based on the common law, while the law in England has been substantially modified by the Occupiers Liability Act, 1957. Thus, in Malaysia and Singapore, the employer as an occupier may be liable to three classes of persons:

a) invitees,
b) licensees, and
c) trespassers.

Duty to invitees

The duty owed to invitees is the highest. This is because in general terms it means that an invitee is a person who goes on to premises on business that concerns the occupier and on his invitation, express or implied. Thus, customers at shops or offices during business hours would clearly come under the category of "invitees". The duty to them is to take reasonable care so that the premises are safe and to prevent injury to them from any unusual or concealed danger. It may

16. [1969] 1 M.L.J. 186.

here be noted that what is not an unusual danger to an adult may well be an unusual danger to a child. Furthermore, the duty owed to an invitee is limited to those places to which an invitee might reasonably be expected to go. If he steps outside this area he may become a licensee or even a trespasser.

An instructive local case with regard to invitees is that of *Shamsudin* v *Yap Choh Teh & Anor.*[17] In that case the plaintiff was a police constable who assisted the police escort party in transferring the explosives for blasting operations to a quarry. The first defendant was a contractor of the quarry who had a licence to possess explosives. The second defendant was employed as a kepala at the quarry. The plaintiff's evidence was that he emerged from behind a rubber tree where he was stationed after the kepala and a police corporal had signalled the all clear and was struck in the eye by a splinter of stone following a further explosion. It was held *inter alia* that the plaintiff was present at a quarry in pursuance of a public duty and consequently was in the same position as that of an invitee and it was the duty of the first defendant as an invitor to take reasonable care for the safety of the plaintiff.

Duty to licensees

A lesser duty is owed to a licensee. A licensee is one who enters on premises of the occupier by permission granted (express or implied) in a matter in which the occupier has no interest. For example, if some charity fund raisers enter a factory or workshop premises for donations and are injured in the premises, they may sue the employer (as occupier) as his licensees. The general duty towards a licensee is to ensure that the premises are safe and he cannot create a trap or allow a concealed danger to exist. However, nothing positive need be done, and a suitable warning of the concealed danger would be sufficient in a majority of cases.

Trespassers

Generally speaking one owes no duty of care to trespassers and therefore one is not liable to trespassers who suffer death or injury on one's premises. This view can be seen from the Federal Court decision of *Khoo Tin Hong & Anor* v *Sim Guan Soon & Anor.*[18] In that case the deceased was a trespasser at a rubbish dump and she was killed when she was run into by a lorry driven by the first appellant who was reversing it towards a rubbish dump. It was held by the

17. [1969] 1 M.L.J. 26.
18. [1969] 1 M.L.J. 222; sitting at Singapore.

Federal Court (reversing the trial judge) that the duty of an occupier towards a trespasser is only that of not inflicting malicious injury and in this case there was no evidence that the first appellant knew that the deceased was at the rear of the lorry or anywhere near its path when he commenced to reverse it. There was therefore no duty on the appellants towards the deceased and therefore they were not liable in damages.

This decision will probably be still good law to-day. However, it should be pointed out that the attitude of English courts towards trespassers has changed to some extent since the famous House of Lords decision in *British Railways* v *Herrington.*[19] Since that case it is now accepted that an occupier of premises owes what has been called the duty of "common humanity". In other words a trespasser is to be treated as a human being with understanding and compassion. Anything inhuman cannot be done to him. Thus, one cannot set up traps or other lethal devices even for thieves and if they are injured by such traps or devices, the occupier would be liable.

EMPLOYERS LIABILITY IN NUISANCE

The tort of nuisance concerns the interference of the enjoyment of one's land. It is maintainable independent of negligence. Occasionally employers may find themselves liable for nuisance; in most cases because of something done by their employees. An interesting decision in this connection is that of *Thean Chew* v *The Seaport (Selangor) Rubber Estate Ltd.*[20] In that case the defendants had employed a competent person to manage their rubber estates. A diseased rubber tree which stood on the defendant's estate immediately adjoining the highway, fell on the lorry in which the plaintiff's husband was travelling and caused injuries from which he died. Damages were claimed in negligence or alternatively in nuisance. It was held on the facts that the estate manager had been negligent in not taking the most elementary precautions. The plaintiff was also held entitled on the alternative ground of nuisance because the defendants omitted to remedy the nuisance constituted by the state of their property when it arose within a reasonable time after they did or ought to have become aware of it.

EMPLOYERS LIABILITY UNDER THE RULE IN RYLANDS v FLETCHER

In simple language this rule means that a person is liable for any

19. [1972] 1 All. E.R. 145.
20. (1960) M.L.J. 166.

damage due to anything escaping from his land to another person's land provided there has been unnatural user of the land. This is a rule of strict liability. This rule is important especially for owners of factories as many things such as fumes, fire, water or poison can escape into adjoining properties. An instructive case in point is that of *Pacific Tin Consolidated Corporation* v *Hoon Wee Thim.*[21] In that case, the appellants for the purpose of their dredging/mining operations maintained on their lands large ponds separated from each other by intermediate bunds. The ponds were at different levels. A large breach in the bund between two large ponds (which together held nearly 500 million gallons of water) caused such a violent outflow from the higher pond to the lower pond that it caused extensive damage to life and property in the low-lying lands adjacent to the ponds. In an action for damages the respondent rested his claim on negligence and the rule in *Rylands* v *Fletcher.*[22] Gill J (as he then was) held that there was no negligence but felt that the appellant was liable under the rule in *Rylands* v *Fletcher.* On Appeal, the Federal Court held that the appellant was liable in both. As regards *Rylands* v *Fletcher* it was held that natural user of their property does not imply that miners had *carte blanche* to carry on mining operations in any manner they thought fit, however hazardous to their neighbours; that the use to which the sand bund was put in this case was a non-natural user; and the rule therefore applied.

B. INSURANCE COVER FOR EMPLOYERS LIABILITY

It is thus important for employers to know that adequate insurance cover should be obtained to cover the various types of liability mentioned above. Employers should thus explain to their agent or broker the areas of liability which are relevant to their particular enterprise. The type of cover to be obtained would vary for example when one insures a school as opposed to a shipyard.

Roughly speaking, the following areas, amongst others should be covered:

a) liability arising out of the employer's negligence or that of his servants or agents towards workmen.
b) liability to workmen caused with or without negligence.
c) liability to invitees, licensees or trespassers i.e. generally to members of the public.
d) liability to workers of independent contractors or sub-contractors.

21. [1967] 2 M.L.J. 35.
22. (1865–66) L.R. Ex 265.

The policies obtained or obtaintable may be variously named. Thus, we have Workmen's Compensation Policies or Employers' Liability Policies. Then we have Public Liability policies. Here again, depending on the type of employment one may have a specially named policy for public liability. Thus we may have a Ship Repairers' Liability Policy or a Motor Repairers' Liability policy or a Stevedore's Policy. In the subsequent sections we will consider some of the provisions in an ordinary Workmen's Compensation Policy and in an ordinary Public Liability Policy.

C. WORKMENS' COMPENSATION POLICIES

Scope

Such policies may be taken by all types of employers. A workman does not have to be a "workman" as defined in the Workmen's Compensation Act. Thus, one might want to take out a workmen's Compensation policy for his domestic servants. Domestic servants are not covered by the Workmen's Compensation Act. Actually therefore, one is covering himself from liability in common law negligence. In such cases, on reading a workmen's compensation policy one may be confused that the policy covers domestic servants but only under the workmen's compensation laws. This means that in the event of death or injury to that domestic servant the policy will pay only to the extent specified under the existing workmen's compensation laws. This again is because the premium given is low. Thus, employers covering their domestic servants should see to it that the policy covers liability for common law negligence also, and if necessary a higher premium may be paid. In many cases insurance companies will not explain such facts to the prospective insured who is quite happy that the premium is low. Only when an accident occurs does one know the policy coverage is not wide enough.

For employers doing business, it is always advisable to cover both common law negligence as well as liability under the workmen's compensation laws and other labour laws. It should also be clearly understood that it covers breach of statutory duty as well.

This question of coverage for breach of statutory duty arose in the Singapore decision of *Lim Chin Yok Co Ltd* v *Malayan Insurance Co Inc.*[23] Lim Chin Yok Co had taken out a workmen's compensation policy to cover accidents at their worksite. The plaintiff was a workman employed by a sub-contractor and had received certain injuries. He therefore claimed from Lim Chin Yok Co and the com-

23. [1975] 1 M.L.J. 101.

pany inserted the insurance company as a Third Party. The trial judge (Choor Singh J) held that the company was liable to the injured workman but the insurance company was not liable under the policy. One of the reasons for so holding was that the company had not complied with the obligations imposed on them by s. 31 of the Factories Act, under condition 3 of the policy. On Appeal, the Court of Appeal held that the said condition 3 in the policy was repugnant to the commercial purpose of the contract.

INSURED'S IMMEDIATE SERVICE

A workmen's compensation policy usually covers any employee in the Insured's "immediate service". At the same time, one of the exceptions usually state that the policy does not cover the insured's liability to employees of contractors of the insured. This position should be clarified at the time of insurance for it has also been held in *Lim Chin Yok's case* (supra) that an employee of a sub-contractor was in the "immediate service" of the main contractor. However in that case the exception mentioned above either did not exist in the policy or no mention was made of it. Thus, the Court of Appeal disagreed with the trial judge and by applying the *"contra proferentes"* doctrine, held that the plaintiff was "an employee in the insured's immediate service".

EMPLOYEE TO BE A "WORKMAN"

Workmen's compensation policies also restricts its coverage to employees who are "workmen" within the meaning of the Workmen's Compensation Act and other labour laws. Thus, if such a policy form is used to cover domestic servants, then such a clause will have to be deleted. Nowadays it is fashionable for insurance companies to have a separate domestic servant's policy. The meaning of workman has also been gone into in a previous section dealing with the general principles of employers' liability.[24]

NON-DISCLOSURE OR MISREPRESENTATION

One major source of disputes with regard to workmen's compensation policies is that employers are in the habit of showing a lesser number of employees and in reducing the estimated total earnings of the employees. This reduces the premium payable. However, they do not realise that this can enable the insurance company to repudiate liability on grounds of non-disclosure or misrepresentation. However, insurance companies are now in the habit of putting in an "ave-

24. Readers are referred to Section A of this Chapter.

rage clause" whereby it is no longer necessary to repudiate liability. Thus, by virtue of such a clause the employer will have to bear the risk for the extra number of employees. It is therefore important for employers to ask the insurance company to include such a clause in the policy (or attach to it) to avoid repudiation at a later stage.

In this connection one might mention two local cases where insurance companies successfully repudiated liability under a workmen's compensation policy. The first is that of *Fook Yew Timber Co* v *The Public Insurance Co Ltd.* [25] In that case the plaintiffs were a firm of timber merchants felling trees and sawing timber and had declared the number of their employees as (6) when on their own admission (20) to (30) were being employed. It was held that this amounted to a breach of warranty and avoided the policy.

The second case is that of *Suhaimi Bin Ibrahim* v *United Malayan Insurance Co Ltd.*[26] There again, the employer had stated the number of employees as (6). The workmen's compensation policy was issued on that basis. Like the previous case the employers were also concerned with felling timber. Unfortunately, the employers were caught out by their returns to the forestry department where they had shown (15) to (17) labourers. It was accordingly held that there was a breach of warranty under the policy and the policy could be avoided.

INSURED'S OBLIGATIONS

Condition 3 of a workmen's compensation policy is usually in the following terms:

> "3. The insured shall take reasonable precautions to prevent accidents and disease and shall comply with all statutory obligations."

It will be recalled that in *Lim Chin Yok's case* (supra) the Court of Appeal of Singapore held that this condition was repugnant to the commercial purpose of the contract. But that decision was based on the circumstances of that case. It cannot therefore be said that condition 3 is *ipso facto* repugnant and of no effect. In fact in that case, the Court of Appeal referred to the English decision of *Fraser* v *B.N. Furnam (Productions) Ltd*[27] where Diplock L.J. stated:

> "What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court

25. (1960) M.L.J. 72.
26. (1966) 1 M.L.J. 140.
27. [1967] 3 All. E.R. 57.

> it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e. made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy.

Thus, in cases where the employer is *reckless* it is quite possible that some meaning must be given to condition 3.

D. PUBLIC LIABILITY POLICIES

SCOPE

Insurance policies covering liability to the public are generally known as public liability policies. However like all names, they may be misleading. This is because a good deal of liability to the public may not be covered because of the exceptions.

At the same time, such a policy not only covers personal injury to any person but also damage to property. Liability is however to arise by:

a) accident caused by the insured, or
b) any person in the insured's employment,
c) whilst engaged in the insured's business specified in the Schedule under the heading of THE BUSINESS.

Thus, what is important is that it must arise out of the insured's business and that business is the business which is specified in the Schedule. This means that it is important that the business be accurately and adequately described in the Schedule. Another qualification which is usually imposed is that even if it arises as a result of the insured's business it must occur in the premises described in the Schedule.

WORKMEN EXCLUDED

As the policy is meant to cover liability to the public, personal injury suffered by workmen will not be included in the policy. That is the domain of a workmen's compensation policy.

LIMITATIONS AS TO DAMAGE TO PROPERTY

Although the policy is meant to cover damage to third party's

property there are very notable limits to such liability. Thus, the policy will not cover any damage to property belonging to the insured's family ordinarily residing with the Insured. Thus a working son may live with his parent and may be living on different incomes, but such son's property would not be covered by the policy. Some policies may state that it would not cover damage to third party property if it is caused by the negligence of the insured or his servants or agents. On the whole, it can fairly be said that limitations as to property damage are quite wide and it would be much more comforting to the insuring public if the limitations or exceptions were put in simpler language so that one can readily understand the scope of such limitations or exceptions. For example, who would ordinarily know that damage to property arising out of pollution would not be included?

LIMITATIONS AS TO BODILY INJURY

Among the limitations or exceptions would be bodily injury occured by or through or in connection with any vehicle, vessel, craft, lift, elevator, escalator, crane, hoist, or other lifting machinery in the ownership or possession of the insured and not included under the heading of "The Plant" described in the Schedule. This means that the plant mentioned in the schedule should be accurately and adequately described. There are of course, other exceptions. For example, bodily injury arising out of fire or explosion or pollution of any kind would not be included. Similarly, injury arising out of flood, typhoon, hurricane, tornado, cyclone, earthquake, volcanic eruption or other atmospheric disturbance or convulsion of nature would not be included.

INFORMING CHANGE OF FACTS

The conditions to a public liability policy should also be carefully perused. One such condition would be that if any change occurs which materially vary any of the facts existing at the date of the proposal, the insured is to inform the company within seven days. The company is given the option to accept such change or not and also has the right to ask for additional premium if necessary.

PREVENTION OF ACCIDENTS

Like in workmen's compensation policies, the insured is also bound to take reasonable precautions to prevent accidents. He must

also use his best endeavours to see that only competent employees are employed. He is also bound to see that all statutory obligations are observed. With regard to this requirement, the observations made by Diplock L.J. in *Fraser's case* (supra) may well be relevant. In other words, they would cover serious breaches of statutory obligations. The insured is further obliged to see that all buildings, ways, works, plant, machinery, furniture, fixtures and fittings are substantial and sound and in proper order and fit for the purposes for which they are used. Furthermore, if any defects come to the knowledge of the insured he must remedy them or take temporary precautions to see that no accident arises.

OTHER WARRANTIES OR ENDORSEMENTS

Like other policies, companies may restrict or expand the scope of the policy by attaching or typing in certain warranties or endorsements. If the coverage is not satisfactory then the insured can pay extra premium and get extra endorsements in his favour. It is thus important to know what one is getting for the premium which one is paying.

CHAPTER IX

PERSONAL ACCIDENT INSURANCE

A. INTRODUCTION

Accidents can happen at any time. Therefore, a personal accident policy is almost a necessity for everyone though its importance has not yet been realised in this part of the world. Hence, the dearth of case law on the subject. Usually, such policies are taken for special occasions; e.g. while travelling. In such cases one may have a special policy called a "Travellers Policy". Or one may take a Travel Accident and Sickness Insurance Policy. One can even take an accident policy for playing golf. Thus, insurance companies also cater for a "Golfer's Insurance Policy".

Whether it be the usual personal accident policy or a variation thereof, it is important to consider that such policies will only cover "accidents". It is therefore important to understand what the terms means. Perhaps the most precise definition was given by Lord Macnaughten in *Fenton* v *Thornley & Co Ltd*[1] where he said that in the ordinary and popular sense it meant an "unlooked-for mishap or an untoward event which is not expected or designed". It is thus clear that an intended event cannot be an accident. Thus, in the case of *Hamlyn* v *The Crown Accidental Insurance Co*[2] a tradesman picked up a marble which had been dropped by a child. As he leant forward to grab at the marble, he wrenched his knee and could not get it straight again. It was held that this was accidental. In the words of A.L. Smith L.J. "They were also accidental, for getting into the particular position in which the injury could happen was not done on purpose".

The more recent case of *Gray* v *Barr*[3] further throws some light as to the meaning of "accident". In that case the assured believed that his wife was visiting a neighbour with whom she had been having an affair. He attempted to invade the neighbour's bedroom with a shot-gun and in the struggle the gun went off killing the neighbour. A majority of the English Court of Appeal held that his death was not an accident, since it was a foreseeable, although unintended,

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1. [1903] A.C. 443.
2. [1893] 1 Q.B. 750.
3. [1971] 2 Q.B. 554.

consequence of his decision to force his way into the bedroom with a loaded gun.

An interesting recent decision is that of *Marcel Beller Ltd* v *Hayden.*[4] That case arose out of a personal accident policy covering an employee who had died in a car accident by losing control of his car. He had apparently been drinking and his blood alcohol content was high. One of the questions was whether he died of an "accident". It was held by the English High Court that inspite of his negligence and the drinks he had taken it was still an "accident". It was further remarked that in a document such as an insurance policy, it was important not to depart from the ordinary meaning of English words which ought to be understandable by laymen.

B. THE PROPOSAL FORM

GENERAL

The contents of a proposal form differ from company to company. Most policies would usually include questions as to the following:

a) age and physical characteristics.
b) state of health at the time of insurance.
c) habits and pursuits.
d) previous history.
e) special circumstances.

AGE AND PHYSICAL CHARACTERISTICS

Besides the age, the height, weight and physical defects would be asked for. The questions are quite straightforward and should present no difficulty.

STATE OF HEALTH

The insurance company would like to know about the state of health of a person at the time of insurance. This is because in the case of an accident the state of a person's health might be important in aggravating or mitigating the consequences. Thus a person may be asked whether he is in ill health. Or he may be asked whether he had consulted any medical man for any accident or illness.

HABITS AND PURSUITS

Some proposal forms merely ask whether there is anything hazardous about a person's occupation or pursuits. Other forms may

4. [1978] 1 Lloyd's Rep. 472.

specifically ask whether he is engaging in pursuits such as motor cycling, hockey playing, football playing, mountaineering, racing, hunting etc. He may also be asked whether he travels by air and whether he is a regular fare paying passenger travelling on a regular air line. He may further be asked whether he is a total abstainer or whether he is of sober and temperate habits.

PREVIOUS HISTORY

In some proposal forms a person may be asked about any previous accident or illnes within a specified period. Sometimes the diseases may be specified. Some questions may be asked about his near relatives. However, such questions are rare in modern proposal forms for personal accident insurance.

SPECIAL CIRCUMSTANCES

Sometimes a proposal form may contain a general question as to whether there are any circumstances connected with his occupation, health, pursuits, or habits of life which render him peculiarly liable to accident or disease. Such a question is again rarely found in modern proposal forms.

C. POLICY TERMS AND CONDITIONS

SCOPE

A personal accident policy usually covers any bodily injury (including death) caused by violent, accidental, external and visible means. Some policies do not include the word "accidental" as it is probably assumed that this is understood being a personal accident policy. The connotation of the term "accident" has been explained above.

Bodily injury

When injury causes a wound or even where there are bruises, it is easy to perceive that there has been bodily injury. However it is settled law that an injury does not have to manifest itself by outward or physical means. Thus, in *Hamlyn's case* (supra) all the judges proceeded on the basis that wrenching of the knee was an "injury". Even disease or bodily infirmity might amount to an injury within the meaning of the policy. In the well known case of *Re Etherington*[5] the assured, while hunting had a heavy fall. In the process he got wet and combined with the shock, it lowered the vitality of his

5. [1909] 1 K.B. 591.

system and ultimately resulted in pneumonia from which he died. The English Court of Appeal had little trouble in finding that the death came under the accident policy and obviously assumed that the disease of pneumonia was an "injury" on the facts of the case.

Violent

Among other requirements, the injury must be caused by violent means. In the case of most injuries the element of violence is patently present. Example, where a person slips from a ladder and falls. It seems however that the degree of violence is immaterial and really means that the injury should be caused by other than natural causes. Thus, to quote again *Hamlyn's case* (supra), Lopes L.J. said:

> "In stooping to pick up the marble the plaintiff used some extra exertion and some extra physical force, and I think that the expression 'violence' is satisfied by the facts which attended the injury".

It may be mentioned here that even death by drowning is considered as having been caused by violence.

External

The word "external" is used as the antithesis of "internal", and if the cause of the injury is not internal then it would be external. Thus, one may have a situation as in *Hamlyn's case* where the injury was wholly internal in that there was nothing to indicate its existence, but nonetheless was considered as "external". A.L. Smith L.J. stated in that case:

> "Then, were they external? I think the word must be understood as meaning the opposite of internal. The means by which the injury was caused were the stooping on the part of the plaintiff and his grabbing of the marble to pick it up; and I think they may be properly described as external."

Visible

The injury must be visible. As it must also be external, it is difficult to see what is further added by the word "visible". The view has however been expressed that it may serve the purpose of bringing out more clearly the fact that disease is excluded from the scope of the insurance.[6]

INJURY TO BE SOLELY AND INDEPENDENTLY CAUSED BY THE ACCIDENT

The policy usually requires that the injury shall solely and inde-

6. Ivamy, *Personal Accident, Life and Other Insurances*, 1973, p. 29.

pendently of any other cause result in his death or disablement. Such a requirement brings in the doctrine of *proximate cause* to the realm of accident insurance.

The question of proximate cause often arises in accident insurance where a disease becomes associated with the accident. It may be a disease which existed before the accident, and the accident may have aggravated it. Or, it may be a disease which came into existence as a result of the accident. Sometimes, the question of proximate cause may also arise where no disease is involved but where the injury or death appears to be too remote a cause of the accident.

An interesting case involving the question of causation is that of *Smith* v *Cornhill Insurance Company Ltd.*[7] In that case the owner of a car had taken out a policy which provided for the payment of $1,000/- to the insured or her estate provided the death or injury was the sole result of the accident. While the insured was driving her car it left the road and fell down a ravine and she received a severe head injury. As a result she was suffering from concussion and wandered aimlessly through some brushwood and stepped into a stream. The shock of entering the water, which would have been insignificant but for the injuries, caused her to die from heart failure. The death was not due to drowning as she was found dead clutching the branch of a tree with her head above water. It was held that the death was the result solely of the injury caused by the accident within the meaning of the policy.

A relevant decision involving a disease which existed before the accident is that of *Fidelity and Casualty Co of New York* v *Mitchell.*[8] In that case the insured had sprained his wrist, and thereafter became totally disabled. It appeared that about ten or fifteen years before the date of the policy the respondent had suffered from a tubercular infection of a small part of his left lung. This had caused a lesion which had been healed. There was thus in his system tuberculosis which was latent and would have remained harmless had it not been for the accident, and that apart from the tubercular infection the wrist would have recovered within six months of the accident. It was held that the disablement resulted "directly, independently and exclusively of all other causes" from the accident and that the insured was entitled to recover under the policy.

The above decision may be contrasted with the local case of *Leong Luen Kiew* v *The New Zealand Insurance Co Ltd.*[9] That case

7. (1938) 54 T.L.R. 869.
8. (1917) 117 L.T. 494.
9. (1939) M.L.J. 173.

involved a motor car policy which covered death or injury caused by "means which independently of any other cause . . . . .". The deceased had a car accident. Subsequently he died and the immediate cause of death was shock and haemorrhage from gastric ulcer. The insurance company refused to pay on the ground that his death arose from or was accelerated or promoted by a disease or bodily infirmity or natural "cause arising within his system, to wit, gastric ulcer". The autopsy showed that there was a gastric ulcer of long standing. There was a blood clot adherent to an eroded blood vessel in the base of the ulcer. The case of the plaintiffs was that the shock of the accident, the haemorrhage of the brain and the sepsis of the leg combined in aggravating the gastric ulcer and in causing the eroded blood vessel in the base of the ulcer to burst and thus cause death. The case of the insurance company was that the bursting of this blood vessel was due to the gastric ulcer aggravated perhaps by the diabetic condition and by the heart and artery trouble. The learned judge, Mc Elwaine C.J., remarked in the course of his judgment as follows:

> "The accident certainly did not cause the gastric ulcer and it was from the gastric ulcer that this man died.
> To come within the policy it must be shown that violent, accidental, external and visible means independently of any other cause resulted in death".

With regard to a situation where a disease developed after the accident, the case of *Re Etherington* (supra) is also relevant. It will be recalled that in that case because of the fall while hunting, the deceased became wet and this later resulted in pneumonia. The Court of Appeal held that the death was "directly caused by the accident". The pneumonia arose as the direct and natural consequence from the fact that the diminution of vitality caused through the accident allowed the "pneumococca" germs to multiply and attack the lungs.

Another decision which deserves mention is that of *Mardorf* v *Accident Insurance Company*.[10] In that case the insured had accidentally inflicted a wound on his leg with his thumb nail. His leg became inflamed and erysipelas crept in. This was followed by septicaemia and by septic pneumonia and as a result, the insured died. It was held that erysipelas, septicaemia, and septic pneumonia, were not intervening causes within the meaning of the policy, but merely different stages in the development of the septic condition which was immediately brought about by the introduction of the poison, and the man's death was directly and solely caused by the accidental hurt to his leg.

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10. (1903) 88 L.T. 330.

INJURIES COVERED

One would have thought that apart from the "Exceptions" all bodily injury caused by accident would be covered. However, every accident policy has a Schedule attached to it. In the Schedule is mentioned the "Scale of Benefits" or "Scale of Compensation". The interpretation of this scale has given rise to problems. One of the questions is whether the compensation for injuries suffered are limited to those mentioned therein. A perusal of them would show that they are roughly "maim injuries" which one can also find in the Workmen's Compensation Acts. It is therefore unlikely that compensation should be limited to such specified "maim injuries".

The situation is not free from doubt. It seems that limitations as to injuries must be expressed in clear language. This view is consistent with the *contra proferentum* rule. In the Scottish case of *Scott* v *Scottish Accident Insurance Co*[11] the Court of Session held that where the proviso was that partial disablement "implied" the loss of one hand, one foot or complete loss of sight, the definition was not exhaustive but merely explanatory, and that there might be partial disablement within the meaning of the policy although the insured had suffered none of the specified injuries.

Moreover, many policies issued in Malaysia and Singapore include a clause with regard to Permanent Disablement which is somewhat as follows:—

> "In the event of Permanent Disablement by physical loss or loss of use not specified above, the percentage of compensation shall be assessed in proportion to the degree of disability as compared with the cases specified without reference to the profession or occupation of the Insured."

Thus this clause clearly implies that for permanent disablement, one is not limited to the injuries specified in the Schedule. It can even be argued that this must be so even if the above clause does not exist as long as the policy does not make it clear. This reasoning can be based on the above Scottish decision. Furthermore, a close examination of the clause would show that the clause is more concerned with the method of assessment for the non specified injuries. The main purpose of the clause seems to be that in assessing such compensation the proportion used must be without reference to the profession or occupation of the Insured. Thus, if for example, a piano player loses about half an inch of two fingers it will not be in any of the specified injuries as it does not amount as such to a "loss of finger". Even so, as far as the piano player is concerned his loss will be about 100%.

11. (1889) 16 R. 630.

Then, what this clause seeks to state is that in assessing loss his occupation is not to be considered. Thus, in practice he will probably be assessed at 5 – 10%.

EXCEPTIONS

Most policies contain many exceptions. The more important ones giving rise to legal problems will be considered below.

Intoxication

The policy will not cover an accident whilst the insured is under the influence of an intoxicating liquor or a drug. It is logical to include drugs. In fact under the Penal Code intoxication from liquor or intoxication from drugs is treated on the same level.

It will be noted that the policy says "when" or "whilst". It thus appears that the word "when" or "whilst" has a temporal meaning and no causal relation between the injury and being under the influence of liquor or drugs would be required. However, the insurance company will not escape liability by merely showing that the insured was intoxicated when last seen, especially when some time has elapsed before the injury or his death.[12]

Deliberate exposure to needless danger

The policy also would not cover deliberate exposure to needless danger. This may sometimes be associated with intoxication, but in most cases would be independent of it. A good example involving the former situation is the case of *Marcel Beller Ltd* v *Hayden* (supra). In that case the phrase in question was "deliberate exposure to exceptional danger" and by "his own criminal act". It will be recalled that the deceased died of a motor accident in losing control of his car because of intoxication. The learned judge however felt that the phrase "deliberate exposure to exceptional danger" did not apply in this case as there was no sufficient evidence. The deceased had not thought about his condition or the risk he was taking. The effect of alcohol frequently made the victim careless, and his driving was negligent but not deliberately so. But it was felt that his behaviour did come under the phrase "his own criminal act".

Reference may also be made to the well known case of *Cornish* v *Accident Insurance Co Ltd.*[13] In that case the insured was killed and run over by a train whilst attempting to cross a main railway line in broad daylight. At the place he crossed he could have seen the oncoming train. There was no evidence that he was short-sighted or

12. See *Haines* v *Canadian Railway Accident Co* (1910) 13. W.L.R. 709.
13. (1889) 23 Q.B.D. at p. 457.

deaf. Lindley L.J. remarked:

> "But there are degrees of negligence, and we are unable to read this policy as protecting a man against the consequences of running risks which would be obvious enough to him if he paid the slightest attention to what he was doing. In the present case the deceased did in fact expose himself to risk of imminent death: that is quite clear."

Suicide or self injury

A person who commits suicide or attempted suicide or inflicts intentional self-injury would not be covered by the policy.

The exception would cover all forms of self-destruction and it would be *immaterial* if he was insane at that time, provided that he understood the physical nature and consequences of his act. However, it would not cover self-killing by accident, e.g. where a person drinks poison by mistake. Similarly it would not cover unintentional self-destruction as where the insured is delirious from fever and throws himself out of a window.

Engaged in certain hazardous pursuits

Many policies would exclude accident arising from playing football for or against a professional club, polo-playing, mountaineering (with the use of ropes or guides), skiing, bob-sleighing, participating in speed or endurance tests or races of any kind (other than athletics) or hunting. The policy would also exclude motor cycling or air-travel (other than as a fare paying passenger by a regular scheduled Airline Service).

War and hostilities and civil commotion

There would also be a clause exempting liability from accident due to war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war rebellion, riot, civil commotion, revolution, insurrection or military or usurped power.

CONDITIONS

As in other policies, a personal accident policy contains "conditions". Some of them will be discussed below.

Change of occupation, pursuits, etc.

The policies usually contain a condition that the insured shall give immediate notice in writing to the company of any change in occupation, pursuits or residence and, prior to any renewal of the

policy, shall give notice in writing of any disease contracted by him or any physical defect or infirmity by which he has become affected during the period of insurance.

The changes which must be notified are therefore:

(a) occupation,
(b) pursuits,
(c) residence,
(d) disease,
(e) physical defects, and
(f) infirmities.

An interesting Malaysian decision with regard to notification of change in occupation or pursuits are the cases of *Leong Chee Yeong* v *China Insurance Co Ltd*; and *Leong Chee Yeong* v *The Eastern United Assurance Corporation Ltd.*[14] Both cases were apparently heard together as it related to the same incident. The insured had apparently a personal accident policy with each of the above companies. The particulars given by him in respect of the two policies were also similar. He had stated that there was nothing hazardous about his occupation or pursuits. However, before his death he became an Honorary Inspector in the Auxiliary Police Force. He received his certificate of appointment on 24th April 1951, and died three days later on 27th April, 1951, when someone threw a hand grenade whilst making an inspection. He had not informed either of the companies of this additional occupation and accordingly both companies denied liability on grounds of breach of warranty. It was held that on a construction of the policies the companies were not liable. The Court pointed out that it was a court of law and not a court of morals and expressed sympathy for the insured's representative as follows:

> "I need hardly say that I have felt the greatest possible human sympathy with the plaintiff and that it is with very great regret that I have found myself compelled to give judgment against her." (Thomson J.).

Arbitration

Like other policies one also finds an arbitration clause in personal accident policies. The policies usually state that "all differences" are to be referred to arbitration. Thus, this would cover differences as to liability as well as quantum. It is respectfully submitted that this may well lead to unsatisfactory situations where the denial of liability involves questions of construction which are substantially questions of law. In such a case it is desirable in practice to go straight to a Court

14. (1952) M.L.J. 246.

as the decision of the arbitrator will usually be attempted to be set aside for errors of law apparent on the record. The idea of "finality" in arbitrations hardly holds good in such a situation.[15]

Conditions precedent to liability

One important clause in the policy is that the observance of the conditions in the policy shall be a condition precedent as to liability. This means that if any of the conditions in the policy are not fulfilled, the company would be able to avoid liability.

D. ACCIDENT CLAIMS

FORMALITIES

It will be a condition in any accident policy that the notice of injury must be given to the company in writing. The language used may vary from "immediately" to "as soon as possible", or it may specify a definite period such as 21 days from the date of the occurrence.

It is thus important that the notice be given in writing and be given within the time mentioned or specified in the policy.

The insured or his/her representatives will also be required to give "affirmative proof" of the accidental cause of the death or injury. All certificates, information and evidence required by the company shall be furnished at the expense of the insured or his legal representatives and shall be of such form and of such nature as the Company may prescribe.

MEDICAL EXAMINATION AND POST MORTEMS

The policy will also specify that the insured shall submit to a medical examination as often as may be required on behalf of the Company. This will be at the expense of the company. In the case of death the company will also be entitled to arrange for a post-mortem at its own expense.

In practice problems may arise as Muslims will often desire a quick burial and it is quite possible that this aspect as to post-mortem may be forgotten. Moreover, if the period is specified it would appear that legal representatives are within their rights to notify within that period; and this will often be after the burial.

15. Note that England has recently changed its Arbitration Act to be more in line with European law on arbitration. Thus the idea of "finality" is given more weight and it would not be possible to set aside the award on previously accepted grounds. See the English Arbitration (Amendment) Act, 1979.

As to medical examination what often happens is that the insured will also have himself examined by his own doctor as well. Again, the assessment of the injury will differ between the medical examiner for the insured and the medical examiner for the insurance company. For example, a person may sustain an injury to the shoulders. The doctor for the insured may assess at 40% while the doctor for the insurance company may well assess at 20%.

AMOUNT CLAIMED

The amount claimed would depend on the scale of compensation or the scale of benefits which are set out in the Schedule of any particular policy.

A specific sum will always be specified for death. Certain policies will also specify specific sums for loss of one limb or eye, or loss of two limbs or eyes or of one limb and one eye. It may further be specified that in respect of such injuries where a specific sum is mentioned, the death or loss must occur within 12 calendar months of the accident.

There may be some confusion, because lower down in the scale where permanent disablement is dealt with, loss of arm or loss of hand may be expressed as a percentage. Thus questions may arise as to what is the difference between "limb" and an "arm" or a "leg". To avoid this confusion most policies define a "limb". Thus, loss of a limb means total loss by physical severance of hand or foot. It would therefore appear that an "arm" is different from a "hand", and a "leg" is also different from a "foot". Thus a person whose hand is severed will be paid a specific sum for loss of "limb". If his arm (which includes his hand) is severed will he be paid a specific sum or as a percentage? Perhaps things can be made clear to the insured at the time of insurance.

In a previous section of this Chapter it has already been mentioned that difficult questions of interpretation may arise where the injury received is not specifically mentioned in the scale of compensation or the scale of benefits

Lastly, it should be mentioned that Temporary Total Disablement and Temporary Partial disablement will usually be paid by the week. Temporary Total Disablement is understood (and sometimes defined) to mean disablement from engaging in or giving attention to profession or occupation of any kind. Temporary Partial Disablement is understood (and sometimes defined) as partial disablement from engaging in or giving attention to the Insured's ordinary profession or occupation.

CHAPTER X

MARINE INSURANCE

A. SCOPE AND IMPORTANCE

Marine Insurance is a very wide area of insurance. In Malaysia, it may not yet be regarded as important as Life Insurance, but in view of the existence of many sea-ports in East and West Malaysia which handle both the export and the import trade, its importance will continue to rise.

Moreover, there have been significant changes in shipping law and the law and practice relating to international banking. These changes will inevitably have some effect on the practice of marine insurance. Thus, for example, containerisation has brought about changes in marine insurance law and practice. Therefore an "All risks" policy no longer covers the same risks in cases of container shipment.

It is also mainly in marine insurance that one sees the importance of Lloyds Brokers. Thus, one may see some difference in the policies issued by ordinary companies and policies issued by Lloyds underwriters.

Another important thing to realise is that the Insurance Act of Malaysia has little application to the law of Marine Insurance. Under s. 3 and s. 5 of the Civil Law Act, the Law applicable would be the English Marine Insurance Act, 1906. By the same reasoning, the principles of the Marine Insurance (Gambling Policies) Act 1909 should be applicable but it is difficult to see how the penal section formulated by that Act can be enforced by criminal courts in Malaysia.

The Marine Insurance Act, 1906 provides a standard policy known as Lloyds S.G. Policy[1] which the parties may adopt if they so desire whether they insure the risks with underwriters at Lloyds or elsewhere.

Those businessmen dealing with exports or imports may also find it profitable to refer to a publication prepared by the International Chamber of Commerce which has headquarters in Paris entitled *Tables of Practical Equivalents on Marine Insurance.* In this publication, the similarities and differences existing in marine insurance terms, clauses and covers in 13 important centres of the world are analysed and compared from the Marine Insurance point of view.

1. S.G. means Ship and Goods.

B. MARINE INSURANCE POLICIES

THE INSURANCE CONTRACT

The Slip

The contract for marine insurance is usually evidenced by a policy. Where Lloyds brokers are used the contract may be evidenced by what is called a "Slip". This is a document where the broker writes the essentials of the proposed insurance in customary abbreviation. He then takes it to Lloyds or a marine insurance company. An insurer, who is prepared to accept part of the risk, writes on the slip the amount for which he is willing to insure and adds his initials; this is known as "writing a line". The slip is then taken by the broker to other insurers who successively likewise write lines until the whole risk is covered. It is important for the broker to secure a good "lead", because the second and following underwriters are more willing to accept the risk if the lead is a well known name.

The "slip" is recognized in s. 21 of the Marine Insurance Act and it is immaterial whether the policy is issued or not. It is also admissible in evidence under s. 89 of the act.

Cover Notes

After the risk is covered the broker will send a memorandum of the insurance effected which assumes the form of an open or closed cover note. A closed cover note is sent where full particulars of the cargo and shipment are known and therefore the insurance has been made definite. An open cover note is sent by the broker where the instructions obtained are not very definite. This would happen where the assured requires a "floating policy" or "open cover"[2], or where he reserves the right to give "closing instructions".

Certificate of Insurance

Besides the broker's cover notes mentioned above certificates of insurance are also used where a marine insurance contract has been entered into. It is frequently used where an open cover has been obtained. The first part recites the main terms of the open cover under which the goods are insured. The second part contains the declaration of the goods stating the value insured and other particulars such as marks and numbers. The certificate may be signed by the insurance broker or by the insured himself.

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2. These terms will be explained below.

Letters of Insurance

Letters of insurance are addressed by the seller (the assured) to the buyer confirming that insurance has been effected. They have no status in law but would be admissible in law against the seller if there is litigation.

NECESSITY OF A POLICY

Generally speaking, a marine policy is necessary although the documents mentioned above may indicate that a contract has been concluded. Sections 22 and 23 of the Marine Insurance Act are as follows:

22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

23. A marine policy must specify —[2A]
    (1) The name of the assured, or of some person who effects the insurance on his behalf:
    (2) The subject-matter insured and the risk insured against:
    (3) The voyage, or period of time, or both, as the case may be, covered by the insurance:
    (4) The sum or sums insured:
    (5) The name or names of the insurers.

VOYAGE AND TIME POLICIES

Section 25 distinguishes between time and voyage policies and is as follows:[2B]

25. (1) Where the contract is to insure the subject-matter "at and from," or from one place to another or others, the policy is called a "*voyage policy,*" and where the contract is to insure the subject-matter for a definite period of time the policy is called a "*time policy.*" A contract for both voyage and time may be included in the same policy.
    (2) Subject to the provisions of section eleven of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid.

VALUED AND UNVALUED POLICIES

27. (1) A policy may be either valued or unvalued.

2A. Note that this section has been amended by the English Finance Act 1959, 8th Schedule, Part II.

2B. This section has also been amended at the same time as above.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

28. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner herein-before specified.

As will be seen in s. 27(3), the value fixed in the valued policy will be conclusive of the insurable value of the subject insured. However, in the case of an unvalued policy, the value of the insured goods have to be proved by production of invoices, vouchers, estimates and other evidence. In such a policy, the insurable value of goods or merchandise is the prime cost of the goods, plus the expenses of and incidental to shipping and the charges of insurance upon the whole.

It should also be pointed out that the difference between the two types of policies is of practical importance. In a valued policy, the buyer's anticipated profits can be added by adding a percentage to the invoice value. In an unvalued policy, the buyer's anticipated profits cannot be included in the insurable value. It will thus be seen that in modern trade valued policies are the rule and unvalued policies are rarely used.

FLOATING POLICIES

Section 29 of the Act contains the following provisions with regard to floating policies:

29. (1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other Customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

It will be seen that this type of policy is of great importance in international trade and is a convenient method of insuring goods where a number of similar transactions are intended.

Unless the policy otherwise provides, the insured must declare all cargoes within the terms of the policy. Similarly, the insurer cannot refuse an individual risk which comes within the terms of the policy. The mutual obligations of the insured and insurer are expressed as follows in the *Institute Standard Conditions for Floating Policies*[3]:

"It is a condition of this insurance that until completion of the contract the assured is bound to declare hereunder each and every shipment without exception whether arrived or not, underwriters being bound to accept same up to but not exceeding the amount specified herein."

A floating policy often contains a clause requiring the insured to make declarations of shipment as early as possible. It has been held *In Union Insurance Society of Canton Ltd* v *GeorgeWills and Co*[4] that an insured who did not make a declaration at the earliest possible moment was not entitled to recover under the policy for loss suffered by him.

It should also be remembered that a floating policy is not a time policy but really an aggregation of voyage policies. However, it is often a valued policy. It usually contains a clause about the declaration of value which insured has to make when declaring the particulars of shipment.

OPEN COVERS

In international trade, the open cover, combined with the issue of insurance certificates, has become a very popular form of insurance. It is another method of effecting general insurance for recurring shipments where details cannot be known when the insurance is effected. By virtue of this cover the underwriter undertakes that he will subsequently issue duly executed floating or specific policies within the terms of the cover. Open covers sometimes embody the *Institute Standard Conditions for Open covers* which are worded in

3. The Institute of London Underwriters adopt and publish standardised clauses. The Institute has a Technical and Clauses Committee which had drafted a great number of clauses. The clauses are constantly revised and are obtainable in book form or as separate slips.
4. (1916) A.C. 281.

the same way as the Institute Standard Conditions for Floating policies except that they use the words "open cover" instead of "floating policies".

The essential difference between a floating policy and open cover is that in a floating policy the insured "buys" a fixed insurance cover which is written off as declarations are made. But in the case of an open cover the insurance does not run out but covers (within time and other limits) every shipment falling in within the terms of the cover.

BLANKET POLICIES

Sometimes, a trader may find it inconvenient to make declarations of individual shipments as required under floating policies and open covers. He may therefore take out a "blanket policy" which usually provides that he need not advise the insurer of the individual shipments and that a lump sum premium shall cover all shipments.

C. RISKS COVERED IN MARINE POLICIES

INTRODUCTION

Marine policies are usually taken to cover cargo or the ship. In the former case they are known as "cargo policy" and in the latter case they are known as "hull policy".

Whether it be a cargo policy or hull policy, it will cover the risks which are mentioned in the policy as follows:

> TOUCHING the Adventures and Perils which the Assurers are contained to bear and do take upon themselves in this Voyage, they are of the Seas, Men-of-War, Fire, Enemies, Pirates Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils Losses and Misfortunes, that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises or any Party thereof: and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises or any Part thereof without Prejudice to this Assurance and to be reimbursed the Charges whereof by the Assurers. And it is especially declared and agreed that no acts of the Assurer or Assured in recovering, saving, or preserving the property assured shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Assurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the

Royal Exchange, or elsewhere in London.

1. Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not, but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power, and for the purpose of this warranty "power" includes any authority maintaining naval, military or air force in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

Note that in a hull policy, instead of the phrase "of the said goods and Merchandises or any Party thereof", the phrase "the subject-matter of this Assurance" would normally appear.

In the case of a cargo policy one may find additional warranties such as:

Warranted free of loss or damage

(a) caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions.

(b) resulting from strikes, lockouts, labour disturbances, riots or civil commotions.

WARRANTY

It will be seen that the policy uses the terms "warranty" or "warranted free". Warranty has a special meaning. Section 33, 34 and 35 explain the nature of a warranty, the effect of breach of warranty and express warranties. They are reproduced below.

33. (1) A warrantly, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34. (1) Non-compliance with a warranty is excused when, by reason of a

change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35. (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

It will be seen that in marine insurance the word "warranty" is used in a contradictory and confusing manner. First, it is used to denote a condition to be fulfilled by the insured. This type of warranty is known as *promissory warranty*. They are therefore promises by the assured that certain facts exist. Thus, using the general terminology of the law of contract, they are in fact "conditions", which, if not exactly complied with, entitle the insurer to disclaim liability from the date of their breach (s. 33(3)).

Secondly, the term warranty is used to denote a mere limitation on, or exception from, the general words of the policy. They are known as an *executive warranty*, by which an insurer obtains exemption from liability in the indicated circumstances. These warranties are expressed by the words "warranted free . . . . . ". This phrase means that the risk is not covered. Thus, one can find out by examining the policy as to what risks are not covered.

It is therefore suggested that those who take out marine policies carefully consider what is "warranted free" so that they may have a clear idea of the protection which the policy provides.

PERILS OF THE SEAS

Among the perils covered by the insurance policy is perils of the seas. It is therefore important to know what "perils of the seas" means. Rule 7 of the Rules for Construction of Policy attached to the Marine Insurance Act is as follows:

> "The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

One may therefore consider some decisions relating to perils of the seas. An interesting decision is that of the English House of Lords in *Mountain* v *Whittle*[5]. In that case there was a policy of marine insurance for the plaintiff's houseboat. The houseboat was subsequently towed by a tug to have her cleaned, and to have her underworks examined for repairs. On arrival at the place of repair it was found that about 4 feet of water had entered it, and as more water came in, the houseboat ultimately sank. It was found that some of the seams above the waterline were defective and had opened, and that the bow waves made by the tug and tow raised the water to the level of the defective seams, and that made the water enter and caused the boat to sink. The trial judge gave judgment for the plaintiff holding that the vessel had been lost by a peril of the sea. The said judgment was affirmed by the Court of Appeal. On further appeal to the House of Lords, both decisions of the lower Courts were affirmed. In the course of his speech, Lord Birkenhead L.C. stated:

> ". . The elements which are necessary to form a sea peril have frequently been collected and explained in this House. But it is no longer necessary, unless for purposes of illustration, to go further than the statutory provisions of the Marine Insurance Act; that the term "perils of the seas" refers only to fortuitous accidents or casualties of the seas, and does not include ordinary actions of winds or waves. In my opinion the incidence and dimensions of the wave in question amounted to a fortuitous casualty of the seas and were not accounted for merely by the ordinary action of winds or waves."

An interesting local decision is that of *Pana Vana Letchumanan Chettiar* v *The Jupiter General Insurance Co Ltd*[6]. This was a case where cinematograph films carried on deck were damaged by sea water used in washing decks. It was held that the damage had been caused by a peril of the sea. Horne J. stated in his judgment as follows:

> "Washing decks is incidental to the navigation, for ships must be kept clean and the decks need to be wetted down. It is a wooden deck, and as the master has described, must periodically be scrubbed and holystoned. It is not to be anticipated that in the course of these operations even with the ordinary use of a hose pipe, that sea water will get into these trucks which are stowed upon dunnage and covered by tarpaulin
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> . . . . . .
>
> . . . . . .
>
> I therefore find that the damage had been caused by a peril of the sea."

It should further be noted that in practice it is not only important to know what are perils of the sea, but also to find out whether

5. (1921) 1.A.C. 615.
6. (1939) 8. M.L.J. (S.S.R). (Singapore Suit).

the loss was proximately caused by such a peril. Moreover the term is perils *of* the seas and not perils *on* the seas. Thus, perils of the seas is merely a type of maritime peril; there are other maritime perils enumerated in the policy and these will be considered below.

MEN-OF-WAR

This term is of ancient origin and means vessels used for war or attack. Thus all warships would now come under the term "men of war". They include warships of all nationalities whether friend or foe.

FIRE

Strictly speaking fire is not a maritime peril. However it is to be found in the "Perils Clause" of every standard policy. It includes loss by smoke and water used to extinguish fire as well as damage by fire itself. Loss by lightning is also included under the term "fire". Not only is damage caused by accidental fire recoverable, but also damage caused by fire due to negligence of the master or crewis recoverable. However, the policy would generally exclude loss by fire resulting from sponaneous combustion and certain other causes.

ENEMIES

This term includes, on the outbreak of war, all kinds of enemy activities be it in the air, and on land or sea.

PIRATES

Rule 8 of the Rules for Construction of Policy states that the term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore. This definition is far from exhaustive. However it is not easy to define this term. It would cover loss caused by marauders plundering indiscriminately for their own personal ends. In general terms any "forcible robbery at sea" would be piracy.[7]

ROVERS

The meaning of this term is akin to that of piracy. It is an old expression, denoting freebooters who roamed or 'roved' on the high seas, in the hope that they would come across some vessel laden with valuable cargo which they could board and rob.

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7. See the dicta of Kennedy L.J. in *Republic of Bolivia* v *Indemnity Mutual Maritime Association Co.* [1909] 1. K.B. 785. C.A.

THIEVES

Rule 9 of the Rules for Construction of Policy states that the term "thieves" does not cover clandestine theft, or theft committed by anyone of the ship's company, whether crew or passengers. It will therefore cover forcible theft, i.e. robbery and not petty theft or pilferage. Note however Pilferage is now expressly covered in the policy.

JETTISON

This means the intentional throwing overboard of cargo or any part of the vessel's equipment in order to lighten or relieve her when she is in peril.

LETTERS OF MART AND COUNTERMART

This is an ancient expression meaning State-authorised commissions granted to individuals. The holders of such commission were empowered to assail and capture, or to effect reprisals on an enemy's merchant shipping. This term is of little significance today.

SURPRISALS

The meaning of this term is usually associated with capture.

TAKINGS AT SEA

This would seem to relate to the stopping in war time, and taking into port for examination of neutral merchant vessels suspected of carrying contraband of war to an enemy.

ARRESTS, RESTRAINTS AND DETAINMENTS

Rule 10 of the Rules for Construction of Policy states that the term "arrests etc: of kings, princes and people" refers to executive or political acts and does not include a loss caused by riot or by ordinary judicial process.

BARRATRY

Rule 11 of the Rules for Construction of Policy states that the term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer. However, the definition does not profess to be exhaustive.

The case of *The Freighter "Kien Kung"*[8] seems to be the only reported local case where the issue of barratry was raised. In that case the plaintiffs alleged that the goods which they had shipped on the Freighter "Kien Kung" (which had apparently sunk) had been lost either due to perils of the sea or by barratry of the master and mariners. The trial judge (Buttrose J.) did not accept either of the above contentions. With regard to barratry he held that there was no evidence to support this contention. There was nothing to show that the master or crew had any motive for scuttling her. He pointed out that conduct to be barratrous must be in fraud of the ship owners or cargo owners and not in complicity with them. He therefore held that there was no operative motive to lead the master and crew to sink the ship on their own account.

ALL OTHER PERILS

Rule 12 of the Rules for Construction of Policy states that the term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

D. CAUSA PROXIMA AND MARINE INSURANCE

MEANING AND SCOPE OF

The doctrine of proximate cause is well expressed by the latin maxim *causa proxima, non remota, spectatur*. This roughly means that it is the proximate cause and not the remote cause that must be looked into. This principle therefore protects underwriters against claims for indirect and consequential losses. One of the basic tenets of this principle is that instead of having regard merely to the nearest cause in a chain of events or causes, predominance and efficiency are to be given greater weight.

STATUTORY PROVISIONS

Section 55 of the Marine Insurance Act recognises the doctrine of *causa proxima*. It also enumerates what it considers as something which is not proximately caused.

> 55. (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

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8. [1965] 2 M.L.J. 60.

(2) In particular, –

(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

SOME RELEVANT CASE LAW

There are many decisions on *causa proxima* in marine insurance law. They are however rough and ready applications of the rule to particular facts and it is understandable that some of the decisions are difficult to reconcile. In many cases it will be seen that there are more than one causes or perhaps more accurately "inter-acting" causes. In such cases the efficient or dominating cause and not necessarily that one nearest in time is deemed to be the proximate cause.

Inman Steamship Co Ltd v *James Bischoff and Others*[9]

This is one of the older cases decided by the English House of Lords. There the question was whether the pecuniary loss suffered by the owners was "caused" by perils of the sea. The subject matter of the insurance was on "freight outstanding", and the perils insured against were the usual perils including perils of the sea. The ship in question was carrying troops and stores and during the voyage struck upon a rock. She therefore became incapable of performing efficiently the services of a transport vessel till the injuries received were repaired. The ship struck upon the rock on 21st March 1879 and did not receive any pay from the Government till 20th May 1879.

Brett L.J. who decided the case held against the underwriters. The Court of Appeal reversed his judgment and on further appeal to the House of Lords the House affirmed the decision of the Court of Appeal.

Lord Blackburn remarked that the Court of Appeal went on the doctrine of "causa proxima". However he felt that "these are matters

9. (1882) 7. A.C. 670.

which are very apt to lead us into philosophical mazes". He also thought it was best to keep clear of such philosophical mazes. Accordingly he took the view that the issue in the case was not what was the proximate cause of a loss of freight, but whether there was any loss of freight.

A.M.K. Raman Chitty and Anor v *Chuah Eu Kay and Ors.*[10]

This is an old Penang case. One of the conditions in a Chitty Insurance and Mortgage Bond was that the mortgagees would bear the loss if the mortgaged ship became an absolute total loss due to foundering, but a loss by all other perils including collision, would fall on the mortgagors. The mortgaged ship came into collision with another ship and foundered within a few minutes. Law J. the trial judge held that the loss did not appear to be an absolute total loss and the Plaintiffs (mortgagees) should succeed. He further held that the vessel insured was lost by foundering and that the foundering was due to the collision. Therefore, if the vessel was an absolute total loss, then the Defendant (mortgagors) would succeed. On Appeal, the view of Law J. that the foundering was the direct and immediate cause of the loss was confirmed. It was held that the foundering was the *causa proxima*, and that the collision was *causa remota*. Accordingly, a new trial was ordered as to whether the vessel was an absolute total loss or not.

Leyland Shipping Co. Ltd. v *Norwich Union Fire Insurance Society Ltd.*[11]

In that case a ship was torpedoed while on a voyage from South America to Havre. However, with the aid of tugs she was able to reach Havre. A gale then sprang up and she began to bump against the quay. The harbour authorities had her removed to the outer breakwater as they were afraid that she might sink and block the quay. While moored at the latter place she hit the ground with each ebb tide, but floated again with the flood. Ultimately, the bulkheads gave way, and she sank and became a total loss. The insurance policy contained a warranty against "all consequence of hostilities".

It was held by Rowlatt J. who tried the case that the loss was a loss by hostilities and the insurance company (respondents) were not liable. The said judgment was affirmed by the Court of Appeal, with

10. (1897) 4.S.S.L.R.53.
11. [1918] A.C. 350.

Scrutton L.J. doubting but *not dissenting*. On further appeal to the House of Lords the decision of the Court of Appeal was confirmed. It was held that the grounding was not a *novus causus interveniens*, and that the torpedoing was the proximate cause of the loss. Lord Finlay L.C. in the course of his speech from the woolsack stated:

> ". . . In taking the vessel to the anchorage near the Batardeau, the best practicable course was adopted to save her. The effort was successful. She sustained further damage there owing to the fact that in consequence of the injury by the torpedo she took the ground forward at low tides. She was consequently strained severely by the motion of the seas, and this, coupled with the weakened condition of the bulkhead caused by the explosion, led to her ultimate break-up. Such circumstances do not prevent the injury by the torpedo from being the proximate cause of the loss; indeed they appear to me to establish that the loss was a direct consequence of hostilities."

Canada Rice Mills v *Union Marine and General Insurance Co. Ltd.*[12]

In this case a floating policy was issued to the Appellants with regard to shipments of rice. The rice was shipped on the "Segundo" from Rangoon to Columbia. Although the ventilation system was sufficient, certain ventilators were not opened. The rice heated and fermented and thereby caused damage. One of the questions which arose was whether the closing of some ventilators was the *causa proxima* of the loss.

The trial judge found in favour of the plaintiffs (appellants). The Court of Appeal (by a majority) set aside the judgment as they took the view that the loss was not caused by any perils of the sea. Their view was that the *causa proxima* was the deliberate act of the master in closing some of the ventilators due to bad weather, and to prevent the incursion of sea water. The Privy Council reversed the judgment of the Court of Appeal and held that the loss was due to a peril of the sea and was recoverable as such. Lord Wright in the course of his opinion remarked:

> ". . . But it is now established by such authorities as [1918] A.C. 350 and many others that *causa proxima* in insurance law does not necessarily mean the cause last in time but what is "in substance" the cause, per Lord Finlay at p. 355, or the cause "to be determined by commonsense principles", per Lord Dunedin at p. 362."

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12. A.I.R. 1941 P.C. 68.

E. SEAWORTHINESS

IMPORTANCE OF

It is of course important that a ship which is insured is to be seaworthy. No insurer would like to insure a ship which is not seaworthy. Seaworthiness is not only important for the insurer who insures the ship but also the insurer who insures the cargo. This is because an unseaworthy ship is very likely to cause damage or loss to cargo in one way or another. A reference to any book on marine insurance will show that seaworthiness was an implied warranty to every voyage policy long before the passage of the Marine Insurance Act, 1906. The warranty however applies only to the commencement of the voyage, or to each distinct "stage" of the voyage. At one time it was thought that even the omission to employ a pilot at any stage where pilotage was compulsory constituted unseaworthiness. This is however no longer good law today.[13]

STATUTORY PROVISONS

The present statutory provisions relevant to Malaysian marine insurance law is embodied in ss. 39 and 40 of the Marine Insurance Act which deals with seaworthiness of ships and goods.

"39. (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy

13. See for example the case of *Law* v *Hollingworth* (1797) 7.T.R. 160 which was disapproved in *Dixon* v *Sadler* (1839) 5 M & W at p. 900.

state, the insurer is not liable for any loss attributable to unseaworthiness.

40. (1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

It will therefore be seen that there is an implied warranty only at the commencement of the voyage that the ship is seaworthy; and this applied only to a voyage policy. However there is no implied warranty that the goods or moveables put on board a ship are themselves seaworthy.

It should also be noted that the state of seaworthiness is a relative concept and not an absolute one. It is to be considered with regard to the particular voyage and the particular adventure. Thus a ship which is seaworthy for a river may not be seaworthy for the high seas.

With regard to goods which are shipped, the question of seaworthiness may lead to some confusion. For example, a ship may be seaworthy as between the shipowner and the insurer of the ship. However, it may be unseaworthy as between the shipowner and the shipper of a particular cargo such as frozen meat which may require special freezing apparatus but does not affect the safety of the ship.

Chalmers [14] gives an amusing example of a ship which takes on board a consignment of apes. If the apes are insured, then the ship must, for the purposes of the policy on apes, be reasonably fit to carry the animals safely to their destination, that is to say, she must be "ape-worthy" as well as being seaworthy *qua* ship

SOME RELEVANT CASE LAW

Coopan Chetty and Another v *Bain*[15]

This is an old Penang case where the question of seaworthiness was one of the issues in the case. The facts briefly were that Mr. Bain was the agent of the Netherlands India Sea Insurance Company. He had agreed to grant marine policies to the Defendants in respect of goods which was intended to be shipped on board the ship "Alert". After the goods had been put on board and the ship had sailed, he refused to grant the policies on the ground that the ship was unsea-

14. Ivamy, *Chalmers' Marine Insurance Act 1906*, 8th ed, 1976, 60.

15. (1862) Leic. 170.

worthy at the time it sailed. He relied on the implied warranty of the insured that the ship was seaworthy. The learned Recorder however skirted the issue of seaworthiness by deciding that the defendant was merely an agent and that it was for the principals (the Insurance Co) to perform the contract, and not for him to perform it.

Lindsay & Others v *Klein & Others*[16]

This is a House of Lords decision. The steamship *Tatjana* started on a voyage from Libau to Leith with a general cargo. A few hours after she had put to sea her feed pumps broke down and a donkey engine had to be used. She met with bad weather which resulted in damage to ship and cargo, and had to put into Elsinore for repairs. Further particular charges were incurred in Elsinore. The shipowners claimed to recover contribution from the cargo owners and the First Division of the Court of Session of Scotland held in favour of the shipowners. With some doubt, the Court had held that the ship was seaworthy when she sailed from Libau. The decision was later reversed by the House of Lords and it was held that on the facts the ship was not seaworthy. It was further held that the burden of proving seaworthiness at the commencement of the voyage was on the shipowners. Lord Shaw of Dumfermline however pointed out that though the burden of proof is on the person alleging it, certain presumptions of fact may arise which point out to the unseaworthiness of the ship. He thus stated:

> ". . . But the enunciation of that proposition does not impair or alter certain presumptions of fact, such presumptions, for instance, as those which arise from the age, the low classing, or non-classing, the non-survey of ship or machinery, the refusal to insure, the laying up, the admitted defects, and generally the poor and worsening record of the vessel, together with finally the breakdown, say, of the machinery, immediately, or almost immediately, on the ship putting to sea. It would be a very curious, and, in my opinion, an unreasonable and dangerous thing if circumstances like these did not raise presumptions to which, especially taken cumulatively, effect were not to be given in Courts of law."

Northumbrian Shipping Co Ltd v *E. Timm & Son Ltd.*[17]

This is another House of Lords decision. The Appellant shipowners had arranged to carry a cargo from Vancouver to Hull. The vessel was to call on the way to St. Thomas, but did not carry enough coal for the voyage from Vancouver to Hull. The captain altered course to Jamaica in the belief that there would not be enough

16. [1911] A.C. 194.
17. [1939] 3 All. E.R. (H.L.).

coal even to get to St. Thomas. In doing so the vessel struck a reef and both the vessel and cargo became a total loss. The respondents who were holding bills of lading for the cargo on the vessel sued the shipowners. On the facts, both the trial judge and the English Court of Appeal found that the vessel was not seaworthy when it left Vancouver. The House of Lords affirmed the decisions of both the lower courts.

F. TYPES OF LOSS

INTRODUCTION

Different types of policy cover different types of loss. A loss may be an actual total loss. Or, it may be a constructive total loss. It may also be a partial loss. Apart from these, it may also be what is called a "general average loss". To understand the law of marine insurance one will have to have some knowledge of such losses.

ACTUAL TOTAL LOSS

Under s. 56 of the Marine Insurance Act a loss may be either total or partial. A total loss may be either an actual loss or a constructive total loss. An insurance against total loss will include a constructive as well as an actual total loss, unless a different intention appears.

Sections 57 and 58 relate to actual total loss and are as follows:

57. (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

It will be seen from s. 57 that an actual total loss can occur in one of three ways:

(i) where the subject matter insured is destroyed; e.g. where a vessel sinks in deep water and the ship and cargo are destroyed.

(ii) where the subject matter is so damaged that it ceases to be a thing of the kind insured. This is known as "loss of specie", and a good example is where cement is damaged by water and becomes concrete.

(iii) where the assured is irretrievably deprived of the subject-matter. Under this heading it is not necessary that a thing should be destroyed. For example where gold which is insured sinks with a ship in deep water and the ship cannot be recovered.

With regard to s. 58 it should be pointed out that "reasonable time" is a question of fact. If the insurer pays for the missing ship and she turns up later, then the ship of course belongs to the insurer. Moreover, if the underwriter raises the defence of unseaworthiness in respect of a missing ship, the burden of proof is on him to show that the vessel was in fact unseaworthy.

CONSTRUCTIVE TOTAL LOSS

Meaning and Scope

Constructive total loss is unlike actual total loss in that there is no physical total loss. It implies that the subject matter is not destroyed; it is not in fact totally lost, but commercially a total loss is deemed to have occurred. Section 60 of the Marine Insurance Act defines a constructive total loss as follows:

> 60. (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.
>
> (2) In particular, there is a constructive total loss—
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or
>
> (ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damaged would exceed the value of the ship when repaired.
>
> In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or
>
> (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

With regard to constructive total loss it will be seen that the concept of "abandonment" comes in. This is because unless the subject matter is abandoned there cannot be a total loss; and insurers are liable only for a total loss.

It will also be seen that in ascertaining whether a constructive

total loss exists in accordance with the Marine Insurance Act, the insured value is not brought into the calculation. Also, in ascertaining a constructive total loss of cargo, the cost of repairing and forwarding the goods to destination must be compared with their value on arrival.

It will further be noted that s. 60 is silent as to the constructive total loss of freight. It would arise where, in consequence of an insured peril to the ship, the cargo may have to be discharged at an intermediate port and forwarded. The test to be applied is whether the increased cost of forwarding the cargo to its destination would exceed the freight at risk. Another example of a constructive total loss of freight is where a vessel with cargo on board is herself a constructive total loss before reaching its destination. The shipowner in these circumstances is prevented from earning his freight although the cargo may be intact.

Effect of Constructive total loss

Section 61 of the Marine Insurance Act states that where there is a constructive total loss the assured may treat the loss as a partial loss, or abandon the subject matter insured to the insurer and treat the loss as if it were an actual total loss.

In certain circumstances the former course may be advisable. For example, where the subject-matter is undervalued it may be preferable to claim a partial loss and retain the property. Generally, however, most assured would take the latter course.

Notice of Abandonment

Section 62 carefully deals with the requisite of a notice of abandonment in claiming constructive total loss. This requirement is reasonable for if the assured believes that he has a valid claim for a constructive total loss, he will expect full indemnity. In such a case he cannot expect to retain the property insured. The giving of the notice would enable the underwriter to take steps to protect his interests. However it should be pointed out that careful consideration should be made before this notice is given.

In view of its importance, s. 62 is reproduced in full below:

> 62. (1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.
>
> (2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and

may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

It will be seen that s. 62 envisages a situation where the insurer would not accept the notice of abandonment. This is because, if he accepts the abandonment this is irrevocable. Therefore the insurer will usually decline to accept until he is in full possession of the facts.

Effect of abandonment

This is stated in s. 63 of the Act and is as follows:

63. (1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Some relevant case law

Robertson v *Petros M. Nomikos Ltd.*[18]

In this case the Plaintiff (respondent) had insured the freight of a vessel called *The Petrakis Nomikos* with the Defendant (appellant). While the vessel was being repaired extensive damage was caused to it by an explosion. The repairs cost more than the insured value of the hull, but was found expedient in view of rising prices. An action was then brought as freight had not been earned and on the basis of a constructive total loss. The trial judge Goddard J. (as he then was) held that the underwriters were not liable. The Court of Appeal reversed the judgment, and held in favour of the Plaintiff. On appeal to the House of Lords by the Defendant (appellant), the decision of the Court of Appeal was confirmed. It was held that as the ship had suffered a constructive total loss by a peril insured against, and as the insurance was against the happening of that event, the freight underwriters were liable.

C. Czarnikow Ltd v *Java Sea and Fire Insurance Co. Ltd.*[19]
Leslie and Anderson Ltd v *Java Sea and Fire Insurance Co. Ltd.*

This decision involves 2 actions brought by buyers of cargo against the Insurance Company which insured the cargo. They involved copra and oil-cake respectively which had been shipped from Singapore to Hamburg and Rotterdam on a German ship – the *Oder*. Due to the outbreak of war, the ship put into the Italian port of Massawa. Italy at that time was a "neutral" country but on the side of Germany. The Italian authorities would not allow the cargo to be transhipped except in those cases where the port of shipment and of destination were neutral. Notice of abandonment was duly given and the buyers (Plaintiffs) claimed for a total loss. It was held by the trial judge (Viscount Caldecote L.C.J.) that there was a constructive total loss of the goods.

Lau's Timber Co v *Pacific & Orient Underwriters.*[20]

In this case a marine policy had been issued for the transportation of a tractor. It slipped into the river during the course of transportation and was later salvaged. Plaintiffs alleged that as the cost of salvage and repairs exceeded the value of the goods on arrival, there

18. [1939]2 All. E.R. 723 (H.L.).
19. [1941]3 All. E.R. 256.
20. [1972]2.M.L.J. 187.

was a constructive total loss. It was held that they had failed to prove a constructive total loss, and as the policy covered total loss only, the claim must fail.

Boon & Cheah Steel Pipes Sdn Bhd v *Asia Insurance Co Ltd & Others.* [21]

In this case 668 steel pipes were insured in a voyage from Prai to Brunei and as a result of perils of the sea all but 12 of the pipes fell into the sea. Plaintiffs claimed in two ways: (a) it was a constructive total loss, or (b) the cargo was an actual total loss because of the rule of *de minimis curat lex.* It was held on the facts that it was not a constructive total loss. Moreover, as the 12 pipes which were not lost were worth $14,400/- it could not be considered as *de minimis* and therefore there was no actual total loss.

PARTIAL LOSS.

Meaning.

Partial loss in marine insurance is usually expressed by the term "particular average". Thus, as we will see, when a policy is F.P.A. (free from particular average) it means that there will be no payment for partial loss. It will also be seen that the meaning of "average" with regard to partial loss, is slightly different when used in connection with "general average loss". A general average loss involves partial loss in relation to the whole adventure but at the same time may involve total loss of one particular interest.

Statutory provisions.

Section 56(1) of the Marine Insurance Act states that any loss other than a total loss is a partial loss.

Section 64 of the Marine Insurance Act is as follows:

> 64. (1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.
>
> (2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

It is obvious that a particular average loss covers a wide range of losses. The essential feature is that the loss or damage must be acci-

21. [1973] 1.M.L.J. 101.

dentally and fortuitously caused by an insured peril. Examples of particular average to ship are heavy weather damage, and damage from stranding, collision or fire. Particular average to cargo may be damage by sea-water following heavy weather or stranding, or there may be loss of part of the cargo by an insured peril. Particular average to freight is usually the result of loss of part of the cargo by an insured peril, in consequence of which the shipowner is unable to collect the full freight that is due on delivery of the cargo at destination.

The Memorandum.

There is usually a restrictive clause in the policy affecting particular average and this is known in insurance language as the "memorandum". Such a clause seems to have been added to a marine policy since 1749, and variations of the original can still be found in many present-day marine policies. Thus in a cargo policy one might find the following clause.

> "N.B. Corn Fish Salt Fruit Flour and Seed are warranted free from average unless general or the ship be stranded sunk or burnt; Sugar Tobacco Hemp Flax Hides and Skins are warranted free from average under Five Pounds per cent; and all other Goods are warranted free from average under Three Pounds per cent unless general or the ship be stranded sunk or burnt.

To put it in simple language, the memorandum means that subject to the exception of general average or the ship being stranded, sunk or burnt, no payment for partial loss will be made for Corn, Fish, Salt, Fruit, Flour and Seed (the words being used in their ordinary mercantile sense). With regard to Sugar, Tobacco, Hemp, Flax, Hides or Skins, no payment will be made for partial loss or damage unless it reaches five per cent. For all other goods, no payment for partial loss or damage will be made until it reaches three per cent.

In a Hull policy, one might find something like the following clause:

> "N.B. The Ship and Freight are warranted free from Average under Three Pounds per cent, unless general, or the Ship be stranded, sunk or burnt."

In simple language this means that subject to the exception of general average or the ship being stranded, sunk or burnt, no payment will be made for partial loss of ship or freight unless it reaches three per cent.

It should be noted that in all these cases the loss is paid in full and is not confined to the excess of the percentage. The Memorandum percentage is usually known as a "franchise".

PARTICULAR CHARGES.

In using the term "partial losses", it will be seen that it includes what is called "particular charges". An example of a particular charge is "sue and labour charges". Section 78 of the Marine Insurance Act refers to sue and labouring clauses as follows:

> 78 (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.
>
> (2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.
>
> (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.
>
> (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

The sue and labour clause in a marine policy is based on the common law duty that an owner of property should at all times do everything to avert or minimise a loss to his property. It should also be noted that the sue and labour clause is really a supplemental agreement to the policy. Thus, it is independent of the policy and where such expenses are properly incurred they are paid in full, even in addition to total loss. Under-insurance does not reduce the amount payable. An example of such expenses would be where a vessel, in ballast, not under charter, runs aground. The shipowner, to prevent total loss, engages tugs to tow her off. The expense of this action would be paid in full by insurers whether or not the vessel later became a total loss.

GENERAL AVERAGE LOSSES

Meaning.

General average is a system of making good maritime losses which have been voluntarily incurred for the safety of the common adventure. It is founded on the principle of equity. There is no special Malaysian or Singapore law with reference to General Average and in practice contracts of affreightment provide for adjustment ac-

cording to the York-Antwerp Rules which are in force. The Rules are a voluntary code adopted by shipowners in consequence of the many divergencies in the various national laws governing the adjustment of General Average.

Statutory Provisions

Section 66 of the Marine Insurance Act makes fairly extensive provisions with regard to General Average loss. The section is reproduced below:

66. (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having to enforce his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefore from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

It will therefore be seen that a general average loss is one caused by or directly consequential on a general average act, which may be either a sacrifice or an expenditure.

Contributing Interests

Generally speaking, all property which is saved is liable to contribute towards the general average losses incurred on the voyage. There are therefore two essentials: (a) it must have been on board at the time of the general average act, and (b) it must arrive. If the whole adventure is lost, there can be no general average because all interests are lost. The three main contributing interests are ship, freight and cargo. Mails, crew's effects and the personal effects of passengers are exempted. Where ship, freight and cargo (or any two of them) are owned by the same person there can be no obligation to contribute to general average because a person cannot be called upon to contribute himself. However, in applying general average to insurance, the liability of the insurer is to be determined as if each interest were owned by different persons.

Local Case Law

There seems to be only one local decision covering the concept of General Average. It is that of *Syed Hassan bin Omar Al Hadeed* v *Khoo Soon Tjio*[22]. It will be noted that this decision was before the passage of the Marine Insurance Act, 1906. It was held in that case that the law of General Average Contribution imposes on the master of the ship the duty of having the contribution settled and of collecting the amounts. Such liability arises as agent of the owner. In that case the goods of the Plaintiff (with that of some others) had been jettisoned, and the action was brought as the shipowner refused to collect the general average contributions from the persons liable to pay the same.

G. POLICIES COVERING DIFFERENT LOSSES AND RISKS

INTRODUCTION

In taking out marine policies the main object is to buy as much protection as is necessary or prudent and at as low a cost as possible. Thus, businessmen and shipowners have to know what risks can be covered and decide how much coverage is essential or required. For example, sea-water damage is a major risk. Some policies may cover that risk and some may not. Some may cover it partly. A perusal of the whole policy and the slips or endorsements attached thereto is necessary, for one paragraph or even one sheet of paper may not show what risks are really covered. It is therefore in this area that one may find it fruitful to seek the advice of reputable brokers who

22. (1889) 4. Ky. 528.

specialise in marine insurance.

MAIN HAZARDS REGARDING GOODS

It is particularly important for exporters and importers to realise the hazards involved in the transportation of goods. The main points to look for, depending on the type of goods, are reproduced below.

1. *Breakage*: Bottled goods, crockery, glassware, delicate machinery etc.
2. *Fermentation*: Honey, fruit juices, malt, raisins etc.
3. *Fire*: Highly inflammable goods such as acetylene, gasolene, celluloid, cotton, phosphorous etc.
   Heat cargoes prone to spontaneous combustion such as soft coal, coconuts and copra, all oily seeds and nuts, fish meal, straw, sugar etc.
4. *Humidity*: Hygroscopic goods; salt, sugar, nitrates etc.
5. *Leakage*: All liquids; and solids that solidify in heat. Bagged cargoes: coffee and cocoa beans etc. Compressed gases;
6. *Odours*: Foodstuffs and other products can be affected by odorous cargo stored in same hold, such as fish meal, tobacco, hides, guano and other fertilizers, garlic etc.
7. *Sweat*: Goods which themselves give moisture: arrowroot, paper, potatoes, etc. Also any goods packed in metal containers, or containing metal parts.
8. *Taint*: Foodstuffs (tea especially), paper, cork, cigarettes and cigars, and many other goods are susceptible to being tainted from contact with other cargo.
9. *Vermin*: Flour, grain, skins, tropical woods, nuts, dates etc.

T.L.V.O. POLICIES.

This policy covers *Total Loss of Vessel Only*. It is the minimium coverage one can get. It would cover total loss of cargo resulting from total loss of the vessel.

T.L.O. POLICIES.

This means *Total Loss Only*. It covers only the total loss or constructive total loss of the insured cargo whether or not the vessel itself is totally lost. For example, the loss could result from the goods falling into the sea, when being transferred from one vessel to another.

F.P.A. POLICIES.

It means *Free of Particular average;* i.e. no payment will be made for partial loss. This is usually the minimum coverage in general use. In addition to covering total and general average losses, F.P.A. insurance (despite its name) does cover partial losses but only if the ship has been stranded, sunk, burnt or on fire, or in a collision.

In connection with such a policy one may refer to the previous section in this Chapter dealing with partial loss. The nature of the so-called "Memorandum" has already been explained.

One may now mention what is known as the "f.p.a. clause." It is one of the clauses in the F.P.A. Institute Cargo Clauses and is worded as follows:

> "Warranted free from particular average unless the vessel or craft be stranded, sunk or burnt, but notwithstanding this warranty underwriters are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also for any loss of or damage to the interest insured which may be reasonably attributed to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at a port of distress, also to pay special charges for landing, warehousing and forwarding if incurred at an intermediate port of call or refuge, for which underwriters would be liable under the standard form of English marine policy with the Institute Cargo Clauses (W.A.) attached. This clause shall operate during the whole period covered by the policy."

It may be noticed from the above clause that the insurer treats every package as separately insured. For example if goods are packed in 10 cases and one is totally lost the insurer will pay the total insured value of that one case. If however all 10 cases arrive partly damaged, the insurer will pay nothing, unless the ship is stranded, sunk or burnt. It is therefore advisable to value the several packages separately in the insurance policy, and the value insured should be the total of the values of the several packages.

W.A. POLICIES

This means *With Average.* Such a policy broadens the coverage to include a wider range of partial, particular average losses. A plain W.A. policy pays for partial damage caused by *sea perils* if the damage exceeds a specified percentage of the value of the insured cargo. This is generally three per cent. If the ship is stranded, sunk, burnt or involved in a collision, the minimum percentage requirement is waived and the insurer pays for all the damage. In practical terms, the additional coverage one gets with W.A. as opposed to F.P.A.

terms is protection against damage from sea water caused by "heavy weather", since the F.P.A. also covers the other "perils of the sea".

It should however be noted that W.A. clauses vary considerably according to the custom of trade or special arrangements. Some clauses are based on percentage (franchises) as explained above. But some clauses dispense completely with franchises, and is sometimes expressed as "average payable irrespective of percentage".

Where w.a. is arranged, the Institute Cargo Clauses (W.A.) are adopted; and contain the following average clause which supplements the special arrangement of the parties.

> "Warranted free from average under the percentage specified in the policy, unless general, or the vessel or craft be stranded, sunk or burnt, but notwithstanding this warranty the underwriters are to pay the insured value of any package which may be totally lost in loading, transhipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress. This clause shall operate during the whole period covered by the policy."

Mention may be made of some local cases involving W.A. cover. The case of *Aik Teong Trading Co* v *National Union Fire Insurance Co*[23] involved a "warehouse to warehouse" policy with Institute Cargo Clauses W.A. The goods insured were seven cases of Siam Swallow nests and three of the cases were lost in the course of transportation from the steamer to the shore in a lighter. It was held that although the packages were not of the same weight, it was simply a case of arithmetical calculation. Moreover, clause (6) of the W.A. clauses could not be split up as suggested by the insurance company.

The later case of *Victoria Insurance Co Ltd* v *Aik Teong Trading Co*[24] involved a (W.A.) policy where there was a partial loss of maize which was being transported. The loss was caused by sea-water and it was held that the insurers were liable. One of the conditions of the insurance was as follows:

> "Warranted against marine W.A. and War Risks, S.R.C.C., warehouse to warehouse, including damages caused by fresh, sea and rain water, irrespective of percentage."

ALL RISKS POLICIES.

All risks coverage is the broadest kind of standard coverage. However, it does not cover, as its name suggests, "all risks". It ex-

23. (1962) M.L.J. 299.
24. [1973] 1. M.L.J. 15.

cludes coverage against damage caused by war, strikes, riots etc. These perils can be covered by a separate endorsement. Moreover, it covers only physical loss or damage from external causes.

As it covers only *risks,* this means that it covers only the happening of a fortuitous event. Delay is also not covered. This is evidently important for a businessman who would have to insure at additional rates for cover for delay. Furthermore, as it covers loss from external causes it does not cover the kind of damage that can be expected to occur under normal conditions because of the nature of the goods themselves, i.e. their *inherent vice.* For example, butter which turns rancid would be regarded as inherent vice. What an "all risks" policy does not cover has been very well explained by Lord Sumner in *British and Foreign Marine Insurance Co.* v *Gaunt:*[25]

> "There are of course, limits to "all risks". They are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear or British capture . . . . Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured himself."

The All Risks clause of the Institute Cargo Clauses reads as follows:

> "The insurance is against all risks of loss of or damage to the subject matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject matter insured. Claims recoverable hereunder shall be payable irrespective of percentage."

Problems have arisen where the loss has been caused by insufficient packing. Sellers J. held in *F.L. Berk and Co Ltd* v *Style*[26] that an insufficient packing was an inherent vice of the goods themselves. One may also refer to the case of *Gee* v *Garnham Ltd* v *Whittall* [27].

A local decision involving inherent vice is the Singapore case of *Keck Seng & Co Ltd* v *Royal Exchange Assurance*[28]. This was a claim on an "all risks" policy of marine insurance and as usual it did not cover loss or damage caused by inherent vice or nature. The policy covered 4, 980 bags of white sugar shipped from Dairen to Singapore. On arrival at Singapore, 3849 bags were found to be partly damaged by becoming wet. It was held that the damage was due to the inherent vice of the sugar absorbing moisture from the at-

25. [1921] 2.A.C.41, 57.
26. [1955] 1.Q.B. 180.
27. [1955] 2. Lloyds Rep. 562. See also James Wong, "Insurance Problems in Relation to Container Transport in Singapore", *The Banking and Financial Review,* 1976, Vol. 2, No. 1.
28. (1964) M.L.J. 246. This case refers to "sweating".

mosphere and was exempted by clause (6) of the Institute Cargo Clauses (All Risks).

ALL LOSS OR DAMAGE POLICY.

This is a policy which is available in the English market but does not seem to have appeared as yet in Singapore or Malaysia. It is meant to give protection broader than an "All Risks" cover. However, it has not been approved by the Institute of London Underwriters and there is a widespread opinion amongst insurers that no wider cover than in an All Risks Policy should be granted.[29]

Therefore no further treatment is required for the purposes of the Malaysian market. Those interested may contact their insurance brokers.

H. MARINE INSURANCE CLAIMS

INTRODUCTION.

Claims handling in marine insurance is not an easy job. In preparing claims it may be worthwhile for the insured to obtain the advice of his insurance broker. It must be also observed that that this is an area where fraud is not unknown. Claims may become very complicated where there is wrongdoing. For example, where a ship carrying cargo is deliberately sunk or scuttled. In such cases cargo owners may well be innocent. But complications are bound to arise.

LOSS OF SHIP.

In addition to the policy, the following documents would normally be required:

a) Protest. This is a statement sworn by the master before a notary public giving details of the casualty. The protest may later be extended if fuller information is required.
b) Certified list from the shipowner of all P.P.I. Insurance to ensure that the disbursements warranty has not been broken.
c) Evidence that any special warranty in the policy has been complied with.

LOSS OF CARGO

The following documents would normally be required.

a) Original policy of insurance.
b) Protest.
c) Invoices which confirm the F.O.B., C.I.F. or C & F value of

29. See Schmitthoff. The Export Trade, 6th edn, 282.

the cargo, quantity and quality.

d) Full sets of bills of lading, duly endorsed, evidencing the shipment of the cargo and the terms of the carriage.

e) Letter of subrogation from the assured authorising the underwriter to use the assured's name in the proceedings with a view to recovery from other parties primarily responsible for the loss.

In certain cases where for example the ship sinks with the cargo under mysterious circumstances, more information may be asked for by the underwriter. They may want to know what were the ports of call before the sinking and why such calls were made. They may also want to see the survey report etc.

PARTIAL LOSS OF CARGO.

The following documents would generally be required:

a) Original Insurance policy.

b) Bills of Lading.

c) Survey Report by a reputable surveyor.

Other documents such as account sales may be asked for depending on the circumstances surrounding the loss.

MEASURE OF INDEMNITY.

Section 67 to 78 of the Marine Insurance Act deals with the measure of indemnity available in the different types of losses. As it is not worthwhile to reproduce all these sections, the more important points will be dealt with below.

In the case of a total loss the assured is entitled to recover the sum fixed in the policy if it is a valued policy. If the policy is an unvalued policy the assured is entitled to recover the insurable value of the goods, subject to the limit of the sum insured (s. 68).

Under s. 71, the measure of the damages for a partial loss of goods is roughly as follows:

a) where part of the goods insured by a valued policy is lost, such proportion of the fixed value as the lost part bears to the whole insurable value of the insured goods.

b) where part of the goods insured by an unvalued policy is lost, the insurable value of the part lost.

c) where the whole or part of the goods insured arrives damaged, such proportion of the fixed value in case of a valued policy, or insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.

Where different species of property are insured under a single valuation and one species only is damaged, the value of the damaged goods must first be apportioned in the proportion which the damaged item bears to the different species before the ordinary rules of calculation can be applied (s. 72).

CHAPTER XI

OTHER TYPES OF INSURANCE

A. INTRODUCTION

Besides the main types of insurance mentioned in the previous chapters there are quite a few other types of insurance which are made from time to time by various types of people and organisations. Thus, one may mention among them householders' insurance; burglary, housebreaking, theft and robbery insurance; contractors' all risks insurance; professional indemnity insurance; fidelity insurance, cash in transit insurance; goods in transit insurance; and even insurance covering the birth of twins called "twin insurance". In fact, there are many more and one sees that there is a local decision covering "race horse insurance".[1] Some of the insurances mentioned above may be briefly discussed.

B. BURGLARY INSURANCE

SCOPE

In what has been described as "burglary insurance" one sees a motley of insurance policies covering burglary and theft, burglary and housebreaking or a combination of both or even robbery. It is not surprising because burglary, housebreaking and theft are related offences. Where there is threats of violence or violence, it may well turn into robbery.

The difficulty about this type of insurance is that English terms are used. One is therefore faced with problems of interpretation. What does "burglary" mean for example? First of all, "burglary" as such has never been a crime in Malaysia or Singapore as both countries use the Penal Code and "burglary" is not one of the crimes contained therein. It probably means "house breaking by night".

One way of construction might be to find out what it means in England. The definition of "burglary" before and after the Theft Act, 1968 is quite different. When the policies in use in Singapore and Malaysia were drafted it probably meant "burglary" as defined in the Larceny Act 1916. In any event the other question which arises is whether in construing a policy one is bound by the intrica-

1. *New India Assurance Company* v *Lewis* [1967] 1.M.L.J.

cies of the criminal law. Thus parties to an insurance policy are "free to make their own dictionary" and can agree to a definition of risk different from that adopted in the criminal law. Thus, in *Re George and Goldsmiths and General Burglary Insurance Association Ltd*[2] a policy was taken out against burglary and housebreaking "as hereinafter defined" and the risk insured was loss "by theft following upon actual forcible and violent entry upon the premises." It was held that where a thief merely entered by turning the door handle and stole the goods, the policy did not cover such a situation.

For Malaysia and Singapore however, the confusion is even worse because "theft" as defined in the Penal Code and "theft" defined in the English Theft Act, 1968 is different. Before 1968 there was no statutory definition of theft in English Law at all and one would have to go by the common law.

The above position can be realised by considering the local case of *Lim Trading Co.* v *Sinclair*[3]. In that case the Plaintiffs were a firm of stockbrokers. A fraudulent customer bought shares and made payment by the use of dud cheques. The Plaintiffs claimed under an insurance policy for loss of shares by theft. The trial judge (Buttrose J) held that in essence the transaction was one of obtaining the shares by false pretences and not by theft within the meaning of the policy. Under English law it would be regarded and punished as false pretences and under Singapore law as "cheating". In neither case it was theft within the meaning of the policy or in the fullest sense of the term itself and therefore the Plaintiffs claim must be dismissed with costs.

THE PROPOSAL FORM.

The proposal form in burglary insurance is mainly concerned with three matters. They are:

1. description of the subject matter.
2. circumstances affecting the risk.
3. non-disclosure and misrepresentation of material facts.

The subject matter.

The property to be insured is usually classified under the following headings.

i. household goods.
ii. gold and silver articles.
iii. stock-in-trade.
iv. goods held in trust or on commission.

2. [1899] 1.Q.B. 595.
3. [1967] 2.M.L.J. 64.

v. articles of exceptional value.
vi property of other persons.

Circumstances affecting the risk.

The principal circumstances with which the insurer is concerned are:

i. the premises containing the property insured.
ii. the property to be insured.
iii. the previous history of the proposer.
iv. other insurance.

Non-disclosure and Misrepresentation.

The same principles as to any other insurance apply. It seems that among other things which have to be disclosed, previous convictions are important. In *Horne* v *Poland*[4] it was held that even non-disclosure of nationality was a material fact. In that case the insured had not disclosed to an English insurer that he was an alien born in Rumania, and it was held that they were entitled to repudiate liability.

ALTERATIONS TO THE RISK.

The principal alterations which may affect the risk provided in the policy are:

i. Removal of the insured property from the premises described in the policy.
ii. Change in the insured property.
iii. Change of interest.
iv. Change of occupancy.
v. Alteration of other circumstances.

EXCEPTIONS.

As in other policies a burglary policy has its own exceptions. The exceptions which are usually contained may be classified as follows:–

i. exceptions excluding loss or damage from war or similar causes.
ii. exceptions excluding loss or damage which can be insured by other species of insurance.
iii. exceptions relating to the conduct of the insured.
iv. exceptions relating to the conduct of other persons.
v. excepted articles.

4. (1922) 2.K.B. 364.

Item (ii) above may be briefly explained. For example, there may be theft during a fire which may come under loss by "fire" under a fire policy. In such a case, the claim will have to be made under the fire policy.

Item (v) is also interesting. The following articles would usually be excluded.

a. articles which possess a fancy value or a personal value e.g. medals, coins curios, sculptures etc.
b. money and securities, title deeds.
c. articles which are usually insured under a different species of burglary policy, e.g. personal effects are excluded in the case of a policy on the contents of business premises.

C. CONTRACTORS' "ALL RISKS" INSURANCE

SCOPE

Such policies are becoming popular in Malaysia and Singapore with the increase of building and construction works. Contractors feel (and in some cases it is made necessary) that they insure themselves from certain risks that may befall them. The risks which contractors may wish to insure broadly fall under two heads:

1. Insurance against loss or damage to property, plant, machinery and other equipment on the site occupied by the builder or the repairer or other contractor.
2. Insurance against liability which may be incurred by the contractor in the course of his operations.

One should carefully read the policy one gets because slightly different risks may be covered in the so called "Contractors' ALL Risks' Policies". Usually, cover for liability to third parties should be included.

DURATION OF THE POLICY.

The policy will usually specify a period for which the insurers accept liability. Two periods may be mentioned. The construction period and the maintenance period. In most cases, building contracts become delayed and extension of time will be asked for by the contractor; in such cases he will also require an extension of his insurance. Sometimes automatic extension clauses may be included and the premium will be accordingly adjusted.

GENERAL EXCLUSIONS.

It is important to know what is not covered in such a policy.

Usually, there is no liability in respect of any loss, damage or liability which is also covered by any other existing policy except in respect of the excess amount. There is also no cover for loss, damage or liability directly or indirectly caused by ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. To the Malaysian contractor this exclusion is of little practical importance.

There is also the usual exclusion for loss or damage occasioned by war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution etc. Further, the policy does not cover penalties for non-completion or delay in completion of the contract.

D. HOUSEHOLDERS' COMPREHENSIVE INSURANCE.

SCOPE.

This is a policy which is popular in many western countries but their importance has not yet been brought out in Malaysia and Singapore. One reason why it is not so popular is that no efforts have really been made to the householder that such a policy is worth having. There is too much concentration on the selling of more lucrative policies such as life policies. The perils insured against usually cover five important areas:

a. The building.
b. The contents.
c. Miscellaneous extensions.
d. Public liability.
e. Accidents to servants.

COVERAGE

Building.

The policy would cover loss or damage caused by (*inter alia*) fire, lightning, earthquake, bursting or overflowing of water tanks, storm, tempest or flood, or impact by any road vehicle not belonging to or under the control of the insured or any member of his household. There may be an excess clause which the insured has to bear.

Policy extensions.

The policy may cover fatal injury to the insured or his wife occuring on the insured premises due to thieves or by fire. There will of course be a specified limit.

Loss of rent may also be covered. Thus, the policy may indemnify loss of rent which the insured would receive from a tenant and also the rent which he himself would have to pay to the landlord if the premises become untenantable due to the perils mentioned above.

Public liability

This is an important head. The policy would cover sums the insured is legally liable to pay in respect of claims made against him arising from bodily injury or disease to persons or damage to property caused during the currency of the policy as owner or occupier of the building.

An intriguing case where a claim was made under this head is in the English case of *Gray* v *Barr*[5]. That case involved a "hearth and home" policy which had been effected by the Defendant's wife. In that case there was a struggle between the Defendant and Gray over a liaison between Gray and his wife. As a result Gray died of injuries caused by a gun and his father and widow claimed damages from the Defendant. The Defendant admitted liability and claimed an indemnity from the insurers under the said policy.

The Court of Appeal held by a majority that the death was not really caused by an "accident" within the terms of the policy and in any event felt that as the Defendant had been guilty of deliberate violence it would be against public policy to allow him to recover the sum insured against.

Accidents to servants.

The policy may cover the liability of the insured in respect of bodily injury by accident to servants who are employed in connection with the insured premises or in connection with any car used by the insured or by any member of the insured's household.

E. PROFESSIONAL INDEMNITY INSURANCE.

SCOPE.

This is undoubtedly an important branch of insurance as professionals like doctors, lawyers and accountants may cover themselves from liability. Liability for professional negligence seems to have been widened since the well known case of *Hedley Byrne* v *Heller & Partners*[6] whereby a professional may now be liable in tort for neg-

5. [1971] 2 Lloyds Rep, 1; [1971] 2. Q.B. 554.
6. [1964] A.C.465.

ligent mis-statements. The full effect of this decision has however not been worked out as yet by Courts though there are a number of decisions which have followed it.

It must be remembered that as this type of policy is meant to cover professional negligence it is not meant to cover dishonest or fraudulent acts by servants or employees. This would come under the domain of fidelity policies which will be discussed below. It will of course not cover dishonest or fraudulent acts of the insured himself.

Usually the policy covers "negligent act error or omission", and the question is whether the word "negligent" qualifies only the word "act" or also the words "error or omission". It has now been settled that any claim for negligence will be covered by the policy.[7]

NEGLIGENCE OF PREDECESSORS IN BUSINESS.

Many persons seeking professional indemnity insurance are practising in partnership and problems may arise in deciding the scope of the insurance regarding retiring and incoming partners. Most policies make it clear that it covers the firm as well as the individual partners (including new partners).

It is clear under partnership law that where old partners retire and new partners come in, the constitution of the partnership changes. In such a case the remaining partners will be liable for negligence which occurred while the partnership was in its previous form. Therefore, in practice, the policy covers negligent acts or omissions of "the insured or their predecessors in business or any employee of the insured or their predecessors in business".

EXCEPTIONS.

Like other policies there are notable exceptions in professional indemnity policies. It will exclude liability for libel and slander. There is sometimes an exclusion for "claims brought about or contributed by the dishonest, fraudulent, criminal or malicious act or omission of the insured, their predecessors in business or employees of the insured or their predecessors in business."

DUTY TO DISCLOSE NEGLIGENCE.

Needless to say, among the material facts which have to be disclosed will be any negligent acts or omissions which the insured knows of. This casts a heavy burden on the insured at the beginning of the policy.

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7. See *Davies* v *Hosken* [1937] 3.All.E.R.192; and *West Wake Price Co.* v *Ching* [1957] 1.W.L.R.45.

F. FIDELITY INSURANCE

SCOPE.

As criminal breach of trust is prevalent in both Malaysia and Singapore, this type of insurance is becoming increasingly popular. Such a policy is meant to cover pecuniary loss which an employer may suffer if the employee proves to be dishonest. The insurance is usually limited to a particular person or a class of persons occupying a particular position. Thus the policies will usually make clear the precise duties of the employees concerned and that the insurers are to be liable only if the loss is in connection with such duties.

Here again, most fidelity policies use terms originally used in English criminal law. Thus, they would cover larceny, fraudulent conversion, embezzlement etc. It should be noted that these terms do not exist even in English criminal law to-day as they have been superseded by the provisions of the Theft Act, 1968. Thus, the same observations made in connection with burglary policies will apply. It is high time that local companies selling this type of insurance use local criminal law terms. For example, one controversial area would be whether this type of policy covers what is "cheating" under the Penal Codes of Malaysia and Singapore.

THE PROPOSAL FORM.

Questions relevant to the risks involved would be included in the proposal form. The principal matters covered would be

1. the duties of the employee.
2. the temptation to dishonesty.
3. the employee's character.

The insurance company wishes to know the duties of the employees as it would show their opportunities for misappropriation. The insurance company would also like to know how well they are paid as an ill paid employee would be more likely to be dishonest. The employee's character relates to the "moral hazard" involved. Thus an employer must state what he knows about the employee's character. It may even be desirable to disclose his suspicions.

EXCEPTIONS.

A fidelity policy in many cases may contain no express exceptions. However, as the employees' employment or duties are already specified, any loss beyond what is specified would not be met.

The policy may however provide that the omission or neglect to

observe the precautions specified in the policy shall relieve the insurers from liability. Also, if the policy covers acts or defaults which are not criminal, there may be an express exception applying to acts or defaults committed in obedience to superior orders.

ALTERATION OF RISK.

In many cases the risk is tied up with the job which an employee performs. Thus, if his job is changed, then the insurance company should be informed. In practice therefore, the policy usually contains conditions prohibiting certain kinds of alterations. The following matters would be relevant:

1. the contract of employment.
2. the method of business.
3. other securities.
4. the conduct of the employee.

TYPE OF LOSS.

To be covered by the policy the employer must have obtained actual pecuniary loss during the period of insurance. Suppose an employee cheats a customer and it is the customer who suffers the loss. Suppose also that for the sake of good business the employer reimburses the customer and suffers loss. Would such a loss be covered?

The time when the loss is sustained is when it is caused and not when it is discovered. Sometimes there may be specified the period within which claims are to be made, and in such a case the time of loss may become important.

APPENDIX I

LAWS OF MALAYSIA

Act 89

INSURANCE ACT, 1963

(Revised–1972)

Note:-

(Incorporating Act No A182/73, A294/75 and A432/78).

ARRANGEMENT OF SECTIONS

PART I
PRELIMINARY

PART II
CONDUCT OF INSURANCE BUSINESS

Section

PART III
RETURNS, INVESTIGATIONS, WINDING UP AND TRANSFERS OF BUSINESS

Returns

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Administration and enforcement

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Supplementary

LAWS OF MALAYSIA

Act 89

INSURANCE ACT, 1963

(Revised—1972)

An Act to provide for the regulation of insurance business in Malaysia, and for other purposes relating to or connected with insurance.

[*West Malaysia—21st January, 1963; East Malaysia—1st January, 1965.*]

PART I

PRELIMINARY

1. This Act may be cited as the Insurance Act, 1963. Short title.

*1A. In this Act unless the context otherwise requires— Interpretation.

"Accountant-General" means the Accountant-General, Malaysia;

"accounting period", in relation to any insurer, means the period for which the insurer makes up the accounts of the insurance business carried on by him in Malaysia; but unless in any particular case the Director General allows those accounts to be made up for a longer or shorter period, every accounting period for which those accounts have not been made up before the commencement of this Act (that is, before the 21st January, 1963) shall be a period of twelve months beginning from the commencement of that business or from the end of the preceding accounting period;

"adjuster" means any person who for compensation, fee, commission or salary investigates and negotiates settlement of claims arising under insurance contracts, solely on behalf of either the insurer or the insured;

* The definitions appearing under this section formerly appeared under ss. 45 to 47 and L.N. 470/64.

"broker" means any individual, firm or company who for compensation as an independent contractor, in any manner solicits, negotiates or procures insurance or the renewal or continuance thereof on behalf of the insured other than himself;

"Co-operative Societies Ordinance" means the Co-operative Societies Ordinance, 1948, of the Federation of Malaya, or the Co-operative Societies Ordinance, 1958, of Sabah, or the Co-operative Societies Ordinance of Sarawak, as the case may require;

F.M. 33/48. Sabah 3/58. Sarawak Cap. 66.

"existing insurer", in relation to either class of insurance business, means an insurer which has been carrying on that class of business in Malaysia since before the 21st January, 1963;

"initial accounting period" shall have reference to existing insurers only and shall mean the accounting period beginning with the 1st January, 1963, or if the insurer has no such accounting period, the first accounting period beginning thereafter;

"modified initial accounting period" shall have reference to pre-registered insurers only and shall mean the accounting period beginning with the 1st January, 1965, or if the insurer has no such accounting period, the first accounting period beginning thereafter;

"premium receipt book" includes any book or document held by the policy owner in which acknowledgements of receipts of premiums payable in respect of the policy are entered;

"pre-registered insurer", in relation to either class of insurance business, means an insurer which was registered under this Act immediately before the 1st January, 1965, and which has been carrying on that class of business in East Malaysia since before that date;

"prescribed" means prescribed by regulations;

"qualified actuary" means a Fellow of the Institute of Actuaries in England, or a Fellow of the Faculty of Actuaries in Scotland, or a Fellow of the Society of Actuaries in America;

"the Register" means the register of policies established by an insurer under section 9;

"regulations" means regulations made by the Minister under this Act;

"reinsurer's deposit" means an amount deposited with or retained by an insurer by way of security for the performance by the reinsurer of contracts reinsuring liabilities of the insurer, and includes any similar amount retained by a branch of the insurer's business in Malaysia against a branch outside Malaysia (the head office of a business being for this purpose treated as a branch);

"statutory balance sheet" and "statutory valuation" mean respectively a balance sheet lodged with the Director General in order to comply with section 22 (1), and a valuation of which the results are shown in a valuation balance sheet lodged with him on an actuarial investigation made in order to comply with section 23 (1) and—

(*a*) any reference to the last statutory balance sheet or to the last statutory valuation shall be construed as referring to that last prepared or made and not superseded by the arrival of the date as at which another is to be prepared or made; and

(*b*) any reference to there being shown in a statutory balance sheet or on a statutory valuation a surplus of assets over liabilities of an insurance fund shall be construed accordingly by reference to the prescribed form of balance sheet or valuation balance sheet and to the rules to be followed under this Act in preparing it;

"written premiums" means gross premiums during the accounting period in respect of Malaysian policies issued, and reinsurances accepted, which are entered in the Register, reduced by return premiums and premiums in respect of reinsurances on Malaysian policies ceded during the accounting period to an insurer registered or authorized under this Act, and relates only to general business.

Classification of insurance business, and construction of references to matters connected with insurance.

2. (1) For the purposes of this Act—

(*a*) insurance business shall be divided into two classes—

(i) life business, which in addition to all insurance business concerned with life policies shall include, in the case of any insurer, any type of insurance business carried on as incidental only to the insurer's other life business; and

(ii) general business, that is to say, all insurance business which is not life business,

and the reinsurance of liabilities under insurance policies shall be treated as insurance business of the class and type to which the policies would have belonged if they had been issued by the reinsurer:

Provided that if the Director General is satisfied that any part of an insurer's business which belongs to a particular class or type of insurance business ought in the insurer's case to be treated as belonging to another class or type, the Director General may direct that it shall be so treated;

(*b*) references to carrying on insurance business include the carrying it on through an agent, or as agent; but "insurer" shall not include an insurance agent as such nor, in the case of a person who is both insurer and insurance agent, have reference to business done as insurance agent;

(*c*) "Malaysian insurer", and "Malaysian insurance agent" mean a person who is or has been carrying on insurance business in Malaysia as insurer and as insurance agent respectively, and "Malaysian insurance broker" means a person who is or has been carrying on business as insurance broker in Malaysia; and references to carrying on insurance business, or any class of insurance business, in Malaysia include but include only the receipt of proposals for, or issuing of, policies in Malaysia or the collection or receipt in Malaysia of premiums on Malaysian policies;

(*d*) the operation, otherwise than for profit, of a scheme or arrangement relating to service in particular offices or employments, and having for its object or one of its objects to make provision in respect of persons serving therein against future retirement or partial retirement, or against future termination of service through death or disability, or against similar matters, shall not be treated as carrying on the business of insurance; and

13/66. (*e*) no society registered under the Societies Act, 1966, and no company engaged primarily in the business of export credit insurance shall be deemed to be an insurer, and

no agent for such a society shall as such be deemed to be an insurance agent; nor shall references in this Act to a policy or contract of insurance apply to any policy or contract whereby an insurance is effected with such a society or company.

(2) The definitions set out in the First Schedule shall have effect for the construction of references in this Act to policies of insurance, policy owners and policy monies.

PART II

CONDUCT OF INSURANCE BUSINESS

General restriction on insurers

3. (1) Subject to this Act, insurance business shall not be carried on in Malaysia by any person as insurer except— Requirements for carrying on business as insurer.

(*a*) by a company as defined in the Companies Act, 1965, or a company incorporated outside Malaysia which has an established place of business in Malaysia; *79/65.*

(*b*) by a society registered under the Co-operative Societies Ordinance, or *F.M. 33/48. Sabah 3/58. Sarawak Cap. 66.*

(*c*) by an unincorporated company established in the United Kingdom before the year 1862 which has been carrying on business as insurer in Malaysia since before the 21st January, 1963, and has an established place of business in Malaysia.

(2) (*a*) No such company or society shall carry on life business or general business in Malaysia as insurer unless –

(i) it is registered under this Act in respect of that class of business;

(ii) in the case of a company as defined in the Companies Act, 1965 and a society mentioned in subsection (1) (*b*) it maintains at all times a surplus of assets over liabilities of not less than the amount specified under section 4 (4) (*a*) (i) or fifteen per cent of its written premium income in the preceding financial year, whichever is the greater; *Act 125*

(iii) in the case of a company incorporated outside Malaysia and a company mentioned in subsection (1) (*c*), it maintains in Malaysia at all times a surplus of assets in Malaysia over liabilities in Malaysia of not less than one million ringgit or fifteen per cent of its written premium income in Malaysia in the preceding financial year, whichever is the greater; and

(iv) has the deposit required by this Act in respect of it.

(*b*) For the purposes of paragraph (*a*) (iii), the surplus shall be in the form of cash, securities of the Federal Government issued in Malaysia, or securities specified in the Second Schedule or in any combination thereof; and the provisions of section 11 (4A) shall apply to investments specified in the Second Schedule made under this subsection;

(*c*) For the purposes of this section and section 4, the value of assets and the amount of liabilities shall be determined on a basis approved by the Director General.

(2A) In addition to the requirements mentioned in subsection (2), no company or society mentioned in subsection (1) shall carry on general business unless on the commencement of this subsection it is, or within six months thereof it becomes, a member of an association of insurers approved by the Minister.

(3) Subsection (2) shall not apply to an existing insurer or a pre-registered insurer in respect of the collection or receipt of premiums on Malaysian policies belonging to either class of business if the insurer has satisfied the Director General before the 21st April, 1963, in the case of an existing insurer or before the 1st April, 1965, in the case of a pre-registered insurer—

(*a*) that the insurer was not carrying on nor proposing to carry on that class of business in Malaysia as insurer otherwise than by the collection or receipt of premiums on those policies; and

(*b*) that reasonable provision had been or would be made for the insurer's liability in respect of those policies, and adequate arrangements would exist for payment in Malaysia of premiums and claims on those policies.

(3A) An existing insurer, a pre-registered insurer and an insurer who has been registered under this Act immediately before the commencement of this Section shall comply with the provisions of subsection (2) (*a*) (ii) within a period of twelve months from that date. *A 294; 1975*

(4) A person who contravenes this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars, increased by one thousand dollars for each day on which he is proved to have done so, or to imprisonment for a term not exceeding twelve months or to both.

3A. Where any person holds himself out to be a registered insurer in respect of life business or general business or both where he is not registered under this Act in respect of that business, that person shall be guilty of an offence and shall, on conviction, be liable to a fine of five thousand dollars or to imprisonment for a term of twelve months or to both, and to a daily fine of not exceeding one thousand dollars.

Use of words "insurance", "assurance" or "underwriter".

3B. (1) No person other than an insurer registered under this Act shall, without the written consent of the Director General, use the word "insurance", "assurance" or "underwriter" or any of their derivatives in any language, or any other word indicating that such person carries on insurance business in the name, description or title under which it carries on business in Malaysia or make any representation to such effect in any bill head, letter paper, notice or advertisement or in any other manner:

Provided that nothing in this section shall prohibit an association of insurers from using the word "insurance", "assurance" or "underwriter" or any of their derivatives in any language as part of its name or description of its activities.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine of one thousand dollars or to imprisonment for a term of six months or to both and to a daily fine of not exceeding one hundred dollars.

Examination of persons suspected of carrying on insurance business.

3C. (1) Where the Director General has reason to believe that a person is carrying on insurance business without having been registered under this Act, he may call for or inspect the books, accounts and records of that person in order to ascertain whether or not that person has contravened or is contravening any provisions of this Act.

(2) Any person who wilfully refuses to submit the books, accounts and records or to allow the inspection thereof shall be guilty of an offence and shall, on conviction, be liable to a fine of five thousand dollars or to imprisonment for a term of twelve months or to both and to a daily fine of not exceeding one thousand dollars.

Registration of Malaysian insurers

Registration by Director General.

4. (1) The Director General shall be responsible for the registration of Malaysian insurers and, subject to this section, shall on the application of any company or society qualified under sections 3 (1) and 3 (2A) register, with or without conditions and on payment of the prescribed fees, the applicant in respect of life business or general business or both.

(2) An application to be registered in respect of life business or general business may be made by a company or society already registered in respect of the other.

(3) The Director General shall not be required to consider an application unless it is made in writing signed on behalf of the insurer by one of its directors and by its principal officer in Malaysia, and he has been furnished with such documents and information as may be prescribed or as he may in the particular case require.

(4) (*a*) The Director General shall refuse to register an applicant if, after appropriate inquiry, he is not satisfied—

(i) that the applicant has a surplus of assets over liabilities of not less than one million dollars or such greater amount as may be specified by notice in writing by the Minister and, if it is carrying on or will (if the application is granted) be registered in respect of both classes of insurance business, not less than one and a half million dollars or such greater amount as may be specified by notice in writing by the Minister; and in the case of a company incorporated outside Malaysia, it has in Malaysia a surplus of assets in Malaysia of the same amount over liabilities in Malaysia; and

(ii) that the name of the applicant is not by its resemblance to the name of any other body likely to deceive.

(*b*) For the purposes of paragraph (*a*) (i), "assets" does not include goodwill, and "liabilities" includes contingent and prospective liabilities but not liabilities in respect of share capital.

(5) The Director General shall also refuse to register an applicant if, after appropriate inquiry, he is not satisfied

that the business in respect of which the application is made will be conducted in accordance with sound insurance principles:

Provided that if the application is made in respect of both classes of insurance business, and the Director General is satisfied as respects one of them, he shall under this subsection refuse only as respects the other.

(5A) Where the Director General is satisfied that an applicant has complied with all the requirements of this section he shall refer the application to the Minister; and if the Minister so directs, the Director General shall not register the applicant who shall be notified of the direction.

(6) The Director General shall not register an applicant in respect of insurance business of either class until the Accountant-General certifies to him that the applicant has made in respect of that business the deposit required by this Act.

(8) The Director General shall not later than the month of March every year, cause to be published in the *Gazette* a list of Malaysian insurers registered under this Act, and additions to the list shall be published from time to time as they are made.

Subs. A294 of 1975.

4A. (1) The Minister may prescribe different fees in respect of different classes of insurance business.

Ins. A294 of 1975.

(2) The Minister may exempt an insurer from payment of the prescribed fees or part thereof.

"Fees and exem

5.– (1) The Director General may from time to time and as he thinks fit –

"Conditions of registration".

(*a*) impose conditions of registration on an insurer; or

(*b*) add to, vary, or revoke any existing conditions of registration of an insurer,

who is already registered under this Act in order for it to remain so registered.

(2) Any insurer who fails to comply with any of the conditions imposed by the Director General under subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine of five thousand dollars and to a daily fine of one thousand dollars.

6. (1) The Director General may by order cancel the regis-

Cancellation of registration.

tration of an insurer either wholly or in respect of a class of business, as the case may be, if he is satisfied that–

(*a*) the insurer has not commenced business within twelve months after being registered;

(*b*) the insurer has ceased to carry on insurance business in respect of any class of business;

(*c*) the insurer has failed to maintain a surplus of assets over liabilities in accordance with section 3 (2) (*a*) (ii);

(*d*) the insurer has neglected or refused to observe an order of the Director General to make good any deficiency, whenever its insurance fund shall have become impaired;

(*e*) the insurer proposes to make, or had made any composition or arrangement with its creditors or has gone into liquidation or has wound up or otherwise dissolved;

(*f*) the insurer is carrying on its business in a manner likely to be detrimental to the interests of its policy owners;

(*g*) the insurer is unable to meet its obligations;

(*h*) the insurer has failed to effect satisfactory reinsurance arrangements;

(*i*) the insurer is contravening or has contravened the provisions of this Act or any of the regulations or any conditions imposed or any directions given by the Director General under this Act;

(*j*) the insurer has been convicted of any offence under this Act or any of its officers holding a managerial or an executive position has been convicted of any offence under this Act;

(*k*) the insurer has furnished false, misleading or inaccurate information, or has concealed or failed to disclose material facts in its application for registration; or

(*l*) it is in the public interest to cancel the registration.

(2) The Director General shall before cancelling any registration under subsection (1) cause to be given to the insurer con-

cerned notice in writing of his intention to do so, specifying a date, not less than fourteen days after the date of the notice, upon which the cancellation will take effect and calling upon the insurer to show cause to the Director General why the registration should not be cancelled.

(3) Notwithstanding the fact that the registration of an insurer has been cancelled under this section, so long as the insurer remains under any liability in respect of Malaysian policies belonging to the class of insurance business to which the registration relates, the insurer shall take such action as it considers necessary or as may be required by the Director General to satisfy him that reasonable provision has been or will be made for that liability and that adequate arrangements exist or will exist for payment in Malaysia of premiums and claims on those policies.

(4) When the Director General has cancelled a registration under subsection (1) he shall forthwith inform the insurer of the cancellation.

(5) Any insurer whose registration has been cancelled pursuant to this section may within sixty days of being notified in writing of the cancellation appeal against the order of cancellation to the Minister whose decision thereon shall be final.

(6) An order of cancellation made by the Director General, or where there is an appeal, the decision of the Minister confirming the order of cancellation shall not take effect until the expiration of a period of fourteen days after the insurer has been informed in writing of the order or decision.

Effects of cancellation of registration.

6A.(1) Where an order of cancellation becomes effective under section 6 –

(*a*) notice of the cancellation shall be published in the *Gazette;* and

(*b*) the insurer shall, as from the date of cancellation, cease to carry on in Malaysia insurance business of the class in respect of which its registration has been cancelled under this Act, otherwise than by the collection or receipt of premiums on Malaysian policies belonging to that class effected before the date of cancellation of registration and section 3 (2) shall not apply to the insurer in respect of the collection or receipt of those premiums.

(2) The provisions of subsection (1) (*a*) shall not prejudice the enforcement by any policy owner or person of any right or claim against the insurer or by the insurer of any right or claim against any policy owner or person.

Prohibition of investment-linked insurance business without approval.

6B. (1) An insurer shall not carry on investment-linked insurance business in Malaysia without the approval in writing of the Director General and subject to such conditions as he may impose.

(2) For the purposes of this Act, "investment-linked insurance business" means the effecting and carrying out of a contract of life insurance under which the benefits payable to the policy owner is the greater between –

(*a*) a specified minimum amount payable on death, on survival to a specified date, or at specified intervals; and

(*b*) an amount which is determined by reference to the value at the relevant date of, or the income during the relevant period from, assets of a description specified in the policy or in any related statement.

Deposits, registers of policies, insurance funds and reinsurance

Deposit.

7. (1) A Malaysian insurer, while registered in respect of any class of insurance business, shall at all times have in respect of that business a deposit with the Accountant-General of a value of not less than three hundred thousand dollars.

(2) Any such deposit shall be made in cash or in securities specified in the Second Schedule or partly in one way and partly in the other; and any cash comprised in a deposit may be invested in such mannar available for the investment of funds in court as the insurer may select.

(3) All income accruing in respect of a deposit shall be payable to the insurer making the deposit.

(4) A deposit made under this section in respect of any class of business shall be retained by the Accountant-General until either the insurer ceases to be registered in respect of that class of insurance business or the deposit is required in the winding up of the insurer; and if the insurer ceases to be registered as aforesaid, the deposit or part of it may be further retained for the purpose of and in accordance with any such provision for liabilities in respect of policies as is required by section 6 (3).

(5) If at any time a deposit under this section (other than a deposit retained after the insurer has ceased to be registered as aforesaid) comprises assets other than Government securities, and the value of those assets is less than the sum of three hundred thousand dollars reduced by the value of any Government securities comprised in the deposit, then the Director General may by notice in writing direct the insurer to add thereto within twenty-eight days of the service of the notice, cash or securities specified in the Second Schedule of a value not less than the difference.

(6) An insurer which has made a deposit under this section may at any time substitute for any assets comprised in the deposit cash or securities specified in the Second Schedule, so long as the value of the deposit is not thereby reduced to an amount below that which is required by this Act.

(7) In the foregoing subsections "securities" (except in the expression "Government securities") includes any form of investment, and "Government securities" means securities of which the principal or interest is charged directly or by way of guarantee on the Consolidated Fund; but no deposit shall include—

(*a*) any shares in, or debentures or other securities of, an insurer registered under this Act;

(*b*) except so far as a debt comprised in the deposit is secured on land, any estate or interest in land; or

(*c*) any securities authorized in paragraphs 3, 4, 5, 6 and 8 of the Second Schedule which the Minister on the advice of the Director General and the Accountant-General declares in writing to the insurer to be unsuitable for the purposes of a deposit.

(7A) Where by virtue of subsection (7) (*c*) any securities comprised in a deposit are declared unsuitable, the insurer shall within one calendar month of the securities being so declared, substitute therefor such other securities as are authorized by this section.

(8) (*Omitted*).

(9) In the case of an existing insurer any deposit made under section 4 of the Life Assurance Companies Ordinance, 1948, or (in the case of general business) under section 4 of *F.M. 38/48.*

F.M. 39/48. 49/58.

the Fire Insurance Companies Ordinance, 1948, or section 76 of the Road Traffic Ordinance, 1958, shall, if the deposit was in the hands of the Accountant-General on the 21st January, 1963, and has not since been returned to the insurer, be held by the Accountant-General on account of a deposit required by this Act.

Bank covenants in lieu of deposits. *62/58.*

8. (1) If, in the case of any insurer, a bank licensed under the Banking Act, 1973, makes with the Government an agreement in a form approved by the Director General, whereby the bank covenants with the Government to deposit with the Accountant-General a specified sum in cash on account of the insurer's deposit under this Act in respect of either class of insurance business, and the covenant complies with any requirements the Director General sees fit to impose as to the circumstances in which that sum is to be deposited, then for the purposes of this Act the insurer shall be treated as having deposited under section 7 a sum of cash equal to that so covenanted for and the sum so covenanted for shall be recoverable notwithstanding that no consideration is furnished on the agreement.

(2) Any sum deposited by a bank in pursuance of an agreement made under subsection (1) shall be dealt with under or for the purposes of this Act as if it were a sum deposited by the insurer under section 7.

(3) This section shall not authorize an agreement to be substituted under section 7 (6) for assets comprised in a deposit.

(4) (*a*) Any deed or instrument purporting to be a deed which before the 1st January, 1964, was delivered by a bank to the Accountant-General and having effect on that date shall be deemed to be an agreement made under subsection (1).

(*b*) In this subsection the expression "deed or instrument purporting to be a deed" means a deed or instrument purporting to be a deed, in a form approved by the Director General, whereby the bank covenants with the Government to deposit with the Accountant-General a specified sum in cash on account of an insurer's deposit under this Act in respect of either of the classes of insurance business mentioned in section 2 (1).

Register of policies.

9. (1) Every Malaysian insurer registered under this Act shall establish under this Act a register of policies, and

(subject to any prescribed exceptions) shall keep the Register at an office in Malaysia.

(2) Subject to this section, there shall be entered in the Register all Malaysian policies of the insurer, and no policy entered in the Register shall be removed from it so long as the insurer is under any liability in respect of the policy.

(3) Subject to this section, there may be entered in the Register such other policies as the insurer with the consent (express or implied) of the policy owners may determine, and this Act shall apply in relation to any policy so entered as if it were a Malaysian policy.

(4) Subject to subsection (5) an insurer carrying on life business outside Malaysia (and not doing so only by the collection or receipt of premiums) may, at the request of the owner of a policy belonging to the insurer's life business—

(*a*) refrain from entering the policy in the Register, notwithstanding that it is a Malaysian policy; or

(*b*) remove the policy from the Register,

and this Act shall thereafter apply in relation to the policy as if it were not a Malaysian policy.

(5) Regulations may provide that subsection (3) or (4) shall apply only in such cases as may be prescribed or shall have effect subject to any prescribed exceptions or restrictions.

(6) A Malaysian insurer shall, at the request of any person having an interest in any policy of the insurer, inform him whether or not the policy is entered in the Register.

(7) If the insurer ceases to be registered under this Act in respect of either class of insurance business; the Register shall cease to exist as a statutory register under this Act of policies belonging to that class of business and any reference in this Act to policies registered under this Act shall be construed accordingly.

(8) Subject to subsection (7), the Register shall, notwithstanding that the insurer at any time ceases to carry on in Malaysia either class of insurance business, continue to be maintained by the insurer for policies be'onging to that class so long as the insurer is under any liability in respect of such policies registered or required to be registered at that time; but no policies belonging to either class of business

shall be entered in the Register under subsection (3) when the insurer is not carrying on that class of business in Malaysia, or is doing so only by the collection or receipt of premiums.

(9) The Register of an existing insurer shall be established as at the beginning of the initial accounting period, and that shall be taken for the purposes of this Act to be the date of the establishment of the Register.

(10) This section shall apply in respect of any Malaysian policy issued by any pre-registered insurer in East Malaysia before the first day of the modified initial accounting period, and any such policy shall be added to and included in the Register as from that day.

Establishment and maintenance of insurance funds, and allocation of surplus.

10. (1) Every Malaysian insurer registered under this Act shall establish and maintain in accordance with this section an insurance fund in respect of the class or each of the classes of insurance business carried on by the insurer in Malaysia so far as that business relates to Malaysian policies.

(2) There shall be paid into an insurance fund all receipts of the insurer properly attributable to the business to which the fund relates (including the income of the fund), and the assets comprised in the fund shall be applicable only to meet such part of the insurer's liabilities and expenses as is properly so attributable.

(3) In the case of a fund established in respect of life business, no part of the fund shall be allocated by way of bonus to participating policies, except with the approval of a qualified actuary and out of a surplus of assets over liabilities as shown on the last statutory valuation of the fund: and on the making of any such allocation that surplus shall be treated for purposes of this section as reduced by the amount allocated.

(4) If on the last statutory valuation (in the case of a fund established in respect of life business) or in the last statutory balance sheet (in the case of a fund established in respect of general business) there was shown a surplus of assets over liabilities of an insurance fund, there may, subject to any provision to the contrary in any instrument or contract binding the insurer, be withdrawn from the fund an amount not exceeding the surplus, and on the making of any such

withdrawal that surplus shall be treated for purposes of this section as reduced by the amount withdrawn:

Provided that, in the case of a fund established in respect of life business, no withdrawal shall be made without the approval of a qualified actuary, and no part of the surplus attributable to participating policies shall be withdrawn in excess of one quarter of the amount allocated thereout by way of bonus to participating policies.

(5) In respect of any policy belonging to the insurer's life business which is under section 9 (4) removed from the Register, there may be withdrawn from the fund established in respect of that business an amount not exceeding the prescribed amount.

(6) Any amount withdrawn from an insurance fund under subsection (4) or (5) and, in a winding up, any part of an insurance fund remaining after meeting the liabilities and expenses to which the fund is applicable may be dealt with as if it had not formed part of the fund.

(7) In a winding up assets comprised in the deposit made by an insurer under this Act in respect of either class of business shall be treated as assets of the insurance fund established by the insurer in respect of business of that class, and subsections (2) and (6) shall apply to those assets accordingly.

(8) An insurance fund established by a Malaysian insurer for any class of business shall, notwithstanding that the insurer at any time ceases to carry on that class of business in Malaysia, continue to be maintained by the insurer so long as the insurer is required by this Act to maintain the Register for policies belonging to that class.

(9) (*a*) In the case of an existing insurer, any insurance fund shall be established as at the date of establishment of the Register, and by reference to the policies registered or required to be registered in it as at its establishment, and by reference to the assets and liabilities of the insurer as at that date; and—

(i) there shall be allocated to the fund assets of a value not less (after allowing for any charges to which the fund is not applicable) than the aggregate of the amounts specified in paragraph (*b*); and

(ii) all such matters as would subsequently have affected the fund if established at that date shall be brought into account accordingly.

(*b*) The amounts referred to in paragraph (*a*) (i) are as follows:

(i) the amount, determined in the prescribed manner, of the liability of the insurer in respect of the policies referred to in paragraph (*a*); and

(ii) the amount of any other liabilities of the insurer so far as the assets allocated to the fund will be applicable or be treated as having been applicable to meet those liabilities.

(10) (*a*) In the case of a pre-registered insurer there shall be an addition to any insurance fund as at the beginning of the modified initial accounting period, and by reference to the policies added to the Register or required to be added to the Register on that date, and by reference to the assets and liabilities of the insurer as at that date; and—

(i) there shall be added to the fund assets of a value not less (after allowing for any charges to which the fund is not applicable) than the aggregate of the amounts specified in paragraph (*b*); and

(ii) all such matters as would subsequently have affected the fund if added to as aforesaid at that date shall be brought into account accordingly.

(*b*) The amounts referred to in paragraph (*a*) (i) are as follows:

(i) the amount, determined in the prescribed manner, of the liability of the insurer in respect of the policies added or required to be added to the Register as at the beginning of the modified initial accounting period; and

(ii) the amount of any other liabilities of the insurer so far as the assets added to the fund will be applicable or be treated as having been applicable to meet those liabilities.

Requirements as to assets of insurance funds.

11. (1) The assets of any insurance fund under this Act shall be kept separate from all other assets of the insurer, and shall not include assets comprised in a deposit under this Act except as provided by subsection (4), nor any amounts on account of goodwill, the benefit of development

expenditure or similar items not realisable apart from the business or part of the business of the insurer.

(1A) The assets of an insurance fund established in respect of general business shall not include any amount representing the total of outstanding premiums and agents' balances which is in excess of twelve and a half per cent of written premiums.

(2) Subject to section 14 the assets of any insurance fund shall be such that—

(*a*) the value of Malaysian assets as specified in the Second Schedule, with any such additions as are permitted by subsection (3), is not less than seventy per cent of the total value of the assets of the fund for the period 31st December, 1971, to the 30th December, 1972, and not less than eighty per cent at any time thereafter; and

(*b*) the value of investments in securities of the Federal Government issued in Malaysia is not less than twenty-one per cent at 31st December 1978, twenty-two per cent at 31st December 1979, twenty-three per cent at 31st December 1980, twenty-four per cent at 31st December 1981, and twenty-five per cent at 31st December 1982 and at any time thereafter.

(3) For the purposes of subsection (2) there may be added to the value of items specified in the Second Schedule the amount or value of any assets of the fund of the following descriptions:

(*a*) income arising from those items but not yet received;

(*b*) outstanding premiums on life policies on which future liabilities may be met out of the assets of the fund, being premiums which are to be paid in Malaysian currency;

(*c*) outstanding premiums and agents' balances in respect of Malaysian policies for general business but not exceeding the amount permitted in subsection (1A);

(*d*) interest not yet received on loans secured on any such policies, being interest which is to be paid in Malaysian currency.

(4) Notwithstanding anything in subsection (1) an existing insurer may, on the first establishment of an insurance fund for either class of insurance business, allocate thereto under section 10 (9) (*a*) assets then comprised in the insurer's deposit under this Act in respect of that class of business, and the assets so allocated and the assets from time to time representing them in the deposit may form part of the insurance fund accordingly.

(4A) The Minister may, in respect of assets of any insurance fund, require an insurer –

(*a*) not to make investments of a specified class or description;

(*b*) to realise, before the expiration of a specified period or such extended period as the Minister may allow, the whole or a specified proportion of investments of a specified class or description held by the insurer when the requirement is made.

(5) For the purposes of this section the assets from time to time representing any reinsurer's deposit held by the insurer to meet liabilities of an insurance fund shall be treated as assets of the fund.

"Restrictions on payment of dividends and grant of advance, loan, and credit facility.

11A. (1) No insurer shall –

(*a*) pay any dividend on its shares until all its capitalized expenditure (including preliminary expenses, organization expenses, share selling commission, brokerage, amounts of losses incurred, and any other item of expenditure not represented by tangible assets) has been completely written off;

(*b*) grant an advance, a loan, or a credit facility against the security of its own shares;

(*c*) except in such special circumstances and in such amounts as the Director General may allow, grant an advance, a loan, or a credit facility –

(i) to any of its directors other than an advance or a loan secured by a policy of insurance held by the director;

(ii) to a firm in which it or any of its directors has any interest as partner, manager, or agent, or to an individual for whom or a firm for which any of its directors is a guarantor;

(iii) to a company in which any of its directors owns twenty per cent of the voting shares or more;

(iv) to a company in which the insurer owns twenty per cent of the voting shares or more;

(v) to a company which owns twenty per cent of the voting shares of the insurer or more; and

(vi) to a company in which a company mentioned in subparagraph (v) owns twenty per cent of the voting shares or more;

(*d*) except in such special circumstances and in such amounts as the Director General may allow, grant to a person other than its employee or to any person mentioned in paragraph (*c*) an unsecured advance, unsecured loan, or unsecured credit facility;

(*e*) except in such special circumstances as the Director General may allow, act as guarantor on an advance, a loan, or a credit facility granted to any person;

(*f*) except with the approval of the Director General, pledge, mortgage, or charge any of its assets or securities.

(2) All the directors of the insurer shall be liable jointly and severally to indemnify the insurer against any loss arising from the making of an unsecured advance, unsecured loan, or unsecured credit facility.

(3) For the purposes of subsection (1), "director" shall be deemed to include the wife, husband, father, mother, son, or daughter of a director.

(4) For the purposes of this section and section 11B, "unsecured advance", "unsecured loan", or "unsecured credit facility" mean respectively –

(*a*) an advance, a loan, or a credit facility made without security; or

(*b*) in the case of an advance, a loan, or a credit facility made with security, any portion of the advance, loan, or credit facility which at any time exceeds–

(i) the market value of the assets constituting the security; or

(ii) the value of the assets constituting the security assessed on a basis approved by the Director General where he is satisfied that there is no established market value.

Disclosure of interests by directors.

11B. (1) Every director of an insurer who in any manner whatsoever has an interest, whether directly or indirectly, in an advance, a loan, or a credit facility from that insurer shall as soon as practicable make to the insurer a declaration in writing as to the nature and extent of his interest and the insurer shall within seven days of its receipt furnish copies of that declaration to the Director General, its auditors, and all its directors.

(2) For the purposes of subsection (1), a general notice given to the board of directors of an insured by a director to the effect that he has an interest in a specified enterprise, undertaking, firm, or company and that he is to be regarded as having an interest in an advance, a loan, or a credit facility which may, after the date of the notice, be granted to that enterprise, undertaking, firm, or company shall be deemed to be sufficient declaration of interest in relation to an advance, a loan, or a credit facility so granted if –

(*a*) it specifies the nature and extent of his interest in that enterprise, undertaking, firm, or company; and

(*b*) at the time an advance, a loan, or a credit facility is made, his interest is not different in nature or greater in extent than had been specified in the notice.

(3) Every director of an insurer who holds an office or possesses any property whereby whether directly or indirectly a duty or an interest may arise in conflict with his duty or interest as such director shall declare at a meeting of the directors of the insurer the fact, nature, and extent of the conflict which may arise.

(4) The declaration referred to in subsection (3) shall be made at the first meeting of the directors held –

(*a*) after the person becomes a director of the insurer; or

(*b*) (if already a director) after the person commenced to hold office or to possess the property whereby the conflict may arise.

(5) The secretary to the board of directors of the insurer shall cause to be brought up and read any declaration made or notice

given under this section at the next meeting of the directors after the declaration is made or the notice is given and he shall record the same in the minutes of that meeting.

(6) Any director or secretary to a board of directors who acts in contravention of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

Submission of statement and liquidation of transaction by insurer.

11C. (1) An insurer which has, or a director of an insurer who has, prior to the commencement of sections 11A and 11B, entered into a transaction or has an interest contrary to the provisions of those sections shall, within two months of such commencement, submit a statement of the transaction or interest to the Director General and that insurer or director, as the case may be, shall further within that time or such further time as the Director General may specify, liquidate the transaction, cease to have the interest, or comply with the provisions of those sections, and dispose of any property or right that may have been acquired or interest may have been held.

(2) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding twenty-five thousand ringgit and to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.

Requirements as to documents evidencing title to assets of insurance funds.

12. (1) Where an insurer has established an insurance fund under this Act, the insurer shall secure that any documents evidencing the insurer's title to assets of the fund or assets falling within section 11 (5), so long as the documents are held by or on behalf of the insurer, shall be kept in Malaysia or, if not so kept, shall be kept in the custody of a person approved by the Director General, and at a place and on terms so approved.

Provided that the Director General may, in the case of an insurer being investigated under this Act or where the Director General is satisfied that the affairs of an insurer are being conducted in a manner likely to be detrimental to the interests of policy owners or potential policy owners, direct that all such documents be handed over to be kept by him or by a person approved by him and at a place and on terms so approved.

(2) An insurer who has established an insurance fund shall from time to time notify to the Director General in writing the person having custody of any such document on behalf of the insurer.

(2A) No person having custody of any such document shall release it except with the consent in writing of the Director General.

(3) Any such document which is for the time being held by or on behalf of the insurer shall, within such period as may be specified in the notice given in writing by the Director General to the insurer or to the person having the custody of the document, be produced for inspection to the Director General or a person nominated by him by the person to whom the notice is given.

(4) A person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand dollars, and to a daily fine not exceeding fifty dollars.

Establishment and maintenance of insurance guarantee scheme funds and payment of moneys out of the funds.

12A. (1) There shall be established and maintained by the Director General in accordance with this section, insurance guarantee scheme funds in respect of general insurance business and life insurance business respectively carried out by the insurer in Malaysia so far as the business relates to Malaysian policies.

(2) There shall be paid into the insurance guarantee scheme funds through the Director General all such levies as may be imposed on and collected from insurers in such instalments as the Director General may allow.

(3) Subject to any direction by the Minister the total amount of levy shall not exceed 1% of the annual written premium of an insurer in any one year assessable on the general insurance business, in the case of life insurance business on any new business, carried out by the insurer in the previous year. In the case of an insurer who has failed to submit his statutory returns under section 22 by the due date, the Director General may, for the purpose of calculating the amount of levy payable by that insurer, assess an amount to be deemed to be that insurer's written premium income for the preceding year and the amount so collected shall be adjusted against actual written premium income shown in the statutory returns when submitted.

(4) Any sum including any other moneys or interest received or paid into the insurance guarantee scheme funds including any profit or dividends derived from any investment of any sum out of such funds may be withdrawn and utilised from time to time with the approval and subject to the direction of the Director General to meet the administrative, legal, and other costs of maintaining and administering such funds and the liabilities of any insolvent insurer to private policyholders in respect of any valid policy registered in accordance with section 9 provided that any sum so withdrawn and utilised for the purpose of meeting the Liabilities of any insolvent insurer shall not at any time exceed 90% of the lawful amount due and payable to any private policyholder or person entitled through him or any other proper claimant.

For the purpose of this subsection an insurer shall be deemed to be insolvent if–

(*a*) at the close of the last accounting period for which statements have been lodged with the Director General under section 22, the insurer is insolvent;

(*b*) winding up proceeding has been commenced against the insurer;

(*c*) a receiving order has been made against him by the Court;

(*d*) the insurer has been declared a bankrupt.

(5) The Minister may at his discretion direct the Director General at any time after the establishment of the insurance guarantee scheme funds the discontinuance of the collection of any sum by way of levy if he is satisfied that there is more than adequate money in either or both of the funds to meet the liabilities of any insolvent insurer in accordance with subsection (4), but may if circumstances warrant, direct the Director General to resume the collection from insurers in respect of either or both of the insurance guarantee scheme funds:

Provided that the Minister may from time to time at his discretion direct that this section shall not apply to certain types of insurance business within any class or may apply only with such exceptions, restrictions or on terms or for any period or in any manner as he may prescribe.

(6) The Director General may appoint any suitable person to assist him in the administration and distribution of the in-

surance guarantee scheme funds.

(7) For the purposes of this section, the annual written premium of an insurer in any one year shall exclude overseas inward reinsurances.

(8) The moneys in the insurance guarantee scheme funds in so far as they are not for the time being required to be expended for the purposes of this section may be invested in such manner as the Minister may approve and all income accuring in respect of such investments shall be credited to the funds.

(9) In this section, "private policyholder" means a policyholder who is an individual, a partnership or any other unincorporated body of persons, all of whom are individuals; and "proper claimant" shall have the meaning assigned thereto under section 44 (5).

Enforcement of requirements as to registers of policies and insurance funds and payment of levies by insurers.

13. (1) If a Malaysian insurer makes default in complying with the provisions of sections 9 to 12A, the Director General may by notice in writing require the insurer to make good the default.

(2) If the insurer does not make good the default within one month after the notice is given, the High Court may on the application of the Director General make such order against the insurer or any director or officer of the insurer as the High Court thinks fit with a view to making good the default and otherwise securing compliance by the insurer with sections 9 to 12A.

(3) Nothing done under this section shall affect any person's liability for any offence against this Act.

Reinsurance.

13A. (1) A Malaysian insurer shall have arrangements consistent with sound insurance principles for reinsurance of liabilities in respect of risks insured or to be insured by the Malaysian insurer in the course of his carrying on insurance business.

(2) The Director General may by giving notice in writing require a Malaysian insurer to produce for his inspection, within a period specified in the notice, treaties on reinsurance, such other detail information pertaining thereto and any such other reinsurance arrangements as he may in the particular case require.

(3) A person who fails to comply with subsection (2) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred dollars, and to a daily fine not exceeding twenty-five dollars.

Miscellaneous requirements as to conduct of business

Payment in Malaysian currency of policy moneys under life policies.

14. (1) In the case of a life policy issued as a Malaysian policy after the 21st January, 1963, to a policy owner who is a citizen, any policy moneys or moneys payable on the surrender of the policy shall, notwithstanding anything in the policy or in any agreement relating thereto, be paid in Malaysian currency, unless at the time of payment it is otherwise agreed between the insurer and the person entitled to payment.

(2) Where a Malaysian insurer satisfies the Director General as regards any life policy registered under this Act by the insurer that the policy moneys (including any moneys payable under the policy on a surrender) may not under the policy or any agreement relating thereto be paid in Malaysian currency, then for purposes of section 11 (2) there shall be disregarded such part of the value of the assets of the relevant insurance fund as is equal to the value of the insurer's liability in respect of the policy determined on a basis approved by the Director General.

Assumption of risk by insurer and collection and refund of premium.

14A. (1) Subject to subsection (2), no insurer shall assume any risk in respect of any general insurance business unless and until–

(*a*) the premium payable is received by the insurer or is guaranteed to be paid by such person in such manner and within such time as may be prescribed; or

(*b*) deposit of such amount as may be prescribed is made in advance in the manner prescribed.

(2) Subsection (1) shall apply to such description of general insurance business as may from time to time be prescribed.

(3) Where an insurance agent or a broker collects on behalf of an insurer a premium on a policy of insurance of a description for the time being prescribed under subsection (2), he shall deposit with, or despatch by post to, the insurer the premium so collected within such period as may be prescribed in relation to policies of that description.

(4) Any refund of premium which may become due to an insured on account of the cancellation of a policy, alteration in its terms and conditions, or may become due in any other manner shall be paid by the insurer directly to the insured and a proper re-

ceipt shall be obtained by the insurer from the insured and such refund shall under no circumstances be paid or credited to an agent or a broker.

(5) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit.

Regulation of premiums under life policies.

15. (1) A Malaysian insurer shall not issue a life policy of any description being a Malaysian policy, if the premium chargeable under the policy is not in accordance with rates fixed with the approval of a qualified actuary or, where no rates have been so fixed for policies of that description issued by the insurer, is not a premium approved for the policy by a qualified actuary.

(2) An actuary shall not for the purposes of this section approve a premium for a policy or a rate of premium for any description of policy, unless he is satisfied that it is suitable and in accordance with sound insurance principles.

(3) An actuary in giving his approval in respect of any description of life policy shall have regard to the maximum rate of commission proposed to be paid or allowed to any person in respect of that description of policy, and shall certify the said maximum rate.

(4) Where in the case of any insurer a rate of premium is approved by a qualified actuary for any description of life policy, the insurer shall not, except with the approval of the Director General, pay or allow in respect of any policy of that description a commission at a rate greater than the maximum rate of commission certified by the actuary.

(5) The Director General may by notice in writing require any Malaysian insurer to obtain and furnish him within a time specified in the notice with a report by a qualified actuary as to the suitability of the rates of premium for the time being chargeable by the insurer for any description of life policy, and if the actuary considers that the rates are not suitable or not in accordance with sound insurance principles, a report as to the rates of premium which the actuary approves for that description of policy; and for the purposes of subsection (1) regard shall be had to any such report to the exclusion of any previous approval or report.

(6) For each occasion on which an insurer issues a policy or allows a commission in contravention of this section, the insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand dollars.

Notice regarding proof of age.

15A. Where a Malaysian insurer issues a life policy which provides that proof of age of the life insured is a condition precedent to the payment of the sum, the insurer shall, unless the age of the life insured has already been admitted by the insurer, issue on or with the policy a printed notice stating that proof of age of the life insured may be required prior to the payment of the sum insured.

Procedure where insurer declines to accept proof.

15B. (1) If a Malaysian insurer declines to accept the proof of age tendered in respect of a policy, whether issued before or after the commencement of this section, the policy owner may apply to a Judge in Chambers, by summons, for an order directing the insurer to accept the proof tendered.

(2) On any such application, the Judge may make such order in relation to the application as he thinks just.

(3) Every order under this section shall be binding on the insurer and shall be complied with on his part.

Mis-statement of age and non-avoidance of policy.

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15C. (1) A policy shall not be called in question by reason only of a mis-statement of the age of the life insured.

(2) Where the true age as shown by the proof is greater than that on which the policy is based, the insurer may vary the sum insured by, and the bonuses (if any) allotted to, the policy so that, as varied, they bear the same proportion to the sum insured by, and the bonuses (if any) allotted to, the policy before variation as the amount of the premiums that have become payable under the policy as insured bears to the amount of the premiums that would have become payable if the policy had been based on the true age.

(3) Where the true age as shown by the proof is less than that on which the policy was based, the insurer shall either –

(*a*) vary the sum insured by and the bonuses (if any) allotted to, the policy so that, as varied, they bear the same proportion to the sum insured by, and the bonuses (if any) allotted to, the policy before variation as the amount of the premiums that have become payable

under the policy as insured bears to the amount of the premiums that would have become payable if the policy had been based on the true age; or

(*b*) reduce, as from the date of issue of the policy, the premium payable to the amount that would have been payable if the policy had been based on the true age and repay the policy owner the amount of over-payments of premium less any amount that has been paid as the cash value of bonuses in excess of the cash value that would have been paid if the policy had been based on the true age.

(4) No life policy effected before the commencement of this section shall, after the expiry of two years from such commencement, and no life policy effected after the commencement of this section shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in a report of a doctor, referee, or any person, or in a document leading to the issue of the policy, was inaccurate or false unless the insurer shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policyholder with the knowledge that the statement was false or that it suppressed a material fact.

(5) Nothing in this section shall prevent the insurer from calling for proof of age at any time and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted in accordance with subsections (2) and (3).

Control of form of proposals, policies, and brochures.

16. (1) The Director General may by notice in writing require a Malaysian insurer to submit to him the forms of proposal and policy for the time being in use by the insurer in Malaysia, and any brochure which is for the time being in use there by the insurer for describing the terms or conditions of, or the benefits to be or likely to be derived from, policies; and where the whole or part of any such form or brochure is not in Malay or English there shall be submitted with it a translation in Malay or English.

(2) A requirement under this section, unless it is otherwise provided therein, shall apply to all such forms and

brochures as aforesaid coming into use after the making of the requirement and before the Director General notifies the insurer that the requirement is withdrawn.

(3) If it appears to the Director General, after affording the insurer an opportunity to make representations orally or in writing that any such form or brochure as aforesaid contravenes or fails to comply with any provision of this Act, or is in any respect likely to mislead, he may by notice in writing direct the insurer to discontinue the use of the form or brochure in Malaysia either forthwith or from a date specified in the notice.

(4) No Malaysian insurer shall use in Malaysia a form of proposal which does not have prominently displayed therein a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy.

(5) For each occasion on which any insurer uses a copy of a form or brochure in contravention of subsection (3) or (4), the insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand dollars.

(6) In this section "brochure" includes any leaflet, circular or similar advertising matter, whether printed or not.

Misleading statement, promise, or forecast inducing person to enter into contract of insurance.

16A. Any person who, by any statement, promise, or forecast which he knows to be misleading, false, or deceptive, or by any fraudulent concealment of a material fact, or by the reckless making (fraudulently or otherwise) of any statement, promise, or forecast which is misleading, false, or deceptive, induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding one year or to both.

Requirements as to prospectuses and statements of capital. *79/65.*

17. (1) (*a*) In any case where, under section 39 or 42 of the Companies Act, 1965, it is unlawful to issue, circulate or distribute a prospectus relating to a company without a copy of it being first delivered for registration under that Act, it shall also be unlawful, in the case of a company registered or intended to be registered as an insurer under this Act, to do so without the prospectus having been

sanctioned by the Director General; and any person knowingly responsible for the issue. circulation or distribution of a prospectus in contravention of this subsection shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars.

(*b*) In this subsection "prospectus" includes any document to which the expression applies in the said section 39 or 42.

(2) Where a notice, advertisement or other official publication of a company registered or intended to be registered as an insurer under this Act, contains a statement of the company's authorized share capital, and does not state therewith how much of that capital has been subscribed and how much is paid up, the company shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand dollars.

Opening of new branches.

17A. Except with the consent in writing of the Director General, no Malaysian insurer and those licensed under section 20 may open a new branch or agency office in any part of Malaysia.

Approval of proposed managing director, director, chief executive, or principal officer of insurer.

17B. (1) No insurer incorporated in Malaysia or registered as a society in Malaysia shall appoint a person as its managing director, director, chief executive, or principal officer, and no insurer incorporated outside Malaysia or otherwise carrying on business outside Malaysia shall appoint a chief executive or principal officer for Malaysia, unless –

(*a*) the insurer has served on the Director General a notice in writing stating that it proposes to appoint that person to a specified position and containing such particulars as may be prescribed; and

(*b*) the Director General has, before the expiration of a period of three months from the date of service of the notice, notified the insurer in writing that there is no objection to that person being appointed to the specified position or such period elapses without the Director General having served on the insurer a notice of objection in writing.

(2) A notice under subsection (1) (*a*) shall contain a statement signed by the person proposed to be appointed that it is served with his knowledge and consent.

(3) The Director General may object to the person pro-

posed to be appointed and serve notice thereof under subsection (1) (*b*) on the ground that it appears to him that such person is not a fit and proper person to be so appointed, but before serving such notice the Director General shall serve on the insurer and on that person a preliminary notice in writing stating –

(*a*) that the Director General is considering the service on the insurer of a notice of objection on that ground; and

(*b*) that the insurer and that person may, within a period of one month from the date of service of the preliminary notice, make representations in writing to the Director General.

(4) The Director General shall not under any circumstances be obliged to disclose any particulars of the ground on which he is considering the service of the notice of objection or on which he serves the notice of objection.

(5) Where representations are made in accordance with this section the Director General shall take them into consideration in deciding whether to serve the notice of objection.

Approval of person proposing to become controller of insurer where section 17B does not apply.

17C. (1) No person shall become a controller of an insurer incorporated in Malaysia or registered as a society in Malaysia, otherwise than by virtue of an appointment in relation to which section 17B has effect, unless –

(*a*) he has served on the Director General a notice in writing stating that he intends to become a controller of that insurer and containing such particulars as may be prescribed; and

(*b*) the Director General has, before the expiration of a period of three months from the date of service of the notice, notified him in writing that there is no objection to his becoming a controller of the insurer or such period elapses without the Director General having served on him a notice of objection in writing.

(2) The Director General may object to the person who intends to become a controller of the insurer and serve notice thereof under subsection (1) (*b*) on the ground that it appears to him that such person is not a fit and proper person to so become, but before serving such notice the Director General shall serve on that person a preliminary notice in writing stating –

(*a*) that the Director General is considering the service on that person of a notice of objection on that ground; and

(*b*) that that person may, within a period of one month from the date of service of the preliminary notice, make representations in writing to the Director General.

(3) The Director General shall not under any circumstances be obliged to disclose any particulars of the ground on which he is considering the service of the notice of objection or on which he serves the notice of objection.

(4) Where representations are made in accordance with this section the Director General shall take them into consideration in deciding whether to serve the notice of objection.

Duty to notify change of controller, managing director, director, chief executive or principal officer.

17D. (1) A person who becomes or ceases to be a controller of an insurer to which this Part applies shall, before the expiration of a period of seven days from the day following that on which he becomes or ceases to be a controller, notify the insurer in writing of that fact and of such other matters as may be prescribed; and a person who is appointed a managing director, director, chief executive, or principal officer of any such insurer shall, before the expiration of a period of seven days from the day following that on which he is so appointed, notify the insurer in writing of such matters as may be prescribed.

(2) An insurer to which this Part applies give notice in writing to the Director General of the fact that any person has become or ceased to be its managing director, director, chief executive, or principal officer and of any matter of which such person is required to notify the insurer under subsection (1); and the notice shall be given before the expiration of a period of fourteen days from the day following that on which that fact or matter comes to the insurer's knowledge.

"Power of Director General to require information and inspect books"

18. – (1) The Director General may by notice in writing require any Malaysian insurer, Malaysian insurance broker and Malaysian insurance agent licensed under section 20, or any adjuster to furnish the Director General with any information or to appear before him (by such of the insurer's, broker's, agent's, or adjuster's directors, officers, or representatives as he may specify in the notice) about any matter related to any business carried on by that insurer, broker, agent, or adjuster, as the case may be, in Malaysia or elsewhere, if in the opinion of the Director General such information or such appearance is necessary for the purposes of this Act.

(2) The Director General may from time to time inspect under conditions of secrecy the books, accounts and transactions of any Malaysian insurer, Malaysian insurance broker and Malaysian insurance agent licensed under section 20 and adjuster and of any of their branches and agencies.

(3) Where a person fails to comply with any requirement under subsection (1) or refuses to allow inspection by the Director General under subsection (2), he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding three thousand dollars.

Information on change in control of Malaysian insurer.

18A. (1) There shall be no change in the control of any Malaysian insurer unless the Director General has given approval in writing for such change.

(2) For the purpose of this section, the expression "control" in relation to a Malaysian insurer means the possession directly or indirectly of the power to direct or cause the direction of the management and policy of the insurer.

Objection to policies.

18B. (1) If, within twenty-eight days after the delivery of a home-service policy by an insurer to the policy owner or, at the place of abode of the policy owner, to some other person who is an inmate of that place apparently not less than sixteen years of age and by whom any premium in respect of that policy is paid on behalf of the policy owner, the policy owner returns the policy to the insurer with an objection in writing to any term or condition of the policy, the insurer shall forthwith refund any premium which has been paid in respect of the policy which shall thereupon be cancelled.

(2) Where a home-service policy is sent by registered post by an insurer to the person to whom it is issued, it shall, unless the contrary is proved, be deemed to have been delivered to him at the time at which it would reach him in the ordinary course of post.

(3) For the purposes of this section, a policy shall be deemed to have been returned to an insurer with an objection if the policy and the writing specifying the objection are posted for transmission to the insurer by registered post.

Return of home-service policies and premium receipt books after inspection.

18C. If at any time an insurer or any person authorized by such an insurer takes possession of a home-service policy or premium receipt book or other document issued in connection with the policy, a receipt for the policy, book or document shall be

given to the person from whom it was received, and the policy, book or document shall be returned to that person on demand at any time after the expiration of twenty-eight days, unless–

(*a*) it is required for the purposes of evidence in legal proceedings;

(*b*) the policy has been terminated by reason of the satisfaction of all claims capable of arising under it; or

(*c*) in the case of a policy, the insurer is entitled to retain the policy as security for money owning to the insurer by the policy owner.

Penalties for falsification

18D. (1) If any person wilfully makes or causes to be made, any entry or erasure in, or omits any entry, or omits or causes to be omitted any entry from a collecting book or premium receipt book, with intent to falsify the book, or to evade any of the provisions of this Act, he shall be guilty of an offence and shall, on conviction, be liable to a fine of three thousand dollars or to imprisonment for a term not exceeding six months or to both.

As to avoidance of policy by reason of particulars in proposal written or filled in by agent or servant of insurer.

18E. (1) Where any agent or servant of an insurer writes or fills in any particulars in a proposal for a home-service policy with the insurer, then, notwithstanding any agreement to the contrary between the proposer and the insurer, any policy issued in pursuance of the proposal shall not be avoided by reason only of any incorrect or untrue statement contained in any such particulars so written or filled in unless the incorrect or untrue statement was in fact made by the proposer to the agent or servant for the purposes of the proposal.

(2) The burden of proving that any such statement was so made shall lie upon the insurer.

(3) Nothing in this section shall be deemed to allow the avoidance of any policy for any reason or in any circumstances for or in which the policy could not have been avoided apart from the provisions of this section.

Issue of premium receipt books.

18F. (1) An insurer shall, in respect of each home-service policy issued by the insurer, issue to the policy owner a premium receipt book in conformity with the provisions of this section –

(*a*) where the policy was issued before or is issued within the period of twelve months next after the commencement of this section–before the expiration of that period of twelve months; or

(*b*) where the policy is issued after the expiration of that period of twelve months–at the time of the issue of the policy:

Provided that the insurer may, if the policy owners concerned do not object–

(i) issue one premium receipt book in respect of two or more policies if held by the same policy owner or by two or more policy owners who are members of the same household; or

(ii) add the endorsement and entries required by this section in respect of any policy to the premium receipt book issued in respect of any earlier policy held by the same policy owner or by a member of the same household.

(2) After the expiration of the period of twelve months next after the coming into force of this section an insurer shall not issue or permit to be used one premium receipt book in respect of two or more policies held by different policy owners not members of the same household.

(3) Any premium receipt book issued to a policy owner by an insurer, whether before or after the coming into force of this section, shall, if it conforms to the provisions of this section or if it is amended to conform with those provisions and returned to the policy owner within the period of twelve months next after the coming into force of this section, be deemed to be a premium receipt book issued in accordance with the provisions of this section.

(4) Every premium receipt book issued by an insurer shall contain in respect of each policy to which it relates –

(*a*) a statement in distinctive type of the particulars referred to in section 41A;

(*b*) an entry made by the insurer of the following matters –

(i) the full name of the policy owner and, where the policy is issued in respect of the life of a person other than the policy owner, the full name of that person;

(ii) the date and number of the policy; and

(iii) the amount of the weekly or other periodical premium; and

(*c*) a notice stating that proof of age may be required prior to payment of the sum insured.

Premium receipt book to show date to which premiums paid, etc.

18G. (1) Every payment in respect of premiums under a home-service policy made to an agent or servant of an insurer shall be recorded by the agent or servant in the premium receipt book so as clearly to indicate the date on which premiums have been paid in respect of the policy or policies to which the premium receipt book relates, and the record shall –

(*a*) if it is the first entry on a page of the premium receipt book – be signed by the agent or servant with his usual signature; and

(*b*) if it is not such an entry – be signed by the agent or servant with his usual signature or initialled by him.

(2) Where a premium receipt book relates to more than one policy and any payment for premiums on the policies is made which is less than the aggregate of the weekly or other periodical premiums in respect of all those policies, the person making the payment shall be required by the agent or servant of the insurer to whom the payment is made to state the policy or policies in respect of which no payment or an insufficient payment is made, and the agent or servant shall clearly record in the premium receipt book the fact stated, and unless, before any further premiums are paid, the amount of the deficiency is paid, the insurer shall cause a separate premium receipt book in conformity with provisions of section 18F to be issued in respect of any policy in relation to which the deficiency exists and shall cause the particulars and entry in the first mentioned premium receipt book relating to any such policy to be cancelled.

Subsidiary

Insurance agents and brokers

19. (1) Subject to subsection (4), no person shall carry on insurance business in Malaysia as insurance agent for an insurer not entitled under this Act to carry on the business in question in Malaysia; and a person contravening this subsection shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars, increased by one thousand dollars for each day on which he is proved to have done so, or to imprisonment for a term not exceeding twelve months or to both.

(2) Subject to subsections (3) and (4), no Malaysian insurance broker shall in the course of his business as such negotiate any contract of insurance with an insurer (whether

directly or through an insurance agent), except with a Malaysian insurer acting in the course of his business as such, nor shall any person in Malaysia solicit insurance business for an insurer not entitled to carry on that business in Malaysia; and a person contravening this subsection shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand dollars, or to imprisonment for a term not exceeding six months or to both.

(3) The references in subsection (2) to a contract of insurance and to insurance business shall not apply to reinsurance.

(4) If in any particular case a Malaysian insurance broker satisfies the Director General that, by reason of the exceptional nature of the risk or other exceptional circumstances, it is not reasonably practicable to effect an insurance with a Malaysian insurer acting in the course of his business as such, the Director General may, notwithstanding anything in section 3 or in this section, permit the broker to negotiate the insurance with such insurer as the broker sees fit and also, if in the opinion of the Director General the case requires it, to effect the insurance and receive the premium in Malaysia on behalf of the insurer.

(5) Sections 16 and 18 shall apply in relation to Malaysian insurance agents and to Malaysian insurance brokers as they apply in relation to Malaysian insurers.

Provision for members of associations of underwriters to carry on general business

20.– (1) Section 3 shall not prevent general business being carried on in Malaysia by an individual if –

(*a*) on the commencement of this subsection he is, or within six months thereof he becomes, a member of an association of insurers approved by the Minister;

(*b*) he carries on such business as a member of an association of individual underwriters established outside Malaysia and for the time being approved for the purposes of this section by the Director General; and

(*c*) the conditions of this section are complied with.

(1A) In subsections (2), (3), (4), (5), and (12) "association" means an association mentioned in subsection (1) (*b*) only.

(2) The Director General shall not approve an association for the purposes of this section unless it is organised on the system known as Lloyd's, that is to say, a system where-

by every underwriting member of a syndicate of the association becomes liable for a separate part of the sum secured by every policy subscribed to by that syndicate, limited or proportionate to the whole sum thereby secured.

(3) Subsection (1) shall not authorize an individual to carry on insurance business in Malaysia as a member of any association, unless there are one or more persons resident in Malaysia who are authorized to accept service of notices and legal process on behalf of members of the association, being persons nominated for that purpose by the association; and the association shall notify the Director General in writing of any such nomination and of any person ceasing to be nominated.

(4) Subsection (1) shall not authorize an individual to carry on insurance business in Malaysia unless the association makes with the Accountant-General and maintains the deposit required by this section; and any such deposit shall be applied by the Accountant-General, if and so far as the Minister directs, in meeting claims against members of the association in respect of Malaysian policies.

(5) The deposit required by this section from an association shall be such as is mentioned in the Third Schedule, and that Schedule shall have effect in relation thereto.

(6) This section shall not authorize a person to carry on business as a Malaysian insurance agent for any individual, or in the course of a business as Malaysian insurance broker to negotiate insurances with any individual, except under the authority of a licence issued by the Director General; and for each calendar year in which a person acts under the authority of such a licence, he shall before the end of June in the following year lodge with the Director General a statement in the prescribed form, signed by him or on his behalf and giving the prescribed information as to his receipts and payments in connection with business done under that authority.

(7) Where a person fails to lodge a statement as required by subsection (6), he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars, and to a daily fine not exceeding fifty dollars.

(8) The Director General shall not be required to consider an application for a licence under subsection (6) unless he is satisfied –

(*a*) that the person applying for a licence to carry on business as a Malaysian insurance agent for any individual has a surplus of assets over liabilities of not less than one hundred thousand dollars or such greater amount as may be specified by notice in writing by the Minister; and

(*b*) that the person applying for a licence to carry on business as a Malaysian insurance broker in negotiating insurances with any individual has furnished a certificate of solvency signed by the applicant's auditor and has a professional indemnity insurance policy of a value not less than five hundred thousand dollars or such greater amount as the Director General may specify.

(9) In granting a licence under subsection (6) the Director General may impose such conditions as he thinks fit and may at any time add to, vary or revoke such conditions.

(10) Any person in Malaysia who carries on business as a Malaysian insurance agent for any individual or as a Malaysian insurance broker in negotiating insurances with any individual without a valid licence under subsection (6) or who fails to comply with any of the conditions of his licence shall be guilty of an offence and shall be liable, on conviction, to a fine of five thousand dollars or to imprisonment for a term of twelve months, or to both and to a daily fine not exceeding one thousand dollars.

(11)A licence under subsection (6) shall be granted for a period of twelve months, beginning with the first day of the month as the applicant for it may require, but the granting or withholding of a licence shall be at the discretion of the Director General:

Provided that if a licence is withheld, the applicant may appeal to the Minister, and the Minister before determining the appeal shall afford the applicant an opportunity to make representations orally or in writing to a person appointed by the Minister and shall consider any representations made.

(12)In every year there shall be furnished to the Director General on behalf of any association of underwriters of which any members carried on business as Malaysian insurers in the preceding year by virtue of this section—

(*a*) a certificate, signed by the chairman or other presiding officer of the association and by or on behalf of the Minister or other public authority as has the administration of the law relating to insurance in the country in which the association is constituted, whether or not those members of the association have in respect of that preceding year complied with that law so far as applicable to them;

(*b*) a certified copy of such returns for the preceding year and relating to insurance business carried on by those members of the association as are required by the said law to be furnished to the said Minister or authority; and

(*c*) the latest annual list of members of the association and of its committee or other governing body.

"Intermediaries in insurance transactions.

20A. (1) Any person who—

(*a*) invites another person to make an offer or proposal or to take any other step with a view to entering into a contract of insurance with an insurer; and

(*b*) is connected with that insurer as provided in the regulations,

is required to give the prescribed information with respect to his connection with the insurer to the person to whom the invitation is issued.

(2) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand dollars or to imprisonment of not exceeding six months or to both.

Licensing of brokers.

20B. (1) No person shall after the end of six months from the date of the commencement of this section act or hold himself out as a broker unless he is a holder of a licence as a broker granted by the Director General.

(2) In granting a licence under this section the Director General may impose such conditions as he thinks fit and may at any time add to, vary or revoke such conditions.

(3) Every licence under this section shall be granted or renewed for a period of twelve months and on the payment of the prescribed fees.

(4) A person who contravenes this section shall be guilty of an offence and shall, on conviction, be liable to a fine not

exceeding two thousand dollars, increased by five hundred dollars for each day on which he is proved to have done so or to imprisonment for a term not exceeding six months or to both.

Adjusters.

20C. (1) No person shall after the end of six months from the date of the commencement of this section act or hold himself out as an adjuster unless he is the holder of a licence as an adjuster granted by the Director General.

(2) The Director General shall not be required to consider an application for a licence under this section unless he has been furnished with such documents and information as may be prescribed or he may in the particular case require.

(3) In granting a licence under this section the Director General may impose such conditions as he thinks fit and may at any time add to, vary or revoke such conditions.

(4) Every licence under this section shall be granted or renewed for a period of twelve months and on the payment of the prescribed fees.

(5) Nothing in this section shall apply to–

(*a*) an advocate and solicitor and members of other professions who act or assist in adjusting insurance claims as an incident to the practice of their professions and who do not hold themselves out as adjusters; and

(*b*) an adjuster of maritime losses.

(6) Every adjuster shall within one month after the end of each quarter of the year submit to the Director General a quaterly report in the prescribed form of all losses which are the subject of adjustments effected by him.

(7) A person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars, increased by one thousand dollars for each day on which he is proved to have done so, or to imprisonment for a term not exceeding twelve months or to both.

(8) Where a person fails to submit a report as required by subsection (6), he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars and to a daily fine not exceeding fifty dollars.

Saving for validity of policies.

21. Nothing in this Part shall operate to invalidate any policy.

PART III

RETURNS, INVESTIGATIONS, WINDING UP AND TRANSFERS OF BUSINESS

Returns

Annual accounts and audit.

22. (1) An insurer registered under this Act shall prepare the statements of account and other statements required by Part I of the Fourth Schedule and lodge them with the Director General (together with any prescribed fee), and Part III of that Schedule, so far as relevant to those statements, shall have effect with respect to their form and contents and to the time and manner in which they are to be lodged.

(2) An insurer registered under this Act shall have its accounts audited for each accounting period for which statements of account are prepared in accordance with subsection (1), and when those statements are lodged with the Director General there shall be lodged with them a certificate of the auditor as required by Part I of the Fourth Schedule.

(3) The audit required by subsection (2) shall be made by a person who—

(*a*) has a place of business in Malaysia;

(*b*) is for the time being authorized under section 8 of the Companies Act, 1965, to be the insurer's auditor or an auditor of companies generally; and

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(*c*) has for the time being the approval of the Director General to act for the purposes of this section.

(4) In the case of a company incorporated or established outside Malaysia, the audit required by subsection (2) need not extend beyond the business for which an insurance fund is maintained under this Act.

(5) The documents to be lodged with the Director General under this section for any accounting period of an insurer shall be accompanied by copies of any report submitted to the members of the insurer with respect to that period and (if it is not among the documents so lodged) by any statement of accounts so submitted with respect to that period; but references in this Act to documents lodged with the Director General shall not be taken to include documents required by this subsection to accompany documents so lodged.

(6) Where any report or statement referred to in subsection (5) is in a language other than Malay or English, the copy required by that subsection shall be in Malay or English and shall be certified to be a true translation of the original by the translator.

Actuarial investigations and reports as to life business.

23. (1) Subject to this section, an insurer registered under this Act in respect of life business shall from time to time have an investigation made by a qualified actuary into the financial condition of its life business and a report thereon made to it by the actuary, and shall lodge with the Director General (together with any prescribed fee) such abstract of the actuary's report and certificate relating thereto and such statements as to that business as are required by Part II of the Fourth Schedule; and Part III of that Schedule, so far as relevant to those documents, shall have effect with respect to their form and contents and to the time and manner in which they are to be lodged.

(2) Investigations under subsection (1) shall be made as at the end of such accounting periods as the insurer may determine, subject to the following rules:

(*a*) the first investigation shall be made as at the end of an accounting period not later than the third accounting period in which the insurer is registered in respect of life business or such earlier accounting period as the Director General may require; and

(*b*) an investigation made as at the end of one accounting period shall be followed by another made as at the end of the third or an earlier accounting period thereafter, but the Director General may in the case of any particular company direct that so long as the direction remains in force investigations shall be made at such interval as may be specified in the direction.

(3) (*a*) In the case of a company incorporated or established outside Malaysia the investigation required by subsection (1) need not extend beyond the business for which an insurance fund is maintained under this Act; but if such a company is required by the law relating to insurance in the country in which it is incorporated or established to furnish the authority having the administration of that law with returns as to actuarial investigations of its life business,

the documents to be lodged with the Director General under this section shall be accompanied by certified copies of any such returns made since the company was first registered under this Act in respect of life business (or, in the case of an existing insurer, since the 21st January, 1963), other than returns of which copies have previously been furnished under this subsection.

(*b*) References in this Act to documents lodged with the Director General shall not be taken to include documents required by this subsection to accompany documents so lodged.

(4) Where an insurer registered under this Act in respect of life business—

(*a*) has an actuarial investigation made into the life business for which it maintains an insurance fund under this Act (whether with or without any other life business carried on by it); and

(*b*) the investigation is not made to comply with subsection (1) or with any provision as to returns in the law relating to insurance in a country outside Malaysia, but the results of the investigation are made public,

then the insurer shall, as to the lodging of documents with the Director General, comply with the requirements of subsection (1) as in the case of an investigation under that subsection.

(5) (*Omitted*).

Power to require returns under sections 22 and 23 to be rectified.

24. (1) If it appears to the Director General that any document lodged in accordance with section 22 or 23 is in any particular unsatisfactory, incomplete, inaccurate or misleading or that it does not comply with the requirements of this Act, the Director General may by notice in writing require such explanations as he considers necessary to be made by or on behalf of the insurer within such time (not less than fourteen days) as is specified in the notice.

(2) The Director General may, after considering the explanations referred to in subsection (1), or if such explanations have not been given by or on behalf of the insurer within the time specified in that subsection, reject the document or give such directions as he thinks necessary for its variation within such time (not less than one month) as is

specified in the directions.

(3) Directions given under subsection (2) with respect to any document may require such consequential variations of any other document lodged by the insurer under section 22 or 23 as may be specified in the directions.

(4) Where directions are given under subsection (2), any document to which they relate shall be deemed not to have been lodged until it is re-submitted with the variations required by the directions, but the insurer shall be deemed to have submitted the document within the time limited by the Fourth Schedule if it is re-submitted as aforesaid within the time limited by the directions.

Additional provisions as to returns under sections 22 and 23.

25. (1) Any member or policy owner of an insurer shall have a right, on applying to the insurer, to be sent by the insurer at an address supplied by him copies of documents lodged by the insurer to comply with section 22 or 23, and to have the copies despatched not later than fourteen days after the insurer receives the application:

Provided that the right shall not extend to any document excepted from this subsection by Part I of the Fourth Schedule, or to a document of any other description except the last lodged of that description.

(2) Any person shall have the right, on payment of the prescribed fee, at any time during working hours of the office of the Director General, to inspect at that office any document lodged by an insurer to comply with section 22 or 23 and any document required by section 22 (5) and section 23 (3) to accompany the documents so lodged, and make a copy of the whole or any part of it:

Provided that the right shall not extend to any document excepted from this subsection by Part I of the Fourth Schedule, or to documents of any other description lodged more than ten years previously.

(3) In any proceedings a certificate signed by the Director General that a document is one lodged by an insurer to comply with section 22 or 23, or one that accompanied documents so lodged, shall be admissible as evidence of the facts certified.

(4) Where an insurer fails to comply with section 22 or 23, the insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars, and to a daily fine not exceeding fifty dollars.

Returns of changes in registration particulars.

26. (1) Subject to subsection (3), where an insurer is registered under this Act in respect of either class of insurance business, the insurer shall from time to time, until the insurer ceases to be so registered, notify the Director General in writing of any change affecting the insurer's registration particulars, and shall do so within three months of the change taking place.

(2) Where the change consists in the amendment of any document, or the replacement of any document by a new document, the insurer shall furnish the Director General with a copy of the document showing the amendments or, as the case may be, with a copy of the new document.

(3) This section shall have effect subject to any prescribed exceptions, and the Director General may in any particular case dispense (either unconditionally or subject to any conditions) with the furnishing of information under this section about any matter.

(4) In this section "registration particulars" means the documents and information furnished by the insurer to comply with section 4 (3) when applying to be registered in respect of the class of business in question, or furnished by the insurer to comply with this section in respect thereof.

Investigations

Investigation of affairs of insurer.

27. (1) The Director General may institute an investigation into the whole or any part of the business carried on in Malaysia by an insurer registered under this Act, if it appears to the Director General—

(*a*) that the insurer is or is likely to become unable to meet its obligations;

(*b*) that the insurer has failed to comply with any provisions of this Act relating to insurance funds;

(*c*) that the insurer, having been given a notice under section 18, has not, within one month thereafter furnished the required information fully and satisfactorily;

(*d*) that the insurer has failed to comply with any provisions of section 22, 23 or 26;

(*e*) that the expenditure or any class of expenditure incurred in procuring, maintaining or administering any insurance business of the insurer carried on in

Malaysia is unduly high in relation to the income derived from premiums;

(*f*) that the method by which any income or expenditure of the insurer is apportioned between insurance funds or between an insurance fund and any other fund or account is inequitable; or

(*g*) that any information in the possession of the Director General calls for such an investigation.

(2) Before instituting an investigation under this section, the Director General shall serve on the insurer a notice in writing specifying that before the completion of any investigation under this section the insurer shall not under any circumstances save with the prior written approval of the Director General dispose of any assets vested in or accruing to the insurer.

Nothwithstanding the generality of the above for the purpose of this section, assets include but are not limited to –

(i) immovable assets	any land, building and fixtures;
(ii) movable assets	any furniture, equipments, books, periodicals and any other moveable items, any motor-vehicles, vessels, ships, aircrafts and other means of conveyance of whatever description including any tractor, bulldozers and any other type of light and heavy machinery as well as tools and appliances;
(iii) investments . . .	any Federal, State and local government securities including bonds and securities of any quasi-government bodies or agencies and Treasury Bills;
(iv) company and other investments	any stocks and shares whether quoted in any stock exchange or unquoted including any bonds and shares ordinary or preference and debentures;
(v) cash	any cash deposited in any bank, lending institution or placed with any other bodies or agencies for whatever period either on current or fixed deposit account including any determinable amount of cash in hand;

(vi) other assets . . . any outstanding premium, commission and other debts or payment due and payable and rights contractual or otherwise including interest thereon accruing to or vested in the insurer.

(3) The Director General may himself make the investigation or may appoint an inspector to make it and report the results of it to him.

(3A) The Director General may appoint an auditor (other than the auditor who prepares the statements of account or other statements of the insurer under section 22), an actuary, or any other suitable person to be an inspector to carry out the investigation under this section and the cost of such an investigation shall be paid by the insurer.

(4) In making an investigation under this section, the Director General or inspector may, by notice in writing, require—

(*a*) the insurer, or any person having the custody thereof on behalf of the insurer;

(*b*) any person who is or has at any time been or acted as a director, actuary, auditor, officer, servant or agent of the insurer; or

(*c*) any past or present member or policy owner of the insurer,

to produce for his inspection, and allow him to copy the whole or any part of, any books, accounts, records, or other documents of the insurer, whether kept in Malaysia or elsewhere (including documents evidencing the insurer's title to any assets):

Provided that a requirement under this subsection shall extend only to documents relating to business carried on by the insurer in Malaysia, or evidencing the insurer's title to assets held for the purposes of any such business.

(5) In making an investigation under this section, the Director General or inspector may require any such individual as is specified in subsection (4) to attend before him and be examined on oath with respect to the insurer's business, and for the purposes of this subsection may administer oaths.

(6) If any person refuses or fails, when required to do so under subsection (4) or (5), to produce any document in his custody or power or to attend for or submit to examination by the Director General or inspector, or to answer any question put to him on such examination, the Director General or inspector may certify the refusal under his hand to the High Court; and the High Court may thereupon enquire into the case, and after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, punish the offender in like manner as if he had been guilty of contempt of the High Court.

Powers of Director General to issue directions.

28.– (1) Where the Director General is satisfied that the affairs of an insurer are being conducted in a manner likely to be detrimental to the public interest, the interests of the policy owners, or the interests of the insurer, the Director General may issue such directions to the insurer as he considers necessary and may in particular require the insurer –

(*a*) to take such action or engage such management personnel as may be necessary to enable the insurer to conduct its business in accordance with sound insurance principles;

(*b*) to remove any of its directors whom the Director General considers not a fit and proper person to remain a director;

(*c*) to take action as to the disposal or recovery of its assets;

(*d*) to take steps for the recovery by the insurer of sums appearing to the Director General to have been illegally or improperly paid;

(*e*) to cease renewal or cease issue of policies of the classes of business to which the direction relates;

(*f*) to make such arrangements with respect to reinsurance as the Director General specifies.

(2) The Director General may modify or cancel any direction issued under subsection (1) and in so doing may impose such conditions as he thinks fit.

(3) Any insurer which fails to comply with any direction issued under subsection (1) shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding six months or

to both and to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.

Winding Up

General provisions as to winding up. *79/65.*

29. (1) The persons who may petition under the Companies Act, 1965, for the winding up of an insurer registered under this Act, or for the continuance of the winding up of such an insurer subject to the supervision of the Court, shall include the Director General.

(2) The Director General shall be a party to any proceedings under the Companies Act, 1965, relating to the winding up of such an insurer, and the liquidator in such a winding up shall give him such information as he may from time to time require about the affairs of the insurer.

(3) For the purposes of any proceedings under the Companies Act, 1965, for the winding up of such an insurer by the Court, the contingent and prospective liabilities of the insurer in respect of policies shall, in determining whether it is unable to pay its debts, be estimated in accordance with the regulations; and evidence that the insurer was insolvent at the close of the last accounting period for which statements of account have been lodged with the Director General under section 22 shall be evidence that the insurer continues unable to pay its debts.

(4) If the Minister submits to the Rules Committee proposals for making special provision under section 372 of the Companies Act, 1965, in relation to insurers registered under this Act or any description of such insurers, the Committee may by rules under that section give effect to the proposals, either as submitted or subject to such modifications as the Committee thinks fit.

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(5) Proposals under subsection (4), and rules made by virtue thereof, may provide for modifying or excluding, in relation to insurers so registered, provisions of Part X of the Companies Act, 1965, requiring the holding of meetings or otherwise relating to the procedure in a winding up.

(6) In the winding up of an insurer registered under this Act, section 291 (2) of the Companies Act, 1965 (which

applies bankruptcy rules in the winding up of insolvent companies), shall not apply to the valuation of liabilities in respect of policies; but in any such winding up, whether the insurer is insolvent or not, those liabilities shall be estimated in accordance with the regulations and, as regards matters not fixed by the regulations, on a basis approved by the Court:

Provided that in a member's voluntary winding up the basis to be adopted as regards matters not fixed by the regulations may be approved by the Director General instead of by the Court.

(7) References in this section to an insurer registered under this Act shall extend also to a Malaysian insurer which has ceased to be so registered but remains under any liability in respect of Malaysian policies; and where the winding up of a Malaysian insurer has commenced but has not been completed before the commencement of this Act, subsections (4) and (5) shall have effect for the purposes of that winding up as they have effect in the case of an insurer registered under this Act.

Special provision for insurers directed to cease insurance business. 79/65.

30. (1) Where the Director General gives an insurer a direction under section 28 (1) (*e*), the insurer may be wound up by the Court under the Companies Act, 1965, as if it had suspended its business for a whole year (or, in the case of a winding up under Division 5 of Part X of that Act, as if it had ceased to carry on business).

(2) Where the Director General gives an insurer a direction as aforesaid but, on a petition for the insurer to be wound up by the Court, the Court is satisfied that the insurer will be able to pay its debts in full within twelve months or such longer period as the Court thinks reasonable, the Court may (if it thinks fit) order the affairs of the insurer to be wound up only as regards the insurance fund maintained for the class of business to which the direction relates.

(3) An order under subsection (2) for a limited winding up shall be of the same effect as an order for the insurer to be wound up generally, except so far as this section otherwise provides.

(4) Where such an order is made, the powers of the liquidator shall be exercisable only for the purpose of applying the assets of the relevant insurance fund (including the deposit under this Act) in discharging the liabilities to which they are applicable, together with the costs, charges and expenses incurred in the winding up; but the insurer shall from time to time, as the Court may direct, make such additions to those assets as are required to secure that they are sufficient for the purpose or shall, if the Court so directs, discharge any of those liabilities out of other assets.

79/65. (5) In the winding up of an insurer under such an order, the Companies Act, 1965, shall have effect subject to the following modifications:

(*a*) section 214 (or, as the case may be, section 316) and other sections so far as they relate to contributories shall not apply;

(*b*) section 222 shall apply after, as it applies before, the making of the winding up order, and section 126 (3) shall not apply; and

(*c*) sections 223, 224, 272, 283, and 293 to 299 shall not apply.

(6) Where such an order is made, the Court may at any time, on the application of the liquidator or of any person who might petition for the insurer to be wound up, substitute an order for the insurer to be wound up generally, and give such directions as the Court thinks fit as to matters in progress under the previous order; and, subject to any such directions, the winding up shall for all purposes connected with the substituted order be deemed to have commenced at the time of the application for that order.

Co-operative societies doing insurance business. *F.M. 33/48. Sabah 3/58. Sarawak Cap. 66.*

31. (1) Where a society registered under the Co-operative Societies Ordinance, is an insurer registered under this Act, no proceedings for the dissolution or winding up of the society shall be taken under Part VII of that Ordinance except with the consent of the Director General and in accordance with such conditions, if any, as he sees fit to attach to that consent.

F.M. 33/48. (2) Notwithstanding—

Sabah 3/58. Swk. Cap. 66. (*a*) section 57 of the Co-operative Societies Ordinance, 1948, of the Federation of Malaya, or section 59 of the Co-operative Societies Ordinance of Sabah or Sarawak, as the case may be; or

(*b*) section 314 (1) of the Companies Act, 1965, *79/65.*

any such society which is an insurer registered under this Act shall be deemed to be an unregistered company within the meaning of Division 5 of Part X of the Companies Act, 1965, and may be wound up by the Court accordingly under that Act:

Provided that in any such winding up—

(*a*) the provisions of the Companies Act, 1965, shall apply with the substitution for references to the Registrar of Companies and the register under that Act of references to the Registrar and register under the Co-operative Societies Ordinance; and

(*b*) the provisions of section 46 of the Co-operative Societies Ordinance, which govern the disposal of any surplus, shall apply, subject to any necessary modifications, as they apply where a society is wound up under that Ordinance.

(3) Where a society has ceased to be an insurer registered under this Act, but remains under any liability in respect of Malaysian policies, this section shall apply as if the society were an insurer so registered.

Transfers of Business

Schemes for transfer of business.

32. (1) The whole or part of the insurance business of an insurer registered under this Act may be transferred to another insurer registered in respect of the class or classes of business to be transferred, if the transfer is effected by a scheme under this section, but shall not be transferred except by such a scheme:

Provided that—

(*a*) this subsection shall not apply to the transfer of any insurance business of a company incorporated or established outside Malaysia, except so far as it relates to Malaysian policies; and

(*b*) no scheme shall transfer any insurance business of a society registered under the Co-operative Societies Ordinance, except to another society so registered, nor transfer to such a society any business except *F.M. 33/48, Sabah 3/58, Sarawak Cap. 66.*

that of another.

(2) Any insurer registered under this Act, not being a company incorporated or established outside Malaysia, shall by virtue of this section have power to make such a transfer by a scheme under this section, and the directors shall have authority on behalf of the insurer to arrange for and do all things necessary to give effect to such a transfer; and this subsection shall apply notwithstanding the absence of that power or authority under the constitution of the insurer or any limitation imposed by its constitution on its powers or on the authority of its directors.

(3) A scheme under this section may provide for the business in question to be transferred to a body not registered as an insurer under this Act in respect of the relevant class of business (including a body not yet in existence), if the scheme is so framed as to operate only in the event of the body becoming so registered.

(4) A scheme under this section for the transfer of any insurance business may extend to the transfer with it of any other business, not being insurance business, where the other business is carried on by the insurer as ancillary only to the insurance business transferred.

(5) A scheme under this section may include provision for matters incidental to the transfer thereby effected, and provision for giving effect to that transfer, and in particular—

(*a*) for any property, rights or liabilities of the transferor (including assets comprised in a deposit under this Act or in an insurance fund) to vest, by virtue of the scheme and without further or other assurance, in the transferee; and

(*b*) for the registration by the transferee of policies transferred, for the amounts to be included in respect of those policies in the transferee's insurance fund and for other matters arising under this Act out of the transfer.

(6) A scheme under this section shall be of no effect unless confirmed by the High Court, but may be prepared and submitted for confirmation to the High Court by any of the insurers concerned; and if so confirmed, the scheme shall have effect according to its tenor notwithstanding

anything in the foregoing sections and be binding on any person thereby affected.

Confirmation of schemes.

33. (1) Before an application is made to the High Court for confirmation of a scheme under section 32—

(*a*) a copy of the scheme shall be lodged with the Director General together with copies of the actuarial and other reports (if any) upon which the scheme is founded;

(*b*) not earlier than one month after the copy is so lodged notice of the intention to make the application (containing such particulars as are prescribed) shall be published in the *Gazette* and in not less than two newspapers approved by the Director General; and

(*c*) for a period of fifteen days after the publication of the notice a copy of the scheme shall be kept at each office in Malaysia of every insurer concerned, and shall be open to inspection by all members and policy owners of such an insurer who are affected by the scheme.

(2) The Director General may cause a report on the scheme to be made by a qualified actuary independent of the parties to the scheme and, if he does so, shall cause a copy of the report to be sent to each of the insurers concerned.

(3) Copies of the scheme and any such report as is mentioned in subsection (1) (*a*) or (2), or summaries approved by the Director General of the scheme and any such report, shall, except so far as the High Court upon application made in that behalf otherwise directs, be transmitted by the insurers concerned, at least fifteen days before application is made for confirmation of the scheme, to every policy owner affected by the scheme.

(4) An application to the Court with respect to any matter connected with the scheme may, at any time before confirmation by the Court, be made by the Director General or by any person who in the opinion of the Court is likely to be affected by the scheme.

(5) The Court may confirm the scheme without modification or subject to modifications agreed to by the insurers concerned, or may refuse to confirm the scheme.

(6) The insurers concerned shall be jointly and severally liable to reimburse to the Director General any expenses incurred by him under this section in connection with any scheme or proposed scheme (subject to any order of the Court as to costs); and a scheme shall include provision as to how that liability is, as between the insurers, to be borne.

Documents to be filed when scheme confirmed.

34. (1) (*a*) Where by a scheme under section 32 insurance business of an insurer is transferred to another, the transferee shall within one month after the scheme takes effect, lodge with the Director General—

(i) statements of the assets and liabilities of each insurer concerned as at the time immediately before the transfer, signed on behalf of the insurer and, in the case of the transferor, indicating whether the transfer is of the whole of the transferor's business and, if not, the extent to which the transferor's assets and liabilities relate to the business transferred;

(ii) a copy of the scheme as confirmed by the Court, and a certified copy of the order of the Court confirming the scheme;

(iii) copies of any actuarial or other reports upon which the scheme was founded (being reports made since a copy of the scheme was lodged under section 33 (1); and

(iv) a statutory declaration made by the chairman of directors of the transferee, or by its principal officer in Malaysia, fully setting forth every payment made or to be made to any person whatsoever on account of the transfer, and stating that, to the best of his belief, no other payment beyond those so set forth has been, or is to be, made on account thereof by or with the knowledge of any insurer concerned.

(*b*) In paragraph (*a*) (iv) references to the making of a payment include references to the transfer of property or rights of any description.

(2) On the confirmation of a scheme under section 32 each of the insurers concerned shall (unless it is an unincorporated company) file a copy of the scheme with the Registrar of Companies or, in the case of societies registered under the Co-operative Societies Ordinance, with the Registrar under that Ordinance.

F.M. 33/48. Sabah 3/58. Sarawak Cap. 66.

PART IIIA

MALAYSIAN SHIP AND AIRCRAFT AND PROPERTY LOCATED IN MALAYSIA

Malaysian ship and aircraft and property located in Malaysia to be insured with Malaysian insurer.

34A. (1) An owner of a ship or aircraft registered in Malaysia or of property, movable and immovable, located in Malaysia shall not insure or cause to be insured such ship, aircraft or property with any person other than Malaysian insurers and those licensed under section 20; and shall not pay or cause to be paid premium chargeable under any policy issued in respect of such ship, aircraft or property except in and from their places of business in Malaysia.

(2) A person who contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding three thousand dollars.

(3) The Minister may exempt any person or class of persons or ship, aircraft or property or class of ship, aircraft or property from the provisions of this section.

In this section, the expression "property" does not include personal effects.

PART IV

MISCELLANEOUS AND GENERAL

Administration and enforcement

The Director General.

35. (1) There shall be an officer, to be known as the Director General of Insurance, who shall be charged with the general administration of this Act and the exercise of the functions conferred by this Act on the Director General; and references in this Act to the Director General are references to that officer.

(2) Appointments to the office of Director General of Insurance shall be made by the Yang di-Pertuan Agong.

(3) In the exercise of his functions the Director General shall act in accordance with any general directions of the Minister.

(3A) In the exercise of his functions under sections 11A, 17A, 17B, 17C, 18A, 20 (1), 20 (2), 20 (6), 20B (2), 20C (3), and 28 the Director General shall first consult the Minister

and shall act in accordance with any directions given by the Minister.

(4) If the Director General (or the acting Director General for the time being during a vacancy or during the absence or incapacity of the Director General) is not a qualified actuary, the Minister shall arrange for the services of a qualified actuary to be available at all times for the purpose of advising in relation to matters arising under this Act.

Indemnity.

35A. The Director General, any public officer, or any person appointed under section 27 (3) shall not be liable for anything done or omitted to be done in good faith in the exercise of any power or the performance of any function or duty conferred or imposed by this Act or any regulations made thereunder.

Annual reports.

36. (1) Not later than the end of April in any calendar year the Director General shall prepare and submit to the Minister a report on the working of this Act during the preceding calendar year.

(2) The Director General shall include in his report under this section for any year copies or summaries of documents lodged with him in that year under sections 22 and 23, other than documents excepted from section 25 (1) and (2), and may include copies or summaries of documents accompanying those lodged as aforesaid; and he may also include in the report such notes on any such documents or summaries as he thinks fit, and copies of any correspondence between him and an insurer about any such documents lodged by or received from the insurer.

(3) On receiving a report under this section, the Minister shall lay a copy of it before each House of Parliament.

Statistics.

37. (1) Regulations may provide for the collection by or on behalf of the Director General, at such intervals or on such occasions as may be prescribed, of statistical information as to such matters relevant to insurance as may be prescribed, and may provide for the collection and use of such information for any purpose, whether or not connected with insurance.

(2) Such regulations may make provision for requiring Malaysian insurers and insurance agents to furnish to the Director General, in the prescribed form, such information as may be prescribed.

(3) No use shall be made of any information obtained by or on behalf of the Director General by virtue only of this section except in a form which does not disclose the affairs of any particular person.

Service of notices.

38. A letter containing a notice or other document to be served by the Director General under this Act shall be deemed to be addressed to the proper place if it is addressed to the place in Malaysia which the addressee last indicated to the Director General as his address or to the addressee's latest address in Malaysia known to the Director General.

"Secrecy and penalty.

38A.(1) Except for the purposes of this Act or of any criminal proceedings under this Act, no person appointed to exercise any powers under this Act shall disclose any information with respect to any individual business or the affairs of any individual customer of an insurer which has been obtained in the course of this duties and which is not published in the pursuance of this Act.

(2) Any person knowingly contravening the provisions of subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year.

General provisions as to offences.

39. (1) Any person who—

(*a*) signs any document lodged with the Director General under section 20 (6) or under section 22 or 23, or under section 34 (1) (*a*) (i); or

(*b*) furnishes the Director General with any information under or for the purposes of any other provision of this Act,

shall use due care to secure that the document or information is not false in any material particular; and if he does not use due care in this behalf and the document or information is false in a material particular, he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) Any person who is guilty of any breach of a duty imposed on him by or by virtue of this Act as being or having been an insurer or an insurance agent or broker shall, in a case where no other punishment is provided for by this Act, be liable on conviction to a fine not exceeding

five hundred dollars and to a daily fine not exceeding fifty dollars.

(3) Where an offence under this Act is committed by any company or body corporate, any person who at the time of the commission of the offence is a director, manager, secretary or other similar officer of that company or body, or is purporting to act in that capacity, shall be guilty of the offence unless he proves that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(4) Where an offence under this Act is committed by a company or body corporate, being an offence consisting in the breach of a duty imposed only on companies and bodies corporate, any individual guilty of the offence (whether by virtue of subsection (3) or otherwise) shall on conviction be liable to imprisonment for a term not exceeding six months in addition to or in substitution for any fine.

(5) For the purpose of any proceedings under subsection (1) (*a*) a document purporting to be signed by any person shall be presumed to have been signed by him, unless the contrary is proved.

Compounding of offences.

39A. The Minister may prescribe the offences which may be compounded under this Act or the regulations made thereunder and the manner in which the offences may be compounded.

Miscellaneous amendments of law

Insurable interest required for life insurances.

40. (1) A life policy insuring the life of anyone other than the person effecting the insurance or a person connected with him as mentioned in subsection (2) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected; and the policy moneys paid under such a policy shall not exceed the amount of that insurable interest at that time.

(2) The lives excepted from subsection (1), besides that of the person effecting the insurance, are those of that person's wife or husband, of that person's child or ward being under the age of majority at the time the insurance is effected, and of anyone on whom that person is at that time wholly or partly dependent.

(3) In this section "insuring the life of" a person means

insuring the payment of money (or the equivalent) on that person's death or on the happening of any contingency dependent on the termination or continuance of that person's life, and includes granting an annuity to commence on that death or at a time to be determined by reference thereto or to any such contingency.

(4) So far as in the case of any life policy the policy moneys do not consist wholly of a cash payment due on the death in question, the limit under this section on the amount to be paid shall be applied by reference to the value of the right to the policy moneys immediately after the death or the happening before the death of any event on which they become payable.

(5) This section shall not affect policies issued before the 21st January, 1963.

Capacity of infant to insure.

41. (1) Notwithstanding any law to the contrary, a person over the age of ten years shall not by reason only of being under the age of majority lack the capacity to enter into a contract of insurance; but a person under the age of sixteen years shall not have the capacity to enter into such a contract except with the consent in writing of his parent or guardian.

(2) This section shall be deemed always to have had effect.

Particulars to be set forth in life policy.

41A. Every life policy issued shall contain a statement in distinctive type setting forth whether the policy is or is not a participating policy.

Life policy moneys to be paid without deduction.

42. (1) Any policy moneys payable under a life policy or moneys payable on the surrender of a life policy shall be paid without any deduction for sums not due under the policy or under an agreement charging them on the policy, unless the deduction is made with the consent of the person entitled to those moneys; and any provision contained in a life policy or in any agreement relating thereto shall be void, so far as it entitles the insurer to make any such deduction without that consent.

(2) Subsection (1) shall apply to all Malaysian policies, but shall not apply to any other policy issued before the 21st January, 1963.

(3) In any proceedings for the recovery of policy moneys due under the life policy or of moneys payable on the surrender of a life policy, no set-off or counter-claim shall

be allowed except for sums due under the policy or under an agreement charging them on the policy.

Life policies (surrenders: non-payment of premiums: paid-up policies).

43. (1) Where a life policy has been in force in the case of a home service policy for six years or more, or in the case of an ordinary policy for three years or more, the policy owner may by notice in writing to the insurer surrender the policy and shall thereupon become entitled to receive the surrender value thereof, determined in accordance with the regulations (but subject to any deduction for sums due under the policy or under an agreement charging them on the policy).

(2) Where a life policy has been in force for three years or more, the policy shall not lapse or be forfeited by reason of the non-payment of premiums, but shall have effect subject to such modifications as to the period for which it is to be in force or the benefits receivable thereunder or both as may be determined in accordance with any system adopted by the insurer and applicable to the policy; and—

(*a*) in the case of a policy issued as a Malaysian policy after the coming into force of this section, the system shall require the approval of the Director General, and shall be that adopted and applicable at the time the policy is issued, and the policy shall contain a statement in a form approved by the Director General of the effect of this subsection in relation to the policy; and

(*b*) in any other case, unless the system is determined by the policy, the system shall be that which at the time when this section becomes applicable to the policy would apply to a like policy then issued as a Malaysian policy.

(3) Where a life policy has been in force for three years or more, the policy owner may by notice in writing to the insurer elect to exchange the policy for a paid-up policy, which shall be a non-participating policy for an amount determined in accordance with the regulations, but with no other modification not required by this Act or some other written law.

(4) A policy issued in place of an earlier policy shall for the purposes of this section (including this subsection) be treated as having been in force since the earlier policy began to be in force; but this shall not affect the operation in relation to a policy of subsection (2) (*a*) or (*b*).

(5) Subsections (1) to (3) shall not apply—

(*a*) to a policy securing the grant of an annuity for a term dependent upon human life; or

(*b*) to a policy under which no policy moneys are necessarily payable, not being a policy which provides for the payment of policy moneys on a death after a specified period.

(6) As respects policies of any prescribed description subsections (1) to (3) shall have effect subject to such modifications as may be prescribed.

(7) The rights conferred by this section shall be in addition to, and not in derogation of, any other rights available to the policy owner under the terms of the policy or otherwise; but this section shall not be taken to confer on a policy owner any rights except against the insurer as such.

(8) This section shall come into force at the beginning of July, 1963, and shall apply to policies then in force, whenever issued; and, subject to subsection (5), shall extend to any Malaysian policy.

. yment of life policy claims without probate, etc.

44. (1) In any case where the policy owner of any life policy or life policies of an insurer dies, and the policy moneys are payable thereunder on his death, the insurer may make payment to a proper claimant not exceeding in the aggregate nine-tenths of the policy moneys of all such policies issued by the insurer on the deceased's life or twenty thousand dollars whichever is the lesser without the production of any probate or letters of administration; and the insurer shall be thereby discharged from all liability in respect of the sum paid.

(2) If, in any case as is mentioned in subsection (1), estate duty is leviable in Malaysia on any such policy moneys as are there mentioned, the insurer may notwithstanding–

(*a*) section 50 (ii) of the Etate Duty Enactment, 1941, of the Federated Malay States; or *F.M.S. 7/41.*

(*b*) section 35 (1) of the Estate Duty Ordinance of Sabah, *Cap. 42.*

pay to a proper claimant a sum not exceeding in the aggregate nine-tenths of the policy moneys of all such policies issued by the

insurer on the deceased's life or twenty thousand dollars whichever is the lesser, without the policy moneys having been included in such a schedule or certificate as is mentioned in the said sections:

Provided that before making any payment under this subsection the insurer shall give not less than fourteen days' written notice by registered post to the Collector of Estate Duty with such particulars as he may require.

(3) Subsection (2) shall apply in relation to policy moneys under policies of which the deceased was not the policy owner at his death as it applies in relation to any such policy moneys as are mentioned in subsection (1).

(4) Where a sum is paid under subsection (2) on account of any policy moneys and the policy moneys are not within 12 months thereafter included in such a schedule or certificate as is there referred to, than the insurer shall deposit the balance with the Treasury; but before refunding such balance to the insurer on his application to pay to the persons entitled thereto, the Treasury may apply the whole or part of the sum deposited in paying any unpaid estate suty leviable on the deafh.

(5) In this section "policy owner" includes a part owner of a policy, and "proper claimant" means a person who claims to be entitled to the sum in question as executor of the deceased, or who claims to be entitled to that sum (whether for his own benefit or not) and is the widower, widow, parent, child, brother, sister, nephew or niece of the deceased; and in deducing any relationship for the purposes of this subsection an illegitimate person shall be treated as the legitimate child of his actual parents.

Knowledge of and statement by person holding out as agent to be deemed knowledge of and statement by insurer.

44A.(1) Any person who claims to be an authorized representative of an insurer and who solicits or negotiates a contract of insurance shall be deemed for the purpose of the formation of the contract to be the agent of the insurer where—

(*a*) he so holds himself out and the insurer does not take all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general that such person is not its agent; or

(*b*) such person has ceased being an agent of the insurer and the insurer does not take all reasonable steps to inform or bring to the knowledge of potential policy owners

and the public in general that such person has ceased being its agent,

and in every such instance the knowledge of such person relating to any circumstance relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made by any such person in the course of soliciting or negotiating a contract of insurance shall be deemed for the purpose of the formation of the contract to be a statement made by the insurer notwithstanding the contravention of section 16A or any other provision of this Act by such person.

Supplementary

45. The Minister may make regulations for carrying into effect the objects of this Act, and for prescribing anything which under this Act is to be prescribed. Regulations.

46-47. (*Now Section 1A*).

48. (1) The following enactments are hereby repealed: Repeals and savings.

The Life Assurance Companies Ordinance, 1948;	*38/48.*
The Life Assurance Companies Ordinance of Sabah;	*Cap. 71.*
The Fire Insurance Companies Ordinance, 1948;	*39/48.*
The Fire Insurance Companies Ordinance of Sabah;	*Cap. 46.*
The Life Assurance Companies (Amendment) Act, 1961;	*20/61.*
The Life Assurance Act, 1961.	*48/61.*

(2) (*Omitted.*)

(3) The repeals made by this section shall have effect subject to the savings provided for by Part II of the Fifth Schedule (but without prejudice to the application of the provisions of the Interpretation and General Clauses Ordinance, 1948 of the Malayan Union, the Interpretation Ordinance of the former Colony of North Borneo and the Interpretation Ordinance of Sarawak as to the effect of repeals). *7/48.* *Cap. 63.* *Cap. 1.*

First Schedule

(Section 2 (2))

DEFINITION OF INSURANCE TERMS

General

1. (1) "policy" includes any contract of insurance whether or not embodied in or evidenced by an instrument in the form of a policy, and references to issuing a policy shall be construed accordingly.

(2) References to a policy of an insurer include any policy in respect of which the insurer is under any liability, whether the policies were issued by the insurer or the liability was transferred to the insurer from another.

2. (1) Subject to the following sub-paragraphs and to the operation of section 9 (3) and (4), "Malaysian policy" means, in relation to any insurer, a policy issued in the course of the insurer's business in Malaysia and falling within one of the following descriptions:

(*a*) a life policy or personal accident policy in the case of which, at the date of issue of the policy and (if the policy was issued before then) at the date of the establishment of the Register, the policy owner's address is or was an address in Malaysia;

(*b*) a marine, aviation or transit insurance policy which provides expressly for payment of the policy moneys in Malaysia or in the case of which the risk can only arise in Malaysia; and

(*c*) any other policy in the case of which the risk can only arise in Malaysia or the insurance is substantially against risks so arising.

(2) Any life policy issued in the course of an insurer's business in Malaysia at a time when the insurer is not carrying on life business outside Malaysia, or is doing so only by the collection or receipt of premiums, shall (subject to the operation at any later time of section 9 (4)) be deemed to be a Malaysian policy.

(3) For the purposes of this paragraph—

(*a*) any policy belonging to the insurer's life business shall be deemed to be a life policy, and not to be a policy of any other description; and

(*b*) "policy owner's address" means the address for the time being known to the insurer as the address (or normal address) for communicating with the policy owner about the policy,

but sub-paragraph (1) (*a*) shall apply to a policy of reinsurance as if the references to the date of issue of the policy and to the policy owner's address referred to those of the policy under which the liability reinsured ultimately arises.

(4) Where the liability in respect of a policy of one insurer is or has been transferred to another, then (subject to any scheme under this Act whereby the transfer is effected) the policy shall for the purpose of being entered in the Register be treated as a Malaysian policy of the transferee if immediately before the transfer it is or was a Malaysian policy of the transferor:

Provided that where at the date of the transfer the transferor had not established a register of policies under this Act, sub-paragraph (1) (*a*) shall apply for the purpose of determining whether the policy is or was a Malaysian policy immediately before the transfer as if the reference to the date of the establishment of the transferor's register of policies were omitted; but under this proviso a policy—

(*a*) shall not be treated as a Malaysian policy of a transferee unless at the date of transfer the transferee is or was a Malaysian insurer; and

(*b*) need not be entered in a transferee's register of policies if the policy owner's address is not an address in Malaysia at that date or at the date of the establishment of the Register, whichever is the later.

3. "policy owner" means, where a policy has been assigned, the assignee for the time being and, where they are entitled as against the insurer to the benefit of the policy, the personal representatives of a deceased policy owner.

4. "policy moneys" includes any benefit, pecuniary or not, which is secured by a policy, and "pay" and other expressions, where used in relation to policy moneys, shall be construed accordingly.

Definitions related to life business

5. "life policy" means any policy by which payment of policy moneys is insured on death (otherwise than by way of insurance against personal accident, disease or sickness only) or on the happening of any contingency dependent on the termination or continuance of human life, and includes a policy which is subject to payment of premiums for a term dependent on the termination or continuance of human life and a policy securing the grant of an annuity for such a term.

6. (1) "home-service policy" means a life policy in respect of which premiums are contracted to be paid at intervals of less than two months and are or have been ordinarily collected in the course of door-to-door collections made by persons employed for the purpose, but shall not include in relation to any insurer any description of policy which the Director General directs is not to be treated as a home-service policy.

(2) "ordinary policy" means a life policy which is not a home-service policy.

(3) A paid-up policy granted in place of a home-service policy is to be treated as a home-service policy, unless the grant is made in pursuance of an agreement or option providing for it to be treated as an ordinary policy.

7. "participating policy" means a life policy conferring any right to share in the profits or surplus arising from the business of the insurer or any part of it, and "non-participating policy" means a life policy not conferring any such right.

Definitions related to general business

8. "marine, aviation or transit insurance policy" means a policy of insurance—

(*a*) upon vessels or aircraft, or upon the machinery, tackle, furniture or equipment of vessels or aircraft;

(*b*) upon goods, merchandise or property of any description whatever on board vessels or aircraft;

(*c*) upon the freight of, or any other interest in or relating to, vessels or aircraft;

(*d*) against damage arising out of or in connection with the use of vessels or aircraft, including third party risks;

(*e*) against risks incidental to the construction, repair or docking of vessels, including third party risks; or

(*f*) against transit risks (whether the transit is by sea, inland water, land or air, or partly one and partly another) including risks incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance.

9. "personal accident policy" means a policy of insurance upon the happening of personal accidents, whether fatal or not, disease or sickness, or any class of personal accidents, disease or sickness.

SECOND SCHEDULE

(Sections 7 (2), (5) and (6), 11 (2) and (3))

MALAYSIAN ASSETS AUTHORIZED FOR DEPOSITS AND INSURANCE FUNDS

1. Securities of which the principal or interest is charged directly or by way of guarantee on the Consolidated Fund of the Federation or of any State.

2. Debentures or other loans issued under the authority of any written law by any authority or body established by any written law to dis-

charge, otherwise than with a view to profit, any functions of a public nature (including the provision of public utility and similar services).

3. Shares in, or debentures or other securities of, a body incorporated in Malaysia which are listed by the Malaysian Stock Exchange, or any stock exchange approved under the Security Industry Act, 1973.

4. Shares in, or debentures or other securities of, a society registered under the Co-operative Societies Ordinance. *F.M. 31/48, Sabah 3/58, Swk. Cap. 66.*

5. Estates or interests in land in Malaysia, and, up to the value of that security, loans secured on any such estate or interest.

6. In relation to any insurer, any loan secured on a life policy of the insurer, but only up to the value of that security (calculated in the prescribed manner), and only if the policy is a Malaysian policy and the principal and interest of the loan is payable in Malaysian currency.

7. Any Malaysian currency, and any amount payable in that currency which is held on current account or deposit in Malaysia with a bank licensed under the Banking Act, 1973 or with a company licensed under the Borrowing Companies Act, 1969 or such other financial institutions as may be prescribed.

8. Such other loans or investments in or connected with Malaysia as may be prescribed.

THIRD SCHEDULE

(Section 20 (5))

DEPOSITS BY ASSOCIATIONS OF UNDERWRITERS

1. An association of underwriters, in order to comply with section 20 (4), shall make a deposit with the Accountant-General of a value of three hundred thousand dollars.

2. Not later than the end of June in each calendar year there shall be made such additional deposit, if any, as is necessary to secure that the aggregate value of the deposit is not less than fifty-five per cent of the premiums received by members of the association in respect of Malaysian policies in the preceding calendar year.

3. Subject to any direction of the Minister under section 20 (4), the Accountant-General shall retain any deposit under this paragraph unless and until the Director General is satisfied, and certifies, that insurance business is not being carried on in Malaysia by any members of the association, and shall then transfer the amount of the deposit to the association except such part (if any) as the Minister directs to be kept available for meeting any such claims as are mentioned in that subsection.

4. Section 7 (2), (3), (6) and (7) shall apply, with any necessary adaptations, in relation to a deposit by an association under this Schedule as they apply in relation to a deposit by an insurer under that section.

FOURTH SCHEDULE

(Sections 22 (1) and (2), 23 (1), 24 (4), 25 (1) and (2))

RETURNS BY INSURERS

PART I

DOCUMENTS TO BE LODGED YEARLY

1. (1) An insurer, to comply with section 22 (1), shall lodge such statements of account and other statements as are mentioned in this paragraph.

(2) There shall be lodged for each accounting period—

(*a*) by an insurer registered in respect of life business separate revenue accounts in respect of any home service business and in respect of any ordinary business of the insurer, and by an insurer registered in respect of general business a revenue account in respect of that business; and

(*aa*) that the insurer has, during the relevant accounting period, complied with the provisions of section 3 (2) (*a*) (ii) or 3 (2) (*a*) (iii), as the case may be;

(*b*) by any insurer a profit and loss account for the whole of the insurer's business,

together with separate balance sheets, as at the end of that accounting period, for each class of insurance business in respect of which the insurer is registered:

Provided that in the case of a company incorporated or established outside Malaysia, the accounts and balance sheets need not show the results of or relate to business other than insurance business for which the company maintains an insurance fund under this Act.

(3) There shall be lodged—

(*a*) by an insurer registered in respect of life business, statements for each accounting period giving, as regards policies belonging to that class of business, particulars—

(i) as to the issue of new policies during the period;

(ii) as to the termination or reduction of the liability, or of the premiums, on policies during the period, and transfers of policies to or from the Register during the period; and

(iii) as to policies in force at the end of the period;

(*b*) by an insurer registered in respect of general business, statements for each accounting period giving as regards policies belonging to that class of business particulars as to premiums and claims; and

(*c*) by an insurer registered in respect of either class of business, a statement for each calendar year giving particulars as to the

assets held at the end of the year as assets of the insurance fund maintained for that class of business.

(4)-(5) (*Omitted*).

(6) Regulations may modify sub-paragraph (3) (*c*) so that it requires statements of the assets of an insurance fund to be made for parts of a calendar year instead of entire years.

(7) The statement required by sub-paragraph (3) (*c*) shall be excepted from section 25 (1) and (2).

2. (1) With any accounts and balance sheet lodged under paragraph 1 there shall be lodged a certificate of the auditor signed by him and stating whether in his opinion—

(*a*) the accounts and balance sheet are in accordance with this Act;

(*b*) the balance sheet truly represents the financial position of the insurer; and

(*c*) the books of the insurer have been properly kept and record correctly the affairs and transactions of the insurer:

Provided that where the audit does not extend to the whole business of the insurer the certificate shall, as regards paragraphs (*b*) and (*c*), be given subject to the appropriate limitation.

(2) The certificate of the auditor shall also state—

(*a*) whether in the relevant accounting period any part of the assets of the insurance fund or funds maintained under this Act has been applied in contravention of section 10, and whether during that period section 11 has been complied with in relation to those assets and any assets falling within section 11 (5);

(*b*) as regards the documents evidencing the insurer's title to any such assets whether he has inspected such of those documents as are held by or on behalf of the insurer within Malaysia, and whether he has received satisfactory information as to the whereabouts and custody of any others, specifying whether the insurer is complying with the requirements of section 12 (4); and

(*c*) whether all necessary and proper apportionments have been made in preparing the accounts and balance sheet, and have been made in an equitable manner.

PART II

DOCUMENTS TO BE LODGED ON ACTUARIAL INVESTIGATION OF LIFE BUSINESS

3. (1) An insurer registered in respect of life business, in order to comply with section 23 (1) in the case of any actuarial investigation, shall lodge such documents as are mentioned in this paragraph.

(2) There shall be lodged an abstract of the actuary's report, which shall be signed by the actuary and shall include—

(*a*) a summary and valuation of the policies as at the date of the investigation; and

(*b*) a valuation balance sheet as at that date of the business to which the report relates.

(3) There shall be lodged a certificate by the actuary, signed by him, that he has satisfied himself as to the accuracy of the valuations made for the purposes of the investigation and as to their being made in accordance with this Act, and as to the accuracy of the data on which they are based:

Provided that, if the actuary is not a permanent officer of the insurer, the certificate shall, so far as relates to the accuracy of the data on which the valuations are based, be given and signed by or on behalf of the insurer's principal officer in Malaysia, and the actuary shall in his part of the certificate state the precautions taken by the actuary to ensure the accuracy of the data.

(4) There shall be lodged statements signed by the actuary analysing as at the date of the investigation the position as regards policies and premiums of the business to which the report relates.

4. (*Omitted*).

PART III

LODGMENT, FORM AND CONTENTS

5. (1) A document to be lodged by an insurer shall be lodged by sending to the Director General five copies, of which (unless the document itself is required by this Schedule to be signed) one copy at least shall be signed by two of the insurer's directors and by or on behalf of the insurer's principal officer in Malaysia.

(2) The persons signing any balance sheet shall certify that in their belief the assets set forth in the balance sheet are fully of the value stated in the balance sheet, less any investment reserve fund taken into account; and they shall also either certify that in the relevant accounting period no part of the assets of the insurance fund maintained under this Act has been dealt with in contravention of section 10, and during that period section 11 has been complied with in relation to those assets and any assets falling within section 11 (5), or state the exceptions.

(3) The persons signing a balance sheet in respect of life business shall certify that in the relevant accounting period the provisions of section 44 (4) with respect to deposits of balance of policy monies with the Treasury have been complied with.

6. (1) Subject to sub-paragraph (2), a document shall be lodged within six months after the relevant date, or within such longer period as the Director General may allow (but not exceeding, except in the case of the documents to be first lodged by an existing insurer, nine months from the relevant date); and for this purpose the relevant date is the date to which the document relates or, in the case of an account or statement for an accounting period, the end of that period.

Provided that the Director General, upon being satisfied that the affairs of any insurer are being conducted in a manner likely to be detrimental to public interest, the interests of the policy owners, or the interests of the insurer, may in any such case specify a period shorter than six months for the purposes of this sub-paragraph.

(2) Any such statement of the assets of an insurance fund as is required by paragraph 1 (3) (*c*) shall be lodged within three months of the date to which the statement relates.

(3) (*Omitted*).

7. A document shall be in Malay or English, and shall (as regards all five copies) be either printed or, with the permission of the Director General, produced by other mechanical means approved by him.

8. Where by this Schedule a document is required to be signed by or on behalf of the insurer's principal officer in Malaysia, it shall, if not signed by that officer, be signed by one of the insurer's officers in Malaysia who is for the time being notified to the Director General as having authority for the purposes of this Schedule to sign in place of the principal officer in Malaysia.

9. (1) Subject to the following sub-paragraphs, a document shall be in the prescribed form and contain the prescribed particulars, and be prepared in accordance with the regulations (including regulations for the way in which any valuation is to be made or in which any item is to be dealt with).

(2) The Director General may in any particular case permit such departure as he thinks fit from any requirement of the regulations under sub-paragraph (1), if he is satisfied that the purpose of the document in question will nevertheless be substantially fulfilled.

(3) Without prejudice to sub-paragraph (2), where an abstract is to be lodged of an actuary's report on an investigation made otherwise than to comply with section 23 (1), the abstract may conform with the regulations under sub-paragraph (1) subject to any modifications which the Director General may approve, having regard to the purpose of the actuary's investigation and the form and contents of his report.

FIFTH SCHEDULE

(Section 48 (3))

CONSEQUENTIAL AMENDMENTS AND SAVINGS

PART I

AMENDMENTS

1-6. (*Omitted*).

PART II

SAVINGS

7. (1)-(2) (*Omitted.*)

(3) The repeal by this Act of the Life Assurance Companies Ordinance, 1948, and the Life Assurance Companies Ordinance of Sabah shall not affect the operation of sections 19 to 21 of those Ordinances in relation to any winding up of an insurer which, having made a deposit under those Ordinances, is not registered under this Act, including a winding up commenced before the commencement of this Act.

(4) So long as under this paragraph any other provisions of the Life Assurance Companies Ordinance, 1948 and the Life Assurance Companies Ordinance of Sabah are continued in force for any purpose, sections 31 of those Ordinances (which relate to rules) shall continue to have effect in connection with those provisions.

LAWS OF MALAYSIA

Act 89

INSURANCE ACT, 1963

(Revised—1972)

Particulars under section 7 (ii) and (iii) of the Revision of Laws Act, 1968 (Act 1)

LIST OF AMENDMENTS

Amending law	Short title	In force from
Act 10/1964 ...	Insurance (Amendment) Act, 1964	1-1-1964
F.L.N. 470/1964 ...	Modification of Laws (Insurance) (Extension) Order, 1964	1-1-1965
Act 79/1965 ...	Companies Act, 1965	15-4-1966
Act 89/65	Insurance (Amendment) Act, 1965	30-12-1965
P.U. (A) 142/1970	Emergency (Essential Powers) Ordinance, No. 31, 1970	12-5-1970
P.U. (B) 324/70 ...	Notification under section 3 of Titles of Office Ordinance, 1949	1-1-1971
Act A 40	Insurance (Amendment) Act, 1971	29-4-1971

LIST OF LAWS OR PARTS THEREOF SUPERSEDED

No.	Title
1 of 1963	Insurance Act, 1963
10 of 1964	Insurance (Amendment) Act, 1964, section 2 (2)

APPENDIX II

THE INSURANCE (AMENDMENT) ACT 1979:*

An Act to amend the Insurance Act 1963.

[ ]

BE IT ENACTED by the Duli Yang Maha Mulia Seri Padika Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follow:

Short title and commencement.

1. This Act may be cited as the Insurance (Amendment) Act 1979 and shall come into force on such date as the Minister may by notification in the *Gazette* appoint.

Amendment of section 3. *Act 89*

2. The Insurance Act 1963, which in this Act is referred to as the principal Act, is amended by substituting for the words "one million ringgit" in subsection (2) (*a*) (iii) of section 3 the words "the amount specified under section 4 (4) (*a*) (i)".

Amendment of section 14A.

3. The principal Act is amended by substituting for section 14A the following –

"Assumption of risk by insurer and collection and refund of premium.

14A. (1) Subject to subsections (2) and (3), no insurer shall assume any risk in respect of any general insurance business unless and until –

(*a*) the premium payable is received by the insurer or is guaranteed to be paid by such person in such manner and within such time as may be prescribed; or

(*b*) deposit of such amount as may be prescribed is made in advance in the manner prescribed.

(2) Where the premium payable pursuant to subsection (1) is received by any person, including an insurance agent or a broker, on behalf of an insurer, such receipt shall be

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* Act No. A 465, published in gazette dated 20/9/79.

deemed to be receipt by the insurer for the purposes of that subsection and the onus of proving that the premium payable was received by a person, including an insurance agent or a broker, who was not authorised to receive such premium shall lie on the insurer.

(3) Subsections (1) and (2) shall apply to such description of general insurance business as may from time to time be prescribed.

(4) Where any person, including an insurance agent or a broker, receives on behalf of an insurer a premium on a policy of insurance of a description for the time being prescribed pursuant to subsection (3), such person shall deposit with, or despatch by post to, the insurer the premium so collected within such period as may be prescribed in relation to policies of that description.

(5) Any refund of premium which may become due to and insured on account of the cancellation of a policy or alteration in its terms and conditions or for any other reason shall be paid by the insurer directly to the insured and a proper receipt shall be obtained by the insurer from the insured and such refund shall under no circumstances be paid or credited to any other person, including an insurance agent or a broker.

(6) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit."

Amendment of section 34A.

4. The principal Act is amended by substituting for section 34A the following –

"Malaysian ship and aircraft and property located in Malaysia to be insured with Malaysian insurer.

34A.(1) The owner of a ship or aircraft registered in Malaysia or of property, movable or immovable, located in Malaysia shall not insure or cause to be insured such ship, aircraft or property with any person other than a Malaysian insurer or any person licensed under section 20; and such owner shall not pay or cause to be paid premium chargeable under any policy issued in respect of such ship, aircraft or property except in and from his place of business in Malaysia.

(2) The Director General may by notice in writing require the owner of any ship, aircraft or property referred to in subsection (1) to furnish him with information, within

such time as may be specified in the notice, about any matter in relation to the insurance of such ship, aircraft or property and if the owner fails to furnish the Director General with the information required within the time specified in the notice, the owner shall be deemed to have insured or caused to be insured the ship, aircraft or property, as the case may be, in contravention of the provisions of subsection (1).

(3) Any person who contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable, in the case of an offence under subsection (1), to a fine not exceeding five thousand ringgit and, in the case of an offence under subsection (2), to a fine not exceeding three thousand ringgit.

(4) The Minister may exempt any person or class of persons, or any ship, aircraft or property, or any class of ship, aircraft or property from the provisions of this section.

(5) In this section, the expression 'property' does not include personal effects."

Amendment of section 44A.

5. The principal Act is amended by substituting for section 44A the following –

"Knowledge of and statement by authorised agent to be deemed knowledge and statement by insurer.

44A. (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this Act by such person.

(3) This section shall not apply –

(*a*) where there is collusion or connivance between such person and the proposer in the formation of the contract; or

(*b*) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation."

General amendment as to increase of fines specified as sums of money.

6. The maximum amount of every fine specified in the principal Act as a sum of money is increased by multiplying by four the sum so specified.

APPENDIX III

THE MARINE INSURANCE ACT 1906

(6 Edw. 7 c. 41)

An Act to codify the Law relating to Marine Insurance

[21st December 1906]

MARINE INSURANCE

1. **Marine insurance defined.**—A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

2. **Mixed sea and land risks.**—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

3. **Marine adventure and maritime perils defined.**—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(*a*) any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(*b*) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(*c*) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war

perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

INSURABLE INTEREST

4. Avoidance of wagering or gaming contracts.–(1) Every contract of marine insurance by way of gaming or wagering is void.

(2)A contract of marine insurance is deemed to be a gaming or wagering contract –

(*a*) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(*b*) where the policy is made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term:

Provided that, where there is no possibility of such interest a policy may be effected without benefit of salvage to the insurer.

5. Insurable interest defined.–(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where 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 insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

6. When interest must attach.–(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost", the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

7. Defeasible or contingent interest.–(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

8. **Partial interest.**—A partial interest of any nature is insurable.

9. **Re-insurance.**—(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

10. **Bottomry.**—The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

11. **Master's and seamen's wages.**—The master or any member of the crew of a ship has an insurable interest in respect of his wages.

12. **Advance freight.**—In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

13. **Charges of insurance.**—The assured has an insurable interest in the charges of any insurance which he may effect.

14. **Quantum of interest.**—Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

15. **Assignment of interest.**—Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.

INSURABLE VALUE

16. **Measure of insurable value.**—Subject to any express provi-

sion or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:

(1) in insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(2) in insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3) in insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

(4) in insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

DISCLOSURE AND REPRESENTATIONS

17. **Insurance is uberrimae fidei.**—A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18. **Disclosure by assured.**—(1) Subject to the provisions of this section, 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. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) 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.

(3) 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.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) the term "circumstance" includes any communication made to, or information received by, the assured.

19. Disclosure by agent effecting insurance.—Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(*a*) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or have been communicated to, him; and

(*b*) every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20. Representations pending negotiation of contract.—(1) 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.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) 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.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

21. **When contract is deemed to be concluded.**—A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and, for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract. . .[1]

THE POLICY

22. **Contract must be embodied in policy.**—Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

23. **What policy must specify.**—A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf. . .[2]

24. **Signature of insurer.**—(1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

25. **Voyage and time policies.**—(1) Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy". A contract for both voyage and time may be included in the same policy.[3]

26. **Designation of subject-matter.**—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

1. This section is printed as amended by the Finance Act 1959, 8th Sched., Part II.
2. This section is printed as amended by the Finance Act 1959, 8th Sched., Part II.
3. This section is printed as amended by the Finance Act 1959, 8th Sched., Part II.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

27. **Valued policy.**—(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

28. **Unvalued policy.**—An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified.

29. **Floating policy by ship or ships.**—(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

30. **Construction of terms in policy.**—(1) A policy may be in the form in the First Schedule to this Act.

(2) Subject to the provisions of this Act, and unless the co xt

of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

31. Premium to be arranged.—(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

DOUBLE INSURANCE

32. Double insurance.—(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2) Where the assured is over-insured by double insurance—

(*a*) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(*b*) where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(*c*) where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(*d*) where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

WARRANTIES, &C.

33. Nature of warranty.—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be

fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34. **When breach of warranty excused.**—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35. **Express warranties.**—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36. **Warranty of neutrality.**—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral" there is also implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

37. **No implied warranty of nationality.**—There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

38. Warranty of good safety.—Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

39. Warranty of seaworthiness of ship.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

40. No implied warranty that goods are seaworthy.—(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

41. Warranty of legality.—There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

THE VOYAGE

42. Implied condition as to commencement of risk.—(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied

condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

43. Alteration of port of departure.—Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

44. Sailing for different destination.—Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

45. Changes of voyage.—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

46. Deviation—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(*a*) where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(*b*) where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47. Several ports of discharge.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to,

in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to "ports of discharge", within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

48. Delay in voyage.—In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

49. Excuses for deviation or delay.— Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(*a*) where authorised by any special term in the policy; or

(*b*) where caused by circumstances beyond the control of the master and his employer; or

(*c*) where reasonably necessary in order to comply with an express or implied warranty; or

(*d*) where reasonably necessary for the safety of the ship or subject-matter insured; or

(*e*) for the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(*f*) where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(*g*) where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch.

ASSIGNMENT OF POLICY

50. When and how policy is assignable.—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of

the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

51. Assured who has no interest cannot assign.—Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

THE PREMIUM

52. When premium payable.—Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

53. Policy effected through broker.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

54. Effect of receipt on policy.—Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

LOSS AND ABANDONMENT

55. Included and excluded losses.—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but,

subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,–

(*a*) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(*b*) unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(*c*) unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

56. Partial and total loss.–(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

57. Actual total loss.–(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need to given.

58. Missing ship.–Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has

been received, an actual total loss may be presumed.

59. Effect of transhipment, etc.—Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

60. Constructive total loss defined.—(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61. Effect of constructive total loss.—Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

62. Notice of abandonment.—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63. **Effect of abandonment.**–(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

PARTIAL LOSSES (INCLUDING SALVAGE AND GENERAL AVERAGE AND PARTICULAR CHARGES)

64. **Particular average loss.**–(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

65. Salvage charges.—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

66. General average loss.—(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoi-

dance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

MEASURE OF INDEMNITY

67. **Extent of liability of insurer for loss.**–(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

68. **Total loss.**–Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,–

(1) if the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) if the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

69. **Partial loss of ship.**– Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:

(1) where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:

(2) where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:

(3) where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

70. Partial loss of freight.– Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

71. Partial loss of goods, merchandise, etc.–Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:

(1) where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss:

(3) where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value:

(4) "gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

72. Apportionment of valuation.—(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

73. General average contributions and salvage charges.—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

74. Liabilities to third parties.—Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

75. General provisions as to measure of indemnity.—(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

76. Particular average warranties.—(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from

particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

77. **Successive losses.**—(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

78. **Suing and labouring clause.**—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

RIGHTS OF INSURER ON PAYMENT

79. Right of subrogation.–(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casulty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

80. Right of contribution.–(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitle to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

81. Effect of under insurance.–Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

RETURN OF PREMIUM

82. Enforcement of return.–Where the premium or a proportionate part thereof is, by this Act, declared to be returnable,–

(*a*) if already paid, it may be recovered by the assured from the insurer; and

(*b*) if unpaid, it may be retained by the assured or his agent.

83. Return by agreement.–Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

84. Return for failure of consideration.–(1) Where the consideration for the payment of the premium totally fails, and there has been

no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular–

(*a*) where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

(*b*) where the subject-matter insured, or part thereof, has never been imperilled, the premium, or as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not loss" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.

(*c*) where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;

(*d*) where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(*e*) where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;

(*f*) subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

MUTUAL INSURANCE

85. Modification of Act in case of mutual insurance.—(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangements as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

SUPPLEMENTAL

86. Ratification by assured.—Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

87. Implied obligations varied by agreement or usage.—(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

88. Reasonable time, etc. a question of fact.—Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

89. Slip as evidence.—Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

90. Interpretation of terms.—In this Act, unless the context or subject-matter otherwise requires,—

"Action" includes counter-claim and set off:

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy" means a marine policy.

91. Savings.–(1) Nothing in this Act, or in any repeal effected thereby, shall affect–

(*a*) the provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue;

(*b*) the provisions of the Companies Act 1862, or any enactment amending or substituted for the same;

(*c*) the provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

92. *This section was repealed by the Statute Law Revision Act 1927; 24 Halsbury's Statutes (2nd Edn.) 426.*

93. *This section was repealed by the Statute Law Revision Act 1927; 24 Halsbury's Statutes (2nd Edn.) 426.*

94. Short title.–This Act may be cited as the Marine Insurance Act 1906.

SCHEDULES

Section 30

FIRST SCHEDULE

FORM OF POLICY

BE IT KNOWN THAT as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause
and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordinance, munition, artillery, boat, and other furniture, or and in the good ship vessel called the
whereof is master under God, for this present voyage,
or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, &c.
and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordinance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at

upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safe-guards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London

N.B.—Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

RULES FOR CONSTRUCTION OF POLICY

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:

1. Where the subject-matter is insured "lost or not lost", and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not.

2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

3. (*a*) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

(*b*) If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(*c*) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(*d*) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

4. Where goods or other moveables are insured "from the loading thereof", the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them

while in transit from the shore to the ship.

5. Where the risk on goods or other moveables continues until they are "safely landed", they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

10. The term "arrests, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges".

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

17. The term "goods" means goods in the nature of merchandise,

and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SECOND SCHEDULE

(This Schedule was repealed by the Statute Law Revision Act 1927; 24 Halsbury's Statutes (2nd Edn.) 426)

APPENDIX IV

THE MARINE INSURANCE (GAMBLING POLICIES) ACT 1909

(9 Edw. 7 c. 12)

An Act to prohibit Gambling on Loss by Maritime Perils

[20th October 1909]

1. Prohibition of gambling on loss by maritime perils.—(1) If—

(*a*) any person effects a contract of marine insurance without having any bona fide interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a bona fide expectation of acquiring such an interest; or

(*b*) any person in the employment of the owners of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term,

the contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding six months or to a fine not exceeding one hundred pounds, and in either case to forfeit to the Crown any money he may receive under the contract.

(2) Any broker or other person through whom, and any insurer with whom, any such contract is effected shall be guilty of an offence and liable on summary conviction to the like penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of this Act.

(3) Proceedings under this Act shall not be instituted without the consent in England of the Attorney-General, in Scotland of the Lord Advocate, and in Ireland of the Attorney-General for Ireland.

(4) Proceedings shall not be instituted under this Act against a person (other than a person in the employment of the owner of the

ship in relation to which the contract was made) alleged to have effected a contract by way of gambling on loss by maritime perils until an opportunity has been afforded him of showing that the contract was not such a contract as aforesaid, and any information given by that person for that purpose shall not be admissible in evidence against him in any prosecution under this Act.

(5) If proceedings under this Act are taken against any person (other than a person in the employment of the owner of the ship in relation to which the contract was made) for effecting such a contract, and the contract was made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term, the contract shall be deemed to be a contract by way of gambling on loss by maritime perils unless the contrary is proved.

(6) For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed either in the place in which the same actually was committed or in any place in which the offender may be.

(7) Any person aggrieved by an order or decision of a court of summary jurisdiction under this Act, may appeal to [the Crown Court].[4]

(8) For the purposes of this Act the expression "owner" includes charterer.

(9) Subsection (7) of this section shall not apply to Scotland.

2. **Short title.**—This Act may be cited as the Marine Insurance (Gambling Policies) Act 1909, and the Marine Insurance Act 1906, and this Act may be cited together as the Marine Insurance Acts 1906 and 1909.

4. The words in square brackets were substituted by the Courts Act 1971, s. 56, Sch. 9, Part I.

APPENDIX V

THE LIFE ASSURANCE ACT 1774

(14 Geo. 3 c. 48)

An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances except in cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured.[1]

Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming:

1. **No insurance to be made on lives, etc., by persons having no interest etc.**—From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

2. **No policies on lives without inserting the names of persons interested, etc.**—And . . . it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.[2]

3. **How much may be recovered where the insured hath interest in lives.**—And . . . in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount of value of the interest of the insured in such life or lives or other event or events.[3]

4. **Not to extend to insurances on ships, goods, etc.**—Provided, always, that nothing herein contained shall extend or be construed to extend to insurances bona fide made by any person or persons on ships, goods, or merchandises, but every such insurance shall be as valid and effectual in the law as if this Act had not been made.

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1. The short title was given to this Act by the Short Titles Act 1896. The Act is also known as the Gambling Act 1774.
2. The words omitted were repealed by the Statute Law Revision Act 1888.
3. The words omitted were repealed by the Statute Law Revision Act 1888.

APPENDIX VI

BUKIT TIMAH LIFE ASSURANCE COMPANY LIMITED

Head Office: Principal Office Malaysia: Kuala Lumpur.

PROPOSAL FOR ASSURANCE

1. Name in full of person whose life is to be assured:

2. (a) Address to which correspondence should be directed:

2. (b) Sex: Nationality: Race: I.C No.

3. Name of Beneficiary: Relation of Life Assured:

4. Date of Birth: DAY MONTH YEAR Age Next Birthday.....Years.

5. (a) Type of Policy: .....with Profits / without — SUM ASSURED — PREMIUM Payable.....
Term of Assurance: .....

(b) Additional Benefits to be incorporated:

(i) Comprehensive Accident Benefits with Riot and Civil Commotion .. ..

(ii) Double Indemnity Accident Benefit with/without Riot and Civil Commotion .. ..

(iii) Hospitalisation Benefit .. .. per week .....

TOTAL

6. (a) Name and address of Business in which you are engaged? .....
(b) Position Held ..... Exact Nature of Work: .....

7. (a) Are you married? ..... (b) How many children have you? .....

8. (a) In what Companies is your life now assured? (Give Details)
.....

(b) Is the assurance now applied for intended to replace any listed above? If so, which?
.....

(c) Has any Proposal or Application for a Life or Accident or Hospital Assurance Policy ever been:—

	Answer "Yes" or "No"	If the answer if "Yes" name the Company or Companies:
(i) Declined:	.....	.....
(ii) Delayed:	.....	.....
(iii) Accepted at other than normal terms:	.....	.....

9. (a) Do you engage or have you any prospect or intention of engaging in any business, sport or occupation of a hazardous nature? If so, give particulars .....

(b) Have you any intention of taking part in Aerial flights other than as a fare-paying passenger on a recognised air route? .....

10. (a) Has the first premium been paid? .....
If so, what amount and to whom? Give the number of interim receipt.....

(b) Who has paid or will pay the premiums on this policy? .....
If not yourself name the person and state his or her relationship to you and the extent of his or her insurable interest on your life .....

STATEMENT PURSUANT TO SECTION 16 (4) OF INSURANCE ACT

You are to disclose in this proposal form, fully and faithfully all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

I warrant that the above answers are full and true, and that I am now and usually in sound health; and I agree that this declaration, with the answers to be given by me to the Medical Examiner, shall be the basis of the policy and of the interim assurance should any be granted, and that the said policy shall not take effect until the first premium has been paid during my life and good health.

And I reserve the right, without the consent of the beneficiary, to revoke the appointment of such beneficiary, and substitute my own or any other name therefor, and also without such consent to receive every benefit, exercise every right, and enjoy every privilege conferred upon the assured by such policy.

And I agree that if any premium be settled wholly or in part by cheque, note or other obligation, such obligation shall not be considered as payment but only as extension of the time for payment, and if not fully paid when due, the Company shall not be liable if death occurs while such obligation remains unpaid.

Date at .....the ..... day of ..... 19 .

Witness .....

.....
(Life to be Assured)

N.B. Cheque, Draft or Money Order must be made payable to BUKIT TIMAH LIFE ASSURANCE CO., LTD., and the policy number should be written on the back thereof. Cash must only be paid to Company's Offices or to Collecting Banks.

The Examiner is particularly requested not to give the proposer any information whatever as to the result of the Examination.

MEDICAL OFFICER'S CONFIDENTIAL REPORT

1. When an examiner recommends a risk, it is presumed that he has determined to his entire satisfaction by whatever additional means he has seen fit to employ that the proposer is free from disease or from the effects of disease, and

that he is likely to live as long as a perfectly healthy man of his age. Examiners are requested to forward to Head Office under separate cover a report relating to any point on which doubt may exist as to the fitness of the Proposer.

2. Please fill in all blank spaces in your own handwriting and give full particulars as to any admitted attack of such diseases as Syphilis, Gonorrhoea, Glycosuria etc., with special reference to treatment adopted.

Name of Proposer ..... *Occupation* .....

Address .....*AGE*( ) *Sex*..... *Nationality* .....

Questions to be put by the Medical Officer	ANSWERS
1. Who is your ordinary Medical Attendant? When and for what illness consulted? ...	
2. Have you been successfully vaccinated? When was the last occasion? ...	

3. Have you ever suffered from: –

(a) Any disease of the Brain, Paralysis, Epileptic or other Fits, Insanity or any other Nervous Disease?

(b) Any affection of the Eye, Ear, Throat or Nose?

(c) Influenza, Malaria or Tropical Fevers of any description?

(d) Cough, Asthma, Spitting of Blood, Pleurisy, Pneumonia or any other affection of the Chest?

(e) Palpitation, Breathlessness or any affection of the Heart?

(f) Any affection of the Spine, Glands, Bones or Joints?

(g) Indigestion, Abdominal pain or discomfort, Fistula, Piles, Rupture, Dysentery, Sprue or any other affection of the digestive organs?

(h) Rheumatic Fever or Gout? What parts of the body were affected? Was the heart implicated?

(i) Gonorrhoea, Syphilis, Chancre or any other affection of the Urinary or Generative organs? (In the case of syphilis give details of treatment and dates and results of all blood tests)

(j) Glycosuria or Albuminuria?

(k) Any other illness or operations?

If "Yes", state in the space below.					
	Yes or No	Name of Illness	Duration	Date of Recovery	Name of attending doctor
(a)					
(b)					
(c)					
(d)					
(e)					
(f)					
(g)					
(h)					
(i)					
(j)					
(k)					

4. (a) Has any near relatives of yours suffered from Tuberculosis or Leprosy? If so, give dates and say whether you lived in the same house at the time.

.....

(b) Has any near relatives of yours suffered from Insanity, Epilepsy or Gout?

.....

5. (a) Do you use opium or other narcotics?

.....

(b) If so, what are the amounts consumed and how often?

.....

(c) If opium not now taken, when was the habit stopped?

.....

(d) What is your daily consumption of tobacco?

.....

6. (a) To what extent have you ever used alcoholic or other stimulants?

.....

(b) What is your present daily habit as to the use of beer, wine or other stimulants?

.....

(c) If a total abstainer, how long have you been so?

.....

7. Have you ever met with any serious personal injury?
If so, give particulars

8. Are there any other circumstances likely to render an Assurance on your life more than usually hazardous; if so, give particulars

9. State the ages attained by your wife (or husband), father, mother, brothers and sisters; the present condition of health of those living; and the nature and duration of the last illness of those dead.*

LIVING

		Present Age	State of Health
Wife (or husband),		aged	
Father,		aged	
Mother,		aged	
By same Parents		aged	
	Brothers,	aged	
		aged	
		aged	
		aged	
	Sisters,	aged	
		aged	
		aged	

DEAD

		Age at Death	Name of Last Illness	Duration of Illness	Year of Death
Wife (or husband),		aged			
Father,		aged			
Mother,		aged			
By same Parents		aged			
	Brothers,	aged			
		aged			
	Sisters	aged			
		aged			

*The Medical Examiner is particularly requested to obtain the precise cause of each Death, and not accept such terms as "Childbirth", "Dropsy", "Natural Causes", etc.

To be signed in presence of Medical Officer by Person on whose life Assurance is proposed

Witness

..... *Signature* .....

QUESTIONS	ANSWERS
1. Are you personally acquainted with the person under examination – how long have you been so? 2. Does he appear healthy in all respects? Is there any evidence of Tuberculous Disease – past or present? What is Proposer's temperature? If 99° or over give an explanation. Has the weight increased, decreased or remained stationary during the past two years? Give an explanation of any marked change. (Proposer must be weighed in the presence of examiner. Please state if this has been done .....).	*Height* ..... *Weight* ..... *Circumference of Chest* *in full inspiration .....inches* *in full expiration .....inches* *Circumference of Abdomen* *at Umbilicus.....inches*
3. Does appearance correspond with the age stated?	
4. Does he seem to be a person of temperate habits?	
5. Anything in mode of living, occupation or place of residence tending to affect health or longevity? Is there any reason to suspect that proposer uses intoxicants, opium or any other drug to a greater extent than stated?	
6. Nervous System – Do the pupils react equally, to light and accomodation? Are the knee jerks present and equal on both sides? Is there any tremor of lips or tongue or any other sign of nervous disease?	
7. Teeth–Eyes–Ears–Throat. Are the teeth and eyes in good condition? Is there any Pyorrhoea? Is there any disease of the ear? When there is a history of Otorrhoea, state appearance of membrana tympani, and character of discharge, if any. Are the tonsils healthy?	
8. Is there any disease of the spine or joints?	

9. Chest – Is the chest symmetrically formed?
Do both sides move equally?
Percussion – Are there any areas of pathological dullness?
Auscultation – Are there any adventitious sounds or harsh breathing?

10. (a) Heart – Apex beat: In which intercostal space?
Relation to nipple line or midsternal line?
Is the apex beat palpable over an area of more than one square inch?
Is there any enlargement of the Heart?
Are there any murmurs?
Is there any cyanosis or undue breathlessness on exertion?
Is the pulse wave regular in rhythm and force?
Do the arteries show any signs of degeneration?
(b) Blood Pressure (necessary in all cases)
(By auscultatory method only)
(c) What is the pulse rate?

Systolic ..... m.m. Hg.
Diastolic.....m.m. Hg.
Pulse rate .....
beats per minute

11. Abdomen –
Is the liver or spleen palpable?
Are all the functions normal?
Does hernia exist?
If so, does he wear a properly applied and efficient truss?

12. Urinary and Reproductive Organs –
1. Are there any scars or other signs of disease past or present?
2. Urine (Was this voided in your presence)?
(This is essential)

Specific Gravity .....
Reaction .....
Sugar .....
Albumen .....
Pus cells or other abnormalities .....

13. In the case of a female –
(a) Is she now pregnant?
(b) Has there been any difficulty with past labour?
(c) Do you apprehend any difficulty at future labours?

14. Is any further evidence, medical or other, desirable to enable a correct judgement of the risk to be formed?

15. Medical Officer to advert to any speciality in personal or family history which may seem to call for remark

16. State here some physical mark of identification
If this consists of old operation scars, give full opinion of result of such operation

State your opinion of the Life with reference to the proposed Assurance as to:

1. Present Health .....
2. Constitution .....
3. Family History .....
4. Eligibility for Assurance .....

Dated at .....

Day of .....

Signature and Professional Qualification .....

N.B. – Please revise your answers and see that nothing has been omitted.

I certify that I have seen the proposer's Identity Card No. ..... and photograph of which bears resemblance to the person whom I have examined.

Signature .....

AGENT'S REPORT.

1.–How long have you known Proposer?

2.–Have you ever heard of his being ill? Give particulars.

3.–Is he in thoroughly good health now?

4.–Is he perfectly sober and temperate, and has he always been so?

N.B.–Please answer this very fully and distinctly.

5.–Do you consider him as a life to be over average, average or under average?

6.–(a) Is the financial position of Proposer such as to warrant his applying for a policy of the amount proposed?

(b) Sources of Income and approximate annual income

(c) For Female Proposer:
If married, is her husband assured with this Company or any other Company? If yes, please state the amounts assured with each Company.

7.–Do you unqualifiedly recommend him for assurance at ordinary rates?

Dated.....*19* .....*Agent*

FOR USE AT THE HEAD OFFICE ONLY.

.....

REMARKS.

.....

.....

.....

.....

.....

.....

.....

.....

.....

APPROVED

APPENDIX VII

(APPLICATION FOR A S. 23. LIFE POLICY)

BUKIT TIMAH ASSURANCE COMPANY, LIMITED

Re: Application dated .....for assurance in the amount of $ ..... on the life of

.....

Supplementary Application to be completed where it is desired that the proposed assurance shall be under Section 73 of the Conveyancing and Law of Property Act, Chapter 268, Singapore Section 23 of the Civil Law Ordinance, No. 5 of 1956, Malaysia.

A. I desire the proposed assurance for the benefit of:–

* (i) My wife .....

* (ii) My husband .....

* (iii) My wife/husband and child(ren) .....

.....

.....

(*Delete what is not required)

B. I desire the proposed assurance for the benefit of my wife/husband

CONDITIONALLY upon ..... being alive when the policy becomes a claim, or

ABSOLUTELY

(To be completed only if option A(i) or A(ii) above is selected)

C. I expressly agree that the Trustees hereinbelow named may in their absolute discretion exercise any one or more of the following powers:–

(i) Borrow on the security of the abovementioned policy and assign same to the Company.

(ii) Convert the abovementioned policy into a paid-up policy for the reduced amount free from payment of future premiums.

(iii) Surrender the abovementioned policy to the Company for its

cash surrender value.

(iv) Utilize the moneys properly receivable under the abovementioned policy for the maintenance, education and advancement of any infant beneficiary entitled to the benefits under the abovementioned policy.

D. I hereby nominate the following Trustees for the policy for the purpose of receiving the policy moneys.

(The consent of Trustees (who must not be minors) to act, should be obtained before they are appointed.)

1. Name in full	2. Name in full .....
Occupation	Occupation .....
Address	Address .....
.....	.....
I hereby consent to act as Trustee in respect of the abovementioned policy.	I hereby consent to act as Trustee in respect of the abovementioned policy.
Date:	Date: .....
.....	.....
Trustee's Signature	Trustee's Signature

Dated this..... day of ..... 19 .....

.....	.....
Witness	Applicant's own Signature in full

APPENDIX VIII

(DEED OF ABSOLUTE ASSIGNMENT OF A LIFE POLICY)

THIS INDENTURE is made the ..... day of 19

Between .....

of .....

(hereinafter called "the Assignor") of the one part and .....

..... of .....

..... (hereinafter called "the Assignee") of the other part.

WITNESSETH that in consideration of the sum of .....

.....

paid to the Assignor by the Assignee (the receipt whereof the Assignor hereby acknowledges) the Assignor hereby assigns unto the Assignee ALL that Policy of Assurance dated the ..... day of ..... and numbered ..... issued by THE BUKIT TIMAH LIFE ASSURANCE COMPANY, LIMITED, on the life of the Assignor for the sum of .....

..... subject to the .....

..... premium of .....

and to the conditions contained in the said Policy TO HOLD to the Assignee absolutely.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered by the above-named .....

..... in the presence of

.....

Signature of Assignor .....

Identity Card No. .....

Signature of Assignee .....

Identity Card No. .....

APPENDIX IX

(CONDITIONAL ASSIGNMENT OF LIFE POLICY BENEFITS)

I .....

in consideration of the sum of $1.00 do hereby assign the benefit of all moneys to become payable under the Policy of Assurance No. .... of THE BUKIT TIMAH LIFE ASSURANCE COMPANY, LIMITED, on my life, dated the ..... day of ..... assuring the sum of ..... (reserving, however, to myself the right to receive in cash or apply in reduction of premia any bonuses that may be declared upon such Policy from time to time as I may think fit) to ..... (Relationship .....) and declare that ..... receipt shall be a sufficient discharge to the Company for the same PROVIDED however that in the event of the said .....) predeceasing me, or in the event of my surviving the date on which the said Policy if so expressed would mature, the benefit of the Policy and the right to receive moneys thereunder shall revert to me as if this Assignment had not been made.

Dated at ..... this ..... day of ..... 19...

.....	.....
(Signature of Assignee)	(Signature of Life Assured)
Identity Card No.	Identity Card No. .....
Age	

Witness:

Signature .....

Name .....

Identity Card No. .....

Designation .....

Address .....

APPENDIX X

BUKIT TIMAH INSURANCE COMPANY

MOTOR VEHICLE PROPOSAL FORM

Statement Pursuant to Section 16(4) of the Insurance Act

You are to disclose in this proposal form, fully and faithfully all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

Name of proposer (in full) .....

Occupation or Business .....

Date of Birth ..... Nationality .....

Address .....

..... Telephone No. .....

Period of Insurance required: From ..... to ..... (inclusive).

PARTICULARS OF MOTOR VEHICLE TO BE INSURED

Index Mark and Registration No. .....

Make and Model .....

Type of Body .....

Cubic Capacity of Engine..... Year of Manufacture .....

Authorised or Licensed to Carry:

No. of seats including driver (For Private Car) .....

Carrying Capacity (For Commercial Vehicle) .....

Date of Purchase & Price Paid .....

New or Secondhand When Purchased .....

Proposer's estimate of present value including accessories and spare parts: –

Motor Vehicle: $ ..... Trailer: (if any) $ .....

Engine No. ..... Chassis No. .....

Petrol or Diesel Powered? Diesel/Petrol (Delete whichever not applicable)

Do you require Comprehensive or Third Party Only cover? .....

Comprehensive/Third Party Only (Delete whichever not applicable)

FOR PRIVATE CAR

1. (a) Will the motor vehicle be used solely for Social, Domestic and Pleasure purposes?

(b) Has the motor vehicle been modified to give increased performance from the Makers' published specification, or is it intended to do so?

(c) If installed, do you require the car radio/tape recorder/airconditioner covered against loss/damage?

Value:

Serial No.:

(d) Give the following particulars of yourself and any other persons who will normally drive the motor vehicle.

Name	Age	Occupation or Business	How long has a **full** driving licence been held?

FOR COMMERCIAL VEHICLES

2. (a) State clearly for what purposes the motor vehicle will be used.

(b) What type of Haulage Permit is the motor vehicle licensed under?

(c) Will a trailer be attached to the motor vehicle?

(d) Will the motor vehicle be used for carrying timber logs, oil tanks, gas tanks, or goods of an explosive, inflammable or dangerous nature?

3. (a) Will the motor vehicle be used solely for Private purposes?

(b) Will the motor vehicle be driven solely by you? If not, please give name or names of persons who will drive.

THE FOLLOWING QUESTIONS (i.e. Questions 4 to 12 inclusive) MUST BE FULLY ANSWERED WHETHER PROPOSAL IS FOR PRIVATE CAR, COMMERCIAL VEHICLE, MOTOR CYCLE OR ANY OTHER CLASS OF MOTOR VEHICLE.

GENERAL QUESTIONS

4. Will the motor vehicle be used for hire or reward?

5. Have you or any person who to your knowledge will drive ever suffered an accident whilst driving a motor vehicle or made a claim under any motor vehicle policy?

6. Have you or any person who to your knowledge will drive:–
   (a) Been convicted of or received notice of intended prosecution for any offence (other than parking) in connection with the driving of any motor vehicle?

   (b) Ever had a licence cancelled endorsed or suspended?

7. Have you or any person who to your knowledge will drive:–
   (a) Been at any time refused any motor vehicle insurance or renewal thereof?

   (b) Ever had a policy cancelled by any insurers?

   (c) Been asked to agree to special terms or increased premium?

8. Do you or any person who to your knowledge will drive suffer from defective vision or hearing or from any physical infirmity or disease? If so, please give particulars.

9. Will you allow the motor vehicle to be driven by any person:–
   (a) Under 22 years of age or with less than 2 years driving experience?

   (b) Over 65 years of age?

   (c) Holding a "L" or provisional driving licence?

10. Do you presently hold a Motor Insurance Policy or have you ever held any Motor Insurance Policy prior to this application? If so, please state Policy number and name of Insurers with whom you are now or were last insured.

11. Are you entitled to No Claim Discount? If so, attach Renewal Notice of the previous insurer.

12. (a) Are you the registered owner of the motor vehicle?

   (b) If not, please state name of Hire Purchase or Finance Company if vehicle has been acquired under a Hire Purchase Agreement.

DECLARATION

I/We hereby warrant that the above statements and particulars are true and complete and that nothing materially affecting the risk has been concealed by me/us. I/We agree that this Proposal and Declaration shall be the basis of the contract between me/us and the In-

surance Company. I/We agree to accept a policy subject to the terms and conditions prescribed by the Company and expressed in the policy.

I/We agree that any person filling in completing or assisting in the completion of this proposal form wholly or in part does so as my/our agent and not that of the Bukit Timah Insurance Company Est. 1845 Limited.

I/We undertake that the motor vehicle to be insured shall not be driven by any person who to my/our knowledge has been refused any motor vehicle insurance or continuance thereof. I/We declare that the motor vehicle to be insured is and will be kept in good condition.

Date ..... Signature of Proposer .....

NO INSURANCE IS IN FORCE UNTIL THE PROPOSAL HAS BEEN ACCEPTED BY THE COMPANY.

APPENDIX XI

Cover Note Number ..... Policy Number .....

BUKIT TIMAH INSURANCE CO.

Singapore * East and West Malaysia * Brunei

FORM OF PROPOSAL FOR INSURANCE AGAINST FIRE

Name of Proposer in full .....

Postal Address .....

Address of the Premises, etc. for which the Insurance is required .....

.....

Particulars of items to which this Proposal applies:–

Interest to be Insured	Amount to be Insured
On Building	$ .....
" Months' Rent	$ .....
" Machinery and Utensils	$ .....
" Furniture and Fittings	$ .....
" Personal Effects	$ .....
" Stock-in-Trade of	$ .....
TOTAL	$ .....

DESCRIPTION OF THE PREMISES

---

1. Of what Materials are the external Walls and Roof of the Premises constructed? Do they adjoin other premises? If so, describe them.

---

2. If adjoining other Premises, please state whether the party walls project about 1½ feet above the roof.

---

3. How many storeys high are the Premises?

---

4. For what purposes are the Premises occupied? If any appliances for manufacturing purposes are used, state nature of same.

---

5. How are the Premises lighted?

6. State what the Contents of the Premises consist of.

7. Is there any trade carried on near the Premises proposed to be insured, or other circumstances connected with the Premises which appear to increase the risk? **If so, describe the same particularly.**

8. Is there any Insurance on the same property in force with this or Other Offices? **If so, state the Amounts and the names of the Offices.**

9. Has the insurance now proposed been declined by any other Office?

10. Have you ever had a Fire?

Period of Insurance:
From: 19
To: ..... 19 at 4 p.m.
Rate ..... %

First Premium $ .....
Stamp Duty $ .....
TOTAL $ .....
Annual Premium $ .....

No liability is undertaken until this Proposal has been accepted by the Company and the premium has been paid or the issue of a duly authorised cover note by or on behalf of the Company.

STATEMENT Pursuant to Section 16(4) of the Insurance Act, 1963 of Malaysia and Section 16(4) of the Insurance Act, 1966 of Singapore.— You are to disclose in this proposal form, fully and faithfully all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

I/We hereby declare that the particulars contained in this proposal are true and agree that they shall form the basis of the Contract between me/us and the Company.

Date: ..... Signature of Proposer: .....

APPENDIX XII

(Proposal Form for Workmen's Compensation Insurance)

Agency ..... Policy No. .....

BUKIT TIMAH INSURANCE COMPANY LIMITED

Workmen's Compensation Insurance

Statement pursuant to Section 16(4) of the Insurance Acts, 1963 (Malaysia) and 1966 (Singapore).

You are to disclose in this proposal form, fully and faithfully all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

Proposer's name in full .....

Proposer's business address .....

Proposer's trade or occupation .....

Particulars of work .....

Period of Insurance ..... 19 ..... to ..... 19 .....

Schedule of estimated wages for the proposed period of insurance

All persons affected by the Workmen's Compensation Laws must be included.

Insurance Required State Table A or B or C (see over) .....

.....

Description of Employees .....

.....

Estimated number of Employees .....

.....

Estimated Annual Wages, Salaries and other Earnings

Cash .....

Living and other Allowances (if any) .....

Total .....

For Office Use only

Cn. ..... Rate .....

Premium: $ ..... Cts. .....

Endts. .....

The total amount of wages, salaries and other earnings paid to the above classes of labour by me during the past twelve months was $ .....

Do you wish to insure your liability (under the above mentioned Workmen's Compensation Laws, and subsequent amendments of the said Laws prior to the date of the issue of the Policy,) to the workmen of sub-contractors?

.....

(i.e. of "Contractors" as defined in the Workmen's Compensation Laws,) If so, please state:–

Name of Contractors .....

Nature of work sublet .....

If contract for labour and materials state estimated amount of contract:–

$ ..... $ .....

In cases for which the contract is for Labour only state amount of contract:–

$ ..... $ .....

Rate .....

Premium: $ ..... cts. .....

Please state whether you provide:–

(a) free living quarters .....

(b) free food .....

(c) free education for children .....

(d) free nursing, milk and rice for children .....

(e) any other free benefit. If so, what kind .....

1. Does the above schedule include:–

   (a) All persons in your service? .....

   (b) All your sub-contractors? .....

2. Do your premises come within the meaning of any law or regulation governing the conduct or maintenance of such premises?

   (a) If so, name such laws or regulations. .....

   (b) Have you carried out all the obligations imposed on you by such laws and regulations? .....

3. (a) Have you any circular saws or other machinery driven by steam, gas, water, electricity, or other mechanical power? If so give full particulars. .....

   .....

   (b) Are your machinery, plant and ways properly fenced and guarded, and otherwise in good order and condition? .....

4. What boilers have you? .....

5. (a) Are your boilers and machinery registered or certified under any current ordinance or enactment requiring such registration or certification? .....

.....

(b) If not, under what conditions are they exempted from such registration or certification? .....

6. State what acids, gases, chemicals or explosives will be used and to what extent.

.....

7. Are you at present insured or have you ever proposed for an insurance in respect of your liability to your employees? If so, give the name of the Company or Companies.

.....

8. Has any proposal for an insurance in respect of your liability to your employees or renewal thereof ever been declined or withdrawn? .....

9. State particulars of accidents to your employees, incidental to their occupation, during the last three years:–

FATAL

Year: 19 .....

Settled:–

No. ..... Cost .....

Outstanding:–

No. ..... Cost .....

PERMANENT DISABLEMENT

Year: 19 .....

Settled:–

No. ..... Cost .....

Outstanding:–

No. ..... Cost .....

TEMPORARY DISABLEMENT

Year: 19 .....

Settled:–

No. ..... Cost .....

Outstanding:–

No. ..... Cost .....

I/We agree to keep a proper Wages Record and to render, at the end of each period of insurance, a statement in the form required by the Company of all wages and other earnings actually paid, and to pay premium on any wages paid in excess of the amount estimated above. I/We hereby declare that all the above statements and particulars which I/We have read over and checked, are true, that I/We have not suppressed, misrepresented, or misstated any material fact, that I/We have fairly estimated my/our total wages, salaries and other earnings, and I/We agree that this declaration shall be the basis of the contract between me/us and the Company.

DATE ..... PROPOSER'S SIGNATURE .....

APPENDIX XIII

Statement pursuant to the Insurance Act–You are to disclose in this proposal form fully and faithfully all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

Agent: Policy No.

BUKIT TIMAH INSURANCE COMPANY LIMITED

Proposal for insurance against LIABILITY TO THE PUBLIC for personal injuries and damage to property

Name in full .....
(BLOCK LETTERS)

Postal address .....
(BLOCK LETTERS)

Trade or business .....
(If proposal is for a specific contract of work, please state its title and the principals)

Particulars of risks to be covered

RISK	PLEASE COMPLETE THIS COLUMN WHERE COVER REQUIRED
(*a*) Yours own premises	
(i) Addresses	(i) .....
(ii) Description (workshop, store, etc.)	(ii) .....
(iii) Kinds of work	(iii) .....
(*b*) Work away from your premises - please describe the kind of work undertaken and (if applicable) the FULL VALUE of the contract of work	....
(*c*) Work put out to contractors (or sub-contractors, if for a specific contract) - please state circumstances and describe its nature, and state estimated value	....

(*d*)	Mechanically driven lifts, cranes, hoists and other lifting appliances **NOT attached to any motor vehicle, vessel or craft** (i) Who examines them for defects, and how often? .... (ii) Are any defects revealed by inspections promptly remedied?	DESCRIPTION NUMBER MOTIVE POWER LIFTING CAPACITY
(*e*)	Fire and explosion (other than of boilers etc.) - please describe any explosive or inflammable materials used	....
(*f*)	Food and drink poisoning - please describe the goods sold or supplied, and indicate value	....
1.	Please state estimated number of employees and total annual wages roll (including working principals, directors, partners, etc.)	(i) Number working at your premises ..... Wages roll ..... (ii) Number working away from your premises ..... Wages roll .....
2.	Are all your premises and appliances, machinery and plant, in a sound state of repair?	
3.	How long have you been in business and what claims have been made on you during that period (or are pending) in respect of risks to be covered by this insurance? Please furnish full particulars separately	Number of years in business ..... Personal injury: Number ..... Cost $ ..... Damage to property: Number ..... Cost $ .....
4.	(*a*) Are you at present insured, or (*b*) have you ever proposed for insurance in respect of the said liabilities?	(*a*)..... (*b*) ..... Name of company .....
5.	Has any proposal or renewal even been (*a*) declined, or (*b*) withdrawn, or (*c*) charged an increased rate or subjected to special restrictions?	(*a*) ..... (*b*) ..... (*c*) .....

LIMIT OF INDEMNITY

for any one accident $

Insurance Required from .....

FOR OFFICE USE

Premises risk .....

Wages $ ..... @ .....

..... @ .....

DECLARATION

I/We declare that the above statements are true, and that I/we have not withheld or concealed anything affecting the proposed insurance, and I/we agree that this proposal and declaration shall be the basis of the contract between me/us and the Company. I/We agree also to accept the Company's policy applicable to the insurance.

Date ..... Signature of the Proposer .....

Agent's Declaration: I have known the Proposer for ..... years. He/She is of good character and repute and I can recommend the Company to issue a policy.

Date ..... 19 ..... Agent's Signature .....

The liability of the Company does not commence until this Proposal has been accepted by the Company and the premium paid.

APPENDIX XIV

Statement pursuant to the Insurance Act - You are to disclose in this proposal form fully and faithfully all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

BUKIT TIMAH INSURANCE COMPANY LIMITED

Agency ..... Proposal No. ..... Policy No. P.A. .....

PROPOSAL FOR PERSONAL ACCIDENT INSURANCE

Proposer's name in full ..... Age .....
(BLOCK LETTERS)

Address .....
(BLOCK LETTERS)

Date of birth ..... Height ..... Weight .....

Profession or Occupation	State the exact nature of ALL work you do, also any pastime in which you regularly engage, and frequency of normal travelling.

1.	Do you wish to insure against accidents resulting from —		
	(a) Motor cycling? (b) Football playing?	(a)	(b)
	(c) Horse riding? (d) any other sport (to be stated)?	(c)	(d)
2.	Have you had any accident insurance or life assurance proposal or renewal —		
	(i) declined (ii) withdrawn (iii) subjected to an increased rate or special conditions?	(i) (ii) (iii)	
3.	What accidents necessitating medical attention have you sustained during the last five years?		
4.	Will this insurance be additional to any other accident policies?		

5. Do you suffer from any physical defect or infirmity or have you a tendency to any ailment or disease?

Capital Benefit required $ **Premium**

Insurance required from ..... to .....

DECLARATION

I the undersigned proposer above named declare and warrant that the above questions are fully and truthfully answered and that I have not withheld or concealed any circumstances affecting the proposed insurance and I agree: (a) to give notice to the Company of any variation in my profession or occupation health habits or pursuits or of effecting of any other insurances (except coupon) against accident (b) that this declaration shall be held to be promissory and that it and the answers above given shall be the basis of the contract between me and the Company and (c) to accept a policy subject to the terms provisions exceptions and conditions thereof. I also declare that my weekly income exceeds the gross amount of weekly benefit for disablement by accident now insured or to be insured by me.

Date ..... Signature of Proposer.....

Agent's Recommendation I have known the Proposer ..... years and recommend acceptance of this proposal.

Date ..... Agent .....

The liability of the Company does not commence until this proposal has been accepted by the Company and the premium paid.

Scale of BENEFITS (Capital Benefit $10,000)

ACCIDENT – resulting in:–		$
1.	Death	10,000
2.	Loss of two limbs	10,000
3.	Loss of sight in both eyes	10,000
4.	Loss of one limb and sight in one eye	10,000
5.	Loss of one limb	5,000
6.	Loss of sight in one eye	5,000
7.	(a) Temporary total disablement – per week	60
	(b) Temporary partial disablement – per week	20
	weekly benefit payable up to 100 weeks plus medical expenses actually incurred up to 25% of any claim for weekly benefit.	
8.	Permanent total disablement not otherwise specified	5,000

Whilst the risk of murder or assault or any attempt thereat is NOT excluded, the following are noteworthy exclusions:

war risks; strikes, riots and civil commotion; convulsions of nature; mountaineering and winter sports; racing (other than on foot); hunting.

AIR TRAVEL BY REGULAR SCHEDULED AIR SERVICES IS COVERED AS IS ANY FORM OF LAND/SEA TRAVEL (WORLDWIDE) WITHOUT EXTRA PREMIUM.

APPENDIX XV

PROPOSAL FOR MARINE INSURANCE

BUKIT TIMAH UNDERWRITERS, LTD.

KUALA LUMPUR SINGAPORE PENANG

KOTA KINABALU, SABAH

NOTICE "Pursuant to Section 16(4) of the Insurance Act, 1963 of Malaysia and or Section 16(4) of the Insurance Act, 1966 of Singapore you are to disclose in this proposal form, fully and faithfully, all the facts which you know or ought to know otherwise the policy issued hereunder may be void".

Please issue a Marine Insurance policy as follows:

Policy to be issued in name of .....

Sum to be insured .....

Claims payable at .....

From ..... To..... Via Transhipment at .....

Marks & Numbers

Particulars of cargo, packing, quantity, weight, etc. .....

.....

.....

.....

Consigned to .....

Insurance Conditions .....

(State whether T.L.O., F.P.A. or W.A.)

Any Special risks to be covered .....

(War, Strike, Riot, Civil Commotion, Theft, Pilferage, Non delivery etc.)

Shipped per S.S. ..... Sailing date .....

Policy to be issued in Duplicate/Triplicate/ .....

IMPORTANT: Warranted cargo shipped under deck unless otherwise specified.

Date .....

Signature .....

Address .....

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