A comparative analysis of utmost good faith in colombian and english insurance law

Un Análisis Comparativo del Principio de la Buena Fe en el Derecho de Seguros Colombiano e Inglés

By: Daniel Vásquez -Vega*

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Abstract

Both Colombian and English law impose pre-contractual information duties on the assured; in both cases these duties are derived from the principle of good faith present in Roman law, the law merchant and throughout early modern insurance law. However, the development of this principle and the consequent duties in each jurisdiction led to sufficiently significant differences that produced substantial criticism and reform in England, but have not led to much criticism in Colombia. Even though the Colombian approach is not always more favourable to the assured, the specific situations in which Colombian law is more assured friendly have been enough to not disturb the different actors of the insurance business. The solutions introduced in 2012 in England have in a great way equated, at least in the field of consumer insurance law, the assured's pre-contractual duty of information with the Colombian regime. In the end both jurisdictions have been able to cope with the difficulties that good faith in the pre-contractual stage can entail. Most problems have been or are being addressed and good faith and the assured's pre-contractual information duties remain a very significant and important part of both countries insurance contract law.

Key words: *Insurance, insurance contract, good faith, non-disclosure, misrepresentation.*

* LLM, University College London (United Kingdom), Specialist in Insurance Law, Pontificia Universidad Javeriana (Colombia). Professor of Insurance Law, Pontificia Bolivariana University, Rosario University and EAFIT University (Colombia). Attorney from the Head of Legal Affairs at Suramericana – Insurances Direction dvasquezv@outlook.com.

Resumen

Tanto la ley colombiana como la inglesa imponen al asegurado deberes precontractuales de información; en ambos casos estas obligaciones se derivan del principio de buena fe presente en el derecho romano, en la lex mercatoria y en las primeras leyes de seguros modernos. Sin embargo, el desarrollo de este principio y los deberes resultantes en cada jurisdicción llevaron a diferencias suficientemente significativas que produjeron importantes críticas y reformas en Inglaterra, pero no han dado lugar a muchas críticas en Colombia. A pesar de que el enfoque colombiano no siempre es más favorable para el asegurado, las situaciones específicas en las que la ley colombiana sí es más amigable al asegurado han sido suficientes para no molestar a los diferentes actores de la actividad aseguradora. Las soluciones introducidas en 2012 en Inglaterra han en gran medida equiparado, por lo menos en el campo del derecho de seguros de consumidores, los deberes precontractuales de información con el régimen colombiano. Al final ambas jurisdicciones han sido capaces de hacer frente a las dificultades que la buena fe en la etapa precontractual puede acarrear. La mayoría de los problemas han sido o están siendo abordados y la buena fe y los deberes de información precontractual del asegurado siguen siendo una parte muy importante y significativa del derecho de seguros de ambos países.

Palabras clave: *Seguros, contrato de seguro, buena fe, declaración del estado del riesgo, reticencia, inexactitud.*

Introduction

Both in Colombia[1] and in England[2] it is frequently stated that insurance is a contract based upon the utmost good faith. The common explanation is that due to its particular nature, insurance requires in the pre-contractual stage an extraordinary duty of disclosure on behalf of the assured, who is presumed to know the state of the risk, in order for the insurer, who is presumed to know nothing about it[3], to make an informed decision regarding if he will assume the risk or not and, if so, on what terms[4]. Furthermore, it is said that any other solution to the lack of information of the insurer on the state of the risk, such as, for example, requiring the insurer to inspect the risk, would be ruinous to the day to day underwriting of insurance and would make insurance too expensive, or, at least, more expensive and less commercially attractive[5]. However, during the past decades, good faith and the duty of disclosure have suffered severe criticism in England[6]. Discontent reached such a point that when the Law Commission was appointed to review English insurance law, the first topic it tackled after the emission of their first scoping paper in 2006 was that of the pre-contractual information issues, ie non-disclosure and misrepresentation. The call for reform led to the Consumer Insurance (Disclosure and Representations) Act 2012, which substantially changed the law in respect to the duties and consequences of pre-contractual good faith in consumer insurance contracts, and to a revision of the law regarding business insurance which is still being undertaken by the Law Commission[7].

1 Corte Constitucional, Judgement C-232 of 15 May 1997, per Jorge Arango Mejía; J. Efrén Ossa, *Teoría General del Seguro, El Contrato* (2nd edn, Temis 1991) 44.

2 S 17 of the Marine Insurance Act 1906; Carter v Boehm (1766) 3 Burr 1905; Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 A.C. 501.

3 Greenhill v Federal Insurance Co Ltd [1927] 1 KB 65, 76-77; Rozanes v Bowen (1928) 32 L1LRep 98, 102. Nonetheless, this classical assertion of insurance law has recently been questioned due to all the technological advancements which seem to leave the insurer in a better position than that which he use to traditionally occupy. See Peter Macdonald Eggers and others, *Good Faith and Insurance Contracts* (3rd ed Lloyd's List 2010) xiv.

4 Re Yager (1912) 108 LT 28; Ossa *Op.Cit.*, pp. 44-45, 325; Andrés E Ordóñez, *Lecciones de Derecho de Seguros N.º 3: Las Obligaciones y Cargas de las Partes en el Contrato de Seguro y la Inoperancia del Contrato de Seguro* (Universidad Externado de Colombia 2004) 20; Howard Bennett, *The Law of Marine Insurance* (2nd edn, OUP 2006) para 4.07; Eggers and others *Op. Cit.,* para 3.80.

5 Ossa (n 1) 325; Carlos I Jaramillo, *Derecho de Seguros*, vol 2 (Temis 2011) 651.

6 Reuben A Hasson, 'The Doctrine of Uberrimae Fides in Insurance Law: a critical evaluation' (1969) 32 MLR 615; The Law Commission and The Scottish Law Commission, *Consultation Paper No. 182 – Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured – A Joint Consultation Paper* (2007) <http://lawcommission.justice.gov.uk/docs/cp182_ICL_Misrep_Non-disclosure_Breach_of_Warranty.pdf> accessed 23 August 2013; Eggers and others, *Op. cit.,* vii.

7 The Law Commission and The Scottish Law Commission, Consultation Paper No 204 – Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties – A Joint Consultation Paper (2012) <http://lawcommission.justice.gov.uk/docs/cp204_ICL_business-disclosure.pdf> accessed 23 August 2013.

Conversely, during the same period of time in Colombia, even though at first glance the pre-contractual duties the insured bore due to the principle of good faith seemed quite similar to those that existed in England, no criticism was being raised on the matter by either academics or the courts. It is not as if the insurance industry was not being criticised at all: actually, it had been slated to such a point that Congress passed several acts in recent years regarding insurance (many of which were enacted in order to increase consumer protection); it is just that none of those changes aimed at modifying the rules on pre-contractual disclosure and representations by the assured[8].

As it will be shown in this paper, the reasons present in English law that led to the call for reform seem not to have been present in Colombian law, even though good faith is deeply embedded not only in Colombian insurance law but in its contract law in general. The scope of the assured's duties of pre-contractual disclosure and representation, labelled in Colombia as the duty to faithfully declare the state of the risk, are not as harsh on the insured as its English counterparts: the range of facts and circumstances that have to be disclosed is not as wide, and the remedies available to the insurer vary depending on the (lack of) diligence with which the assured incurred in non-disclosure or misrepresentations. Additionally, contrary to what has happened in England, the Colombian Supreme Court of Justice has used the exceptions to the duty to faithfully declare the state of the risk to increase the level of diligence with which the insurer must act during the pre-contractual stage.

This comparative analysis of the development and current state of good faith in Colombian and English insurance law will evidence how two similar principles, that even share a common historical foundation, may evolve in such different ways that while in one jurisdiction reform was seen as long overdue, in the other jurisdiction reform has not even crossed the mind of either insurers, assureds or academics.

It may be needless to say that good faith in insurance contracts entails more than pre-contractual disclosure and representation duties on behalf of the assured. Good faith, as established by the Colombian Supreme Court, is present in an insurance contract since before its inception and until after its expiration[9]. This is evidenced by other duties and rules derived from good faith such as the insurer's duty of disclosure and information[10], the

8 Law 1328 of 2009 introduced, among other things, new rules on insurance consumer protection; it focused not on modifying the pre-contractual information duties of the assureds, but on increasing the information duties of insurance companies, as well as creating a more effective consumer attention system, including a further reaching ombudsman service and prohibiting the use of abusive practices and clauses.

9 Corte Suprema de Justicia, Judgement of 2 August 2002 per Carlos Ignacio Jaramillo.

10 Howard N Bennett, 'Mapping the Doctrine of Utmost Good Faith in Insurance Law' (1999) LMCLQ 165, 180; Andrés E Ordóñez, 'Los Deberes Recíprocos de Información en el Contrato de Seguro: Y Especialmente el Deber de Información del Asegurador Frente al Tomador del Seguro', en: *Revista de Derecho Privado*, Bogotá, núm. 9, 2005 ; Eggers and others, *Op. cit.*, Ch 12.

assured's duty to present a fair claim[11] and the insurer's duty to tend to claims diligently.[12] Nevertheless, this paper will only deal with these other duties incidentally, for it will focus on the assured's duty to faithfully declare the state of the risk.

The order in which this matter will be approached is the following: some introductory remarks will be made on the Roman origins of good faith, its incursion into the law merchant and ultimately European medieval and early modern insurance law. Secondly, we will assess the circumstances that led to reform in English Law, starting from the introduction of good faith by Lord Mansfield, its codification in the Marine Insurance Act 1906 and finalising with the reform introduced by the Consumer Insurance (Disclosure and Representations) Act 2012. Further on, Colombia's law and doctrine on good faith in insurance contracts will be presented in light of its differences with English law on that matter, in order to be able to conclude why reform was imminent in one jurisdiction and not within the other.

Common origin

Good faith finds its origin in Roman law where it was introduced in order to counter the rigidness of their 'old' civil law[13]. It did not consist of a clear distinct rule but of a principle that encouraged the judge to find a more equitable solution to the cases at hand even if such solutions found no support in the existing law[14].

Based on the solutions inspired by the principle of good faith, new rules and institutions started to emerge such as the *aedilitian* remedies for cases of latent defects[15] or rescission for mistake and duress[16]. Good faith went as far as establishing that the seller had the duty to inform the buyer of all the circumstances known by him relating to the subject-matter of the contract when the buyer had no other mean of informing himself[17].

11 Bennett, 'Mapping the Doctrine of Utmost Good Faith' *Ibíd.*, 207-218; Andrés E Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.*, pp 104-107, 151-152; Eggers and others, *Op. cit.,* Ch 11.

12 Eggers and others, *Op. cit.,* Ch 12.

13 Johan Hendrik Botes, *From Good Faith to Utmost Good Faith in Marine Insurance* (Peter Lang 2006) 18; Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Simon Whittaker and Reinhard Zimmermann (eds.), *Good Faith in European Contract Law* (Cambridge University Press 2000) 16.

14 Martin Josef Schermaier, 'Bona Fides in Roman Contract Law' in Simon Whittaker and Reinhard Zimmermann (eds.), *Good Faith in European Contract Law* (Cambridge University Press 2000) 63-6.

15 The *aedelitian* remedies were created "where losses were suffered as a result of latent defects" and consisted in redhibition (i.e avoidance) and reduction of the price. See Botes, *Ibíd.,* p. 23.

16 S. Whittaker, *Op. cit.*, 17.

17 J. Botes, *Op. cit.,* 20.

These new rules were not rigid but subject to good faith themselves[18]. Cicero explains how even if good faith entailed "that the buyer should be told of all the defects which are known to the seller [... and that] If the latter conceals known defects, then he should be liable for any detriment resulting to the innocent buyer"[19], this would not be the case if the buyer had known of the defect[20].

During the middle ages the principle of good faith was identified with that of equity[21]. From both concepts medieval jurists derived a series of rules similar to those that had been inspired by the principle of good faith in Roman law. These rules included, for example, that parties should keep their word; that they should not take advantages of one another either by misleading the other, nor by driving harsh bargains; and that they were obliged not only to what had been established in the contract, but also to what an honest person would recognize the contract implied even if it was not expressly established[22].

Good faith and equity applied to all contracts in the middle ages and were especially of great importance in the law merchant[23].

It was during this time, in the late XIV century, that insurance as we now know it started to appear in the Italian city states and to spread all over Europe, first through Mediterranean trade and then through the merchant cities around the North Sea[24]. As all other merchant affairs, insurance was regulated through the law merchant and the codes issued in one state to compile these rules and principles would rapidly spread to the other European cities[25]. Among these rules were those, as in any other contract, derived from good faith. Even though there was no explicit reference to good faith in early insurance regulation, requirements that the contract be judged in accordance to good faith and the custom of merchants are found even in the earliest marine insurance policies[26].

"As in all other contracts, good faith, first of all, dictated that there should be no fraud or deceit in contracts of insurance. In the context of marine insurance, the function of good

18 M. Schermaier, *Op. cit.,* pp. 69-70.

19 *Ibíd.*, pp. 67-8.

20 *Ibíd.,* pp. 69-70.

21 S. Whittaker, *Op. cit.,* p. 17.

22 James Gordley, 'Good Faith in Contract Law in the Medieval Ius Commune' in Simon Whittaker and Reinhard Zimmermann (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 94.

23 S. Whittake, *Op, cit*., p.17.

24 Harold E. Raynes, *A History of British Insurance* (2nd edn, Sir Isaac Pitman & Sons LTD 1964) Ch I and II.

25 *Ibíd.*

26 J. Botes, *Op. cit.*, p. 70.

faith to deter fraud meant that both insurer and assured should not misrepresent any facts relating to the substance of the contract, i.e. the risk attaching to the subject-matter to be insured. Further to this, good faith required the parties not conceal any such fact relating to the risk. But this rule against concealment was also related to another function of good faith, namely to assure that insurer and assured concluded the policy on equal information footing… The implication of such a requirement would be that neither the assured, nor the insurer should be allowed to take advantage of an informational advantage over the other"[27].

As it can be observed, good faith meant more than just the assured's duty of disclosure, and the consequences for the inobservance of good faith varied according to the circumstances. Pothier, for example, indicated that "[t]he good faith that should reign in this contract, as in all others, binds each of the parties to dissimulate nothing from the other of what he knows in connection with the subject-matter of the contract"[28]. When this duty was breached by the insurer, he would have to return the premium, even if he also had to pay the indemnity; when it was breached by the assured, Pothier sustained that the consequence must be nullity and that it would be insufficient just to offer "the price of the risk"[29].

Development of good faith in English insurance law

1. Lord Mansfield's original conception

In England, insurance was introduced by the Mediterranean and North Sea merchants and therefore it followed their rules and customs[30]. For several centuries the disputes that arose between them were not settled by the common law courts but by merchant tribunals. From the XIV century onwards several courts, such as the Court of Admiralty, the Privy Council and the Court of Commissioners, would come in competition with these merchant tribunals until the VXIII century when jurisdiction would be assumed by the common law courts[31].

However it was not until Lord Mansfield was appointed Lord Chief Justice of the King's Bench in 1756 that the law merchant started to be properly introduced into the common law. In fact, it was his objective to harmonise the law merchant and the common law[32]. Lord Mansfield was an expert in the civil law and the law merchant, he was familiar with the continental writers and had studied the most important marine and insurance codes from

27 *Ibíd.*, 63-4 (footnotes omitted).

28 *Ibíd.,* p. 48 citing Pothier, *Traité du Contrat d'Assurance, Tome Cinquième d'Oeuvres de Pothier* (Cosse et N. Delamotte Videcoq Père et Fils 1847) Chap III Sect III n 191.

29 *Ibíd.*, pp. 64-5.

30 H. Raynes, *Op. cit.,* p. 34; J. Botes *Op. cit.,* p. 39.

31 H. Bennett, 'Mapping the Doctrine of Utmost Good Faith', *Op. cit.,* pp. 186-188.

32 Eggers and others, *Op. cit.*, para 1.11.

other European nations and city states and was therefore able to introduce the principles of insurance that had applied all over Europe into the common law of England[33].

Among the principles he introduced, established in the paradigmatic case of Carter v Boehm[34], was that of good faith. As it was recognised in the continent, Lord Mansfield did not believe that it was a principle that applied exclusively to insurance contracts but to all contracts in general[35]. Good faith, as it had been intended since Roman law, promoted fairness in contracts and discouraged fraud[36].

The terms in which the principle of good faith was introduced by Lord Mansfield were very similar to those used by the medieval and early modern continental jurists. He did not impose a harsh burden on one of the parties alone, instead he rightfully distributed different duties among them in order to give them an equal opportunity to access information[37]: it is true that the assured had a duty to disclose those facts which were known to him, but the insurer also had the responsibility to obtain information he considered material and this responsibility reduced the assured's duty of disclosure[38].

2. The tergiversation of good faith

However the judges that followed Lord Mansfield made several modifications or took different approaches[39]. On the one hand the principle of good faith was confined to a select group of contracts, among them those of insurance[40], by this meaning, mainly, that in all other contracts the principle of caveat emptor applies[41]. Further on, at least in the case of insurance contracts, and according to Reuben A. Hasson[42], the duties that where derived from good faith seem, on the one hand, to have grown a lot stricter then how Lord Mansfield

33 J. Botes, *Op.cit.,* p. 39.

34 (1766) 3 Burr 1905.

35 *Ibíd.*, 1164: "The governing principle is applicable to all contracts and dealings."

36 *Ibíd.,* 1169.

37 Even though Carter v Boehm is normally traced as the source of the assured's duty of disclosure in English law, it is normally omitted that it was the assured who came out victorious in the dispute, for even though Lord Mansfield considered the assured bore a duty of disclosure, he also considered the insurer could have informed himself through other means of the facts that were not disclosed.

38 *Ibíd.,* 1164 ff. See also the abstracts of Mayne v Walter (1787) in R. Hasson, 'The Doctrine of Uberrimae Fides in Insurance Law', *Op. cit.,* p. 17.

39 R. Hasson, 'The Doctrine of Uberrimae Fides in Insurance Law', *Op. cit.,* p. 618 ff.

40 J. Botes, *Op.cit*., p. 95. Nevertheless, "the principles of misrepresentation have remained universally applicable to all contracts in English law." Eggers and others, *Op. cit.,* para 1.02, 3.01.

41 Bell v Lever Bros Ltd [1932] AC 161, 224, 227; Eggers and others*, Op. cit*., para 1.07-1.08.

42 R. Hasson, 'The Doctrine of Uberrimae Fides in Insurance Law', *Op. cit*. See also J. Botes, *Op. cit*., John Lowry and others, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 86.

had proposed and, on the other hand, to have focused on the duties and burdens that the principle imposed on the assured.

One example, among others[43], is Bates v Hewitt[44] in which the insurer was allowed to avoid the contract for non-disclosure because, even though he had been aware of the undisclosed fact some time before the insurance had been placed and had means to identify such facts, the judge considered that this did not discharge the assured from his duty to disclose the fact. It seems as if, contrary to what Cicero had indicated, the judges had stopped qualifying the rules derived from good faith by good faith itself and had made them strict rules that did not always promote fairness between the parties[45]. As it will be shown later, the approach taken in Bates v Hewitt evidences the different attitude with which English and Colombian courts have addressed issues such as impossibility to rescind the contract when the insurer knew or should have known the undisclosed circumstance.

3. Good faith, non-disclosure and misrepresentation in the Marine Insurance Act

The common law on the matter would then be codified into sections 17-20 of the Marine Insurance Act (MIA) of 1906, which, as has been largely accepted, apply equally to marine and non-marine insurance[46]. The general principle of good faith is recognized in section 17 of the MIA as follows:

> "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" .

As it had been developed in continental law, section 17 establishes that the principle of good faith must be observed by both parties, ie it does not place burdens only on the assured but on the insurer as well. However, contrary to Roman law and the approach taken in other jurisdictions, the MIA reduces the remedy for the inobservance of good faith to avoidance, which has been considered inappropriate or too harsh by the courts in cases that revolve around the insurer's duty of information, the assured's duty to make claims in good faith and even in cases of minor breaches to the assured's duty of disclosure[47]. Avoidance as the unique remedy for breach of good faith has been one of the major sources of criticisms of English

43 See, eg Lindenau v Desborough (1828) 8 B&C 586; Joel v Law Union and Crown Insurance [1908] 2 KB 863 (CA).

44 (1867) LR 2 QB 595.

45 R. Hasson, 'The Doctrine of Uberrimae Fides in Insurance Law', *Op. cit.*

46 Joel, *Op. cit*; Lambert v Co-operative Insurance Soc Ltd [1975] 2 Lloyd's Rep 845; Pan Atlantic Insurance [1995] 518.

47 Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1993] 1 Lloyd's Rep 496, 506; Kauser v Eagle Star Insurance Co Ltd [2000] Lloyd's Rep IR 154, 157; Peter MacDonald Eggers, 'Remedies for the Failure to Observe the Utmost Good Faith' (2003) LMCLQ 249; J. Botes, Lowry and others, *Op. cit.,* p. 91.

law on the matter and consists of one of the major differences between the Colombian and English approach not only regarding the assured's pre-contractual information duties, as will be analysed in detail, but other duties derived from good faith[48].

Even though good faith has to be observed by both parties, the sections that follow section 17 only established duties for the assured. Sections 18-20 contain the assured's (and his agent's) specific pre-contractual duties of disclosure and faithful representation.

Section 18(1) establishes that "the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured". "If the assured fails to make such disclosure, the insurer may avoid the contract". Regarding what is known to the assured, the same section establishes that the "assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him".

A material circumstance, as defined in section 18(2), is every circumstance "which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". It has been interpreted by the courts to include any circumstance that a reasonable insurer would considerer relevant in determining whether he will assume the risk, and if so, under which conditions, but without this meaning that the circumstance, if disclosed, would have necessarily led the insurer to deny the risk or to accept it on different terms or for a different premium[49]. Such an understanding of materiality has been criticized for being too wide[50]; the debate has been centred not only on the understanding of materiality introduced in Pan Atlantic but also on the fairness or unfairness of a prudent underwriter test (in opposition to a reasonable assured test). As it will be evidenced below, the approach taken by Colombian law does not choose between a prudent underwriter or prudent insurance test and guarantees that the assured will not have to disclose information that the insurance company did not let him know was relevant or facts or circumstances that common sense would not have revealed as such and therefore conforms itself better to the intent of promoting fairness present in the principle of good faith.

Although it was not included in the MIA, in order for the insurer to be allowed to avoid the contract, the non-disclosed circumstance besides being material, must have induced the actual insurer into the contract[51]. The requirement of inducement was taken from the general law of misrepresentation and it was extended to non-disclosure[52].

48 For example, article 1078 of the Colombian Commercial Code establishes that if an assured presents a claim in bad faith he will loss the right to the indemnity (instead of the contract being void.

49 Pan Atlantic [1995], *Op. cit.*

50 Norma J Hird, 'Pan Atlantic: Yet More to Disclose' (1995) JBL 608.

51 Pan Atlantic [1995], *Op cit.*

52 *Ibíd.*

Section 18(3) establishes some circumstances that, in absence of enquiry, do not have to be disclosed. Those circumstances are those which diminish the risk; "any circumstance which is known or presumed to be known to the insurer (and 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); any circumstance as to which information is waived by the insurer; and any circumstance which it is superfluous to disclose by reason of any express or implied warranty" .

In addition to the duty of disclosure, section 20 of the MIA sets that "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" and "If it be untrue the insurer may avoid the contract." Materiality is defined in the same terms it was defined for non-disclosure and has also been interpreted in an identical way[53]. Besides being material, the misrepresentation must have induced the insurer into the contract in order for him to be allowed to avoid it[54].

As if the requirement of materiality was not strict enough, besides what is established in sections 18 and 20, based on section 17 the courts have broaden the assured's duty by concluding that materiality is irrelevant with regards to the information requested by the insurer[55] and in the cases in which the non-disclosure or misrepresentation is fraudulent[56]. Materiality also loses all significance when the form is made basis of the contract[57].

4. Criticism and pressure for reform: The Consumer Insurance (Disclosure and Representations) Act 2012

During recent decades criticism has sprung against good faith in the pre-contractual stage. Recommendations for reform were made since 1957 by the Law Reform Committee and again in 1980 by the English Law Commission, in this last occasion it being pointed out that reform had been too long delayed[58]. In 2006 the Law Commission issued a scoping paper in order to determine which areas of insurance contract law were in need of reform, nevertheless non-disclosure and misrepresentation had already been chosen as one of

53 *Ibíd.*

54 *Ibíd.*

55 Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep 476, 512.

56 Pan Atlantic [1995], *Op. cit.,* p. 533; Bennett, 'Mapping the Doctrine of Utmost Good Faith', *Op cit.,* pp. 177-178.

57 Reuben Hasson, 'The Basis of the Contract Clause in Insurance Law' (1971) 34 MLR 29; H. Bennett, *The Law of Marine Insurance*, *Op. cit*., para 4.205-4.206.

58 R. Hasson, The Law Commission and The Scottish Law Commission, *Consultation Paper No. 182, Op. cit.,* para 1.16-1.17.

the at least two topics that were going to be examined by the Law Commission (the other being breach of warranty)[59]. The law was viewed as unjust because it was "heavily biased against the interests of consumers"[60]. Call for reform became imminent and eventually led to the Consumer Insurance (Disclosure and Representations) Act 2012 which deeply modified the state of the law regarding pre-contractual good faith in consumer insurance contracts. Nevertheless, debate around reform is not finished. The Law Commission is still analysing other sectors of insurance law in order to determine if and how they should be modified. Concerning good faith, the pre-contractual duties in commercial insurance are still a matter to be defined, as are the rules pertaining to fraudulent claims in both consumer and commercial insurance[61]. The debate on reform of good faith has been centred on those who consider that what has to be reformed is not the duties themselves but the remedies and those who consider that even the duties deserve a change[62]. At least in what relates to the pre-contractual duties in consumer contracts, it was the second group who 'won' the debate being that the Consumer Insurance Act 2012 not only modifies the remedies but also eliminates the duty of disclosure and modifies the duty to not misrepresent.

In our opinion, the reform introduced by the Consumer Insurance Act 2012 effectively responded to the criticism by levelling the playing ground between insurers and consumers. The Act distinguished consumer insurance contracts as those contracts of insurance between "an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession", and an insurer.[63] Section 2 of the Act established that "It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer" and that this duty "replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before" the Act applied; accordingly "any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of" the Act. This means that, at least for consumer insurance, the assured no longer has a duty of disclosure and this eliminates the unfairness that existed in expecting the insured to be able to know what a prudent underwriter considers relevant without being guided by the insurer. As it will be submitted, this solution is similar, in some respects, to those established in Colombia since the 1971 Commercial Code entered into force.

59 The Law Commission and The Scottish Law Commission, *Insurance Contract Law: a Joint Scoping Paper* (2006) <http://lawcommission.justice.gov.uk/docs/ICL_Scoping_Paper.pdf> accessed 23 August 2013, Para 1.2, Appendix A.

60 R. Hasson, The Law Commission and The Scottish Law Commission, *Consultation Paper No. 182, Op. cit.,* para 1.40.

61 *Ibíd., No. 204.*

62 See the discussion in Peter Macdonald Eggers, 'The Past and Future of English Insurance Law: Good Faith and Warranties' (2012) 1(2) UCLJLJ 211, 234-236.

63 Consumer Insurance (Disclosure and Representations) Act 2012, section 1.

If the consumer breaches his duty "to take reasonable care not to make a misrepresentation to the insurer", the insurer will have a remedy against the consumer if "the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms"[64]. This, again similar to Colombian law, eliminates materiality from the scene and focuses on the requirement of inducement.

Section 5 of the Act distinguishes between deliberate or reckless and careless misrepresentations. A misrepresentation is deliberate or reckless if the consumer "knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer"[65]. A misrepresentation is careless "if it is not deliberate or reckless"[66].

As important as the elimination of the duty of disclosure are the set of remedies introduced by the Act: if the "misrepresentation was deliberate or reckless, the insurer may avoid the contract and refuse all claims, and need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them."[67] If the misrepresentation was careless the remedies vary according to what the insurer would have done had there been no misrepresentation: "If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premiums paid"[68]. "If the insurer would have entered into the consumer insurance contract, but on different terms (excluding terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires."[69] "In addition, if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim"[70]. These remedies address the criticism that had centred on the unfair consequences that the existence of a sole remedy had led to, while still offering special protection to the particular nature of the contract of insurance. In this aspect, even though Colombian law offers several remedies, the Consumer Insurance Act goes beyond what was envisaged by the 1971 Commercial Code.

64 *Ibíd.,* section 4.

65 *Ibid.,* section 5.

66 *Ibíd.*

67 *Ibíd.,* Schedule 1, section 2.

68 *Ibid.,* Schedule 1, section 5.

69 *Ibíd.,* Schedule 1, section 6.

70 *Ibíd.*, Schedule 1, section 7.

Finally, the Act also establishes that the representations made by the consumer are "not capable of being converted into a warranty by means of any provision of the consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise)"[71] therefore guaranteeing that the requirement established in section 4 of the Act will not be made irrelevant nor the new remedies available reduced to avoidance.

As seen, the Consumer Insurance Act tackled the most relevant issues that were debated during the past decades in English Law regarding pre-contractual disclosure and representations by the assured.

Development of good faith in Colombian insurance law

Having revised the development and current state of the assured's pre-contractual information duties in English law and exposed the criticism and reform it has been subjected to, we shall now study Colombian insurance law on the matter in light of the English solutions. First, in order to set the scene, a general introduction will be made into Colombian law on good faith and insurance; afterwards, the duty to make a fair presentation of the risk will be studied in detail in order to conclude why the criticism raised in England has not risen in Colombia.

1. Good faith in Colombian contract law

It is widely recognized among comparative lawyers that the principle of good faith has historically belonged to civilian legal systems and still, today, underpins most of their institutions in all branches of law[72]. The Colombian legal system, entirely from a civilian tradition, is not the exception. Colombia's Civil Code, enacted in 1887, was drafted by Don Andrés Bello mainly along the lines of Roman, French and Spanish law[73]. Although this code does not regulate contracts of insurance, it contains both the principle of good faith in contract law as well as many of the institutions that have derived from it. Indeed, article 1603 establishes that contracts have to be executed in good faith, hence the parties are obliged not only to what is expressly agreed, but to everything else that emanates from their nature; additionally article 1914 ff establishes remedies for latent defects (*vicios redhibitorios*); and article 1508 ff establishes remedies in case of mistake, duress or fraud (*vicios del consentimiento*)[74].

71 *Ibíd.*, section 6(2).

72 S. Whittaker, *Op. cit.*

73 Martha Lucía Neme Villareal, 'El Principio de Buena Fe en Materia Contractual en el Sistema Jurídico Colombiano', en: *Revista de Derecho Privado,* Bogotá, núm.11, p. 79.

74 These two institutions are, in their general features, just as the *aedelitian* remedies and rules for mistake and duress created in Roman law as consequence of the principle of good faith.

Furthermore the 'new' Colombian Commercial Code[75] sets in article 863 that the parties to any contract must act in good faith in the pre-contractual stage and article 871 sets that contracts should be entered into and implemented in good faith and, therefore, they oblige not only to what is expressly agreed in them, but to everything that according to the law, custom and equity belong to their nature. Even the Constitution through article 83 establishes that both private individuals and public authorities must adhere to the principles of good faith. Beyond these articles, good faith can be evidenced in Colombia's unfair competition regulation, consumer protection regulation, corporate law, etc.[76].

As can be observed in article 871 of the Commercial Code and in accordance to what has been expressed by the Supreme Court,[77] good faith must be present at every moment, ie during the period of contract formation, while the contract is in force and even after it has come to an end[78].

2. Insurance in Colombian law

Insurance is not regulated by the Civil Code but by the Commercial Code. The first Colombian Commercial Code was enacted in 1887.[79] Unlike section 17 of the MIA, the rules pertaining to insurance made no explicit reference to good faith, meaning that the general rules of the Civil Code applied. Nevertheless article 680 established that the assured had the obligation to "declare sincerely all the necessary circumstances to identify the subject matter assured and to appreciate the extension of the risks" and sanctioned with rescission all misrepresentations or non-disclosure of "circumstances that, if known by the insurer, could lead him to not enter into the contract or to produce a modification in its conditions".

In 1971 the 'new' Commercial Code was enacted. Except for the chapter on specific marine insurance rules, which was largely based on the English Marine Insurance Act of 1906[80], the rest of the provisions were based on insurance regulation from other civil law countries such as that from France, Mexico, Italy and Argentina[81]. Unlike the state of English law after the changes introduced by the Consumer Insurance Act 2012, Colombian law does not distinguish between business and consumer assureds, consequently all the rules in the Commercial Code apply to both of them indistinctly.

75 A previous Commercial code had been in place since 1887.

76 M. Neme, *Op. cit.*

77 Judgement of 2nd August 2001, per Carlos Ignacio Jaramillo.

78 M. Neme, *Op. cit.,* p. 85.

79 The old Commercial Code was based on the Panamanian Code of 1869 which was in turn based on the Chilean Code of 1865. See C. Jaramillo, *Op. cit.,* p. 10.

80 'Explanatory Preamble to the 1958 Code of Commerce Project' in J. Ossa, *Op. cit.,* Appendix III (free translation). The 1958 Code of Commerce Project was the basis for the debate of the 1971 Commercial Code.

81 C. Jaramillo, *Op. cit*., p. 657.

Surprisingly, even though there is no rule that establishes that insurance contracts are ruled by any special principle of good faith other than the one that applies to any other contract, both the Supreme Court[82] and the Constitutional Court[83], when dealing with insurance cases that arise because of the breach of duties that are derived from good faith, have understood that the good faith present in insurance contracts is one of utmost nature (*ubérrima buena fe*)[84].

Good faith can be observed in multiple institutions and rules of Colombian insurance law. Not only is there a pre-contractual duty of information borne by the assured (as will be analysed in depth in the following chapter), but the assured also has to inform the aggravation of the risk while the contract is in place,[85] he has to inform the coexistence of other contracts of insurance[86], the claims he presents must not be fraudulent[87], etc.

Besides the application of the general principle of good faith that applies to all contracts, and the fact that civil rules, such as those that govern case of mistake, duress or fraud, would in principle apply to contracts of insurance, a special regime was established in the Commercial Code: the duty to make a fair presentation of the risk[88].

The duty to make a fair presentation of the risk: why there is no need for reform

1. Articles 1058 and 1059 of the Colombian Commercial Code

In Colombia the assured's pre-contractual information duties are set in articles 1058 and 1059 of the Commercial Code. Unlike sections 18 and 20 of the Marine Insurance Act, article 1058 does not clearly distinguish between non-disclosure and misrepresentation. In fact, what it does is establish that he who wishes to enter into a contract of insurance with an insurance company has a duty to "declare sincerely the facts and circumstances that determine the state of the risk according to the questionnaire [form] proposed by the insurer" and it indicates that any "non-disclosure or misrepresentation of facts or circumstances, that if known by the insurer they would have withheld him from subscribing the contract or would have led him to establish more onerous conditions, will allow him to avoid the contract".

82 Judgement of 11 April 2002, per Jorge Santos Ballesteros; Judgement of 2nd August 2002, per Carlos Ignacio Jaramillo; Judgement of 27 of October 2005, per María Elena Giraldo; Judgement of 1st of September 2010, per Edgardo Villamil Portilla.

83 Judgement C-232 of 15 Mayo 1997, per Jorge Arango Mejía.

84 Academics are of the same opinion, J Efrén Ossa for example says that as in any other contract good faith is an attribute of insurance, but that in insurance "it is in a higher degree, *uberrimae fidei*". J. Ossa, *Op. cit.,* p. 44.

85 Commercial Code, article 1060.

86 *Ibíd*, article 1076.

87 *Ibíd*, article 1078.

88 It is said that the general rules of the civil code are insufficient considering the special characteristics of the contract of insurance. See J. Ossa, *Op. cit.,* pp. 326-327, 333-334. However, it is also argued that even though the special regime set out for insurance contracts is more demanding than the one that applies to all other contracts, the general regime could eventually apply to insurance contracts if there was an event not covered by the special rules. See A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* pp. 24-28.

Further on paragraph two establishes that in the cases in which “the declaration is not done subject to a determined questionnaire, any non-disclosure or misrepresentation produces the same consequence if the insured has negligently concealed facts or circumstances that involve an objective aggravation of the risk”.

Fraudulent intent on behalf of the proposer is irrelevant and the contract will be voidable both in cases in which the proposer non-disclosed or misrepresented facts innocently or on purpose. Furthermore, article 1059 sets that, besides being able to avoid the contract, the insurer can also retain the premium as a penalty.

Nevertheless, a distinction must be made between negligent and diligent proposers: the rules, as detailed above, apply to negligent proposers (even if they are innocent), however if the non-disclosure or misrepresentation arises from blameless error of the proposer, paragraph three of article 1058 sets that the insurer will not be able to avoid the contract nor to retain the premium, but, if a loss occurs, the insurer may reduce proportionately the amount to be paid on a claim[89].

Finally, paragraph four of article 1058 clarifies that the contract will not be voidable nor can the indemnity be reduced “if the insurer, before entering into the contract, knew or should have known the facts and circumstances that were not disclosed or misrepresented, or, if after entering into the contract accepts to correct them or waives them either expressly or implicitly”.

2. *‘Reticencia’* and *‘inexactitud’*

The Spanish terms used by the code that we have translated as non-disclosure and misrepresentation are, respectively, *reticencia* and *inexactitud*. Although their meaning is similar to what is understood in English insurance law by non-disclosure and misrepresentation, they are not exact equivalents. *Reticencia* means to withhold or not say something, *inexactitud* refers to giving inaccurate or inexact information.[90] Both terms describe breaches of the duty to faithfully declare the state of the risk either by withholding or giving inaccurate information, but, as will be described in detail below, the duty is subject to some limitations not present in English law, for when the insurer has given the proposer a questionnaire, they duty is substantially different from that of disclosure, since the information that the proposer cannot withhold or misstate is that which he is asked about; on the other hand, when no questionnaire is given, the proposer bears a real duty of disclosure, but still the information he is expected to give is less than that in English law.

The following sections will develop in detail the different rules set in articles 1058 and 1059 of the Commercial Code emphasising not only on differences they have if compared to the equivalent institutions in English law, but on how those differences entail, in most of the cases, a more favourable regime for the assured without annulling its original intent to protect the insurer.

89 The formula for the proportional reduction is identical to the one established in the Consumer Insurance (Disclosure and Representations) Act 2012.

90 A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* pp. 20-21.

3. Questionnaire, or no questionnaire, that is the question

Even though legally, as set by article 1058, the presentation of the risk can be subjected or not to a questionnaire, Colombian practice is inclined towards the use of a questionnaire[91]. Professor Ossa, architect of modern Colombian insurance law[92], considered this practice to be more technical and legitimate because proponents of insurance have no reason to know all the factors (either objective or subjective) that determine the state of the risk, while the insurer, because of his profession, has to be aware of them and consequently he must direct the proposer's presentation through a questionnaire which ought to be answered with the highest intellectual and moral scruples[93].

The insurer's decision to offer or not a questionnaire to the proposer is highly relevant for two significant reasons: on the one hand it determines the scope of facts and circumstances that must be declared by the proposer, ie the facts and circumstances that must be informed vary depending on if he has been given a questionnaire or not. For example, when the declaration is subject to a questionnaire, the insurer may inquire on both physical and moral hazard[94]; whereas if the declaration is not subjected to a questionnaire, the assured's information duty is limited to physical hazard because article 1058 establishes that in this case the insurer can only avoid the policy if the non-disclosed or misrepresented fact implies and 'objective' aggravation of the risk[95]. Further on, when a questionnaire is proposed by the insurer anything that is not investigated or asked in the insurer's form does not have to be disclosed by the assured because article 1058 clearly set that the declaration must be made "according to the questionnaire proposed by the insurer"[96]. This may sound harsh on insurers and might at first glance tempt them to not advance a questionnaire, yet, the assured's duty of disclosure when he is not presented with a form may be even more limited as it is reduced to the "circumstances that, according to common sense, imply an aggravation of the risk, [because, since] he is not a specialist in insurance, his duty cannot reach the extreme subtleness that could barely be noticed by the keen judgement of an insurer"[97].

The second reason why the insurer's decision to offer or not a questionnaire to the proposer is highly relevant, regards the onus of proof: when there is no questionnaire the insurer must prove that the proposer's non-disclosure or misrepresentation was negligent, while when there was a questionnaire it is the proposer who must prove that, despite his mistake, he acted diligently[98].

91 J. Ossa, *Op. cit.*, pp. 325, 329; A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.*, p. 33.

92 C. Jaramillo, *Op. cit.,* 11-12.

93 J. Ossa, *Op. cit.,* pp. 325-326.

94 Corte Suprema de Justicia, Judgement of 12 September 2002, per Carlos Ignacio Jaramillo; Corte Suprema de Justicia, Judgement of 11 April 2002, per Jorge Santos Ballesteros.

95 J. Ossa, *Op. cit.,* p. 329.

96 *Ibíd.,* p. 329; A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* p. 33.

97 'Explanatory Preamble to the 1958 Code of Commerce Project' in Ossa (n 1) Appendix III (free translation); see also J. Ossa, *Op. cit.,* pp. 330-332.

98 J. Ossa, *Op. cit.,* pp. 337-339; However, professor Ordóñez, even though he accepts that when there is no questionnaire the insurer must prove that the proposer was negligent, while when there was a questionnaire it is the proposer who must prove his mistake was

Thus it is highly recommendable for the insurer to opt for elaborating questionnaires in the pre-contractual stage. The advantages of doing so were increased even further when the Supreme Court in the Judgement of 1st September 2010[99] established that, in order to prove the relevance that a certain fact or circumstance had for the insurer, it was enough to check if he had asked about those facts or circumstances in the questionnaire, thereby creating a legal presumption that all facts and circumstances asked by the insurer were relevant. The Court clearly stated that "the insurance professional [ie the insurer] does not ask for irrelevant data, nor has the burden of proving that they were [relevant]".

The duality between declarations subject to a questionnaire and those that are not, with all the implications that are derived from opting between one alternative and the other, is perhaps one of the biggest differences between the assured's pre-contractual information duties in Colombian and English law (especially compared to the pre-Consumer Insurance Act regime). The fact that the duty to inform is subjected to that which is asked in the form levels the playing ground between the contracting parties in the way submitted by Hasson[100], for it gives the assured, who has the duty to inform, an idea of the information that he is expected to give to the insurer and which he on his own might never imagine to be relevant. The duty is also much more narrow when no form is provided, for the assured is not expected to disclose all facts and circumstances which might be considered relevant from an insurer's point of view but just those that according to common sense (as opposed to professional expertise) imply an aggravation of the risk and, in the event that he does not comply, it will be for the insurer to prove that his breach was a negligent one that will allow the insurer to avoid the contract. Such differences by their own might be enough to justify why there has been no need for reform in Colombia, since the scope of the assured's duty under the Colombian framework is reduced to a feasible standard from the assured's point of view.

4. Relevance, materiality or inducement?

The subcommittee in charge of drafting the insurance chapter of the Commercial Code debated around if they should establish, in order for the insurer to be allowed to avoid the contract, that the facts or circumstances undisclosed or misrepresented had to be such that if known by the insurer they would lead him to establish different contractual conditions or to reject the contract altogether: on one side Dr. Cobo considered that this would place the harsh burden of proving such a fact on the insurance company, which would in turn make impractical the protection intended by the duty; on the other side Professor Ossa considered that not doing so would be contradictory with the general regime of contract law in which rescission for mistake, duress and fraud all required that the unknown fact or circumstance be determinant for the parties decision to enter into the contract, besides he considered that the onus of proof was not a harsh one to bare[101].

diligent and blameless, points out that the code's wording on this point is obscure and not technically accurate. A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* pp. 33-35.

99 Per Edgardo Villamil Portilla.

100 R. Hasson, 'The Doctrine of Uberrimae Fides in Insurance Law', *Op. cit.*, pp. 633-634.

101 Acoldese, *Actas del Subcomité de Seguros del Comité Asesor para la Revisión del Código de Comercio: Antecedentes del Título V del Libro Cuarto del Código de Comercio sobre el Contrato de Seguro* (Acoldese) 92-99.

As evidenced by the text of article 1058, it was this second position that triumphed and in order for the insurer to be able to avoid the contract or to reduce the indemnity the undisclosed or misrepresented fact must be one that, if known by the insurer, it would have withheld him from entering into the contract or would at least led him to propose more onerous conditions. The facts and circumstances that fulfil this condition are referred to by the academics as 'relevant' facts[102].

The requirement of relevance seems to be more similar to the English requirement of inducement than to that of materiality in the sense that it is subjective and not objective: it is the insurer at hand that must prove that he would not have entered into the contract or would have done so in different terms had he known the undisclosed or misrepresented fact[103]; it has not been considered by the academics or the courts that the standard of 'relevance' should be set according to an objective criteria such as that of 'the prudent underwriter'. However, the proof of relevance has been made easier, as indicated above, by the 'presumption of relevance' created by the Court regarding the questions laid down by the insurer in the proposal form.

Nonetheless it must be restated that, even though relevance is determined in the described way, unlike English law regarding materiality or inducement, in Colombia the assured does not have a duty to disclose all relevant facts and circumstances known to him, but just those for which he is asked for in the form or, if no questionnaire is advanced to him by the insurer, just those facts or circumstances that, according to common sense, imply an objective aggravation of the risk. This reduced scope of the facts and circumstances that have to be informed diminishes the effective harshness that may be derived from the fact that the test for 'relevance' depends on what the insurer considers material and constitutes itself as the second significant difference between Colombian and English law on the matter that has led the former to not consider the need of modifying the law.

Finally, still on the issue of materiality or relevance, again unlike English general insurance law, but in the same fashion of the Consumer Insurance Act, materiality cannot be made irrelevant by way of a warranty that makes the declaration into the basis of the contract, because, even though article 1061 of the Colombian Commercial Code defines warranties in identical terms as section 33 of the MIA, article 1.2.1.3.(b) (Ch II, T VI) of the Circular Básica Jurídica 007 of 1996 issued by the Superintendencia Financiera de Colombia (ie the Colombian equivalent to the Financial Service Authority) establishes the non-disclosure and misrepresentation, as set in article 1058 of the Commercial Code, cannot have any other legal consequences apart from those established in the Code.

5. Remedies

As set by articles 1058 and 1059 of the Commercial Code, three are the remedies available to the insurer when the assured has breached his duty to faithfully declare the state of the risk: avoidance, retention of the premium and the reduction of the indemnity. The first two are available when the proposer's relevant non-disclosure or misrepresentation was fraudulent or negligent (even if innocent); the third remedy is

102 J. Ossa, *Op. cit.,* pp. 330-331.

103 Corte Suprema de Justicia, Judgement of 12 September 2002, per Carlos Ignacio Jaramillo.

available as a substitute for the other two when the proposer incurred in a relevant non-disclosure or misrepresentation innocently and without negligence.

The first remedy, avoidance, as in England, means avoidance ab initio, therefore it is irrelevant if there is no relationship between the issues that were not disclosed and the claimed event[104]. This matter is actually one of the few on which there has been some debate around 'reform' since it reached the Constitutional Court when a plaintiff submitted that the fact that the insurer could avoid the contract even in cases in which there was no connection between the non-disclosed or misrepresented circumstance and the claimed event went against the Constitutional rights of fairness, equality and justice because it was disproportionate and nothing justified a separate regime for contracts of insurance. The Court discharged the submission by concluding, after a careful and important analysis of good faith in insurance law and the assured's pre-contractual information duties, that the "reason for the [special] rescissory regime in insurance contracts is based on the very nature of the insurance business, which requires the presence of a qualified good faith or uberrimae bona fidei"[105] and therefore is justified and in accordance with the Constitution.

The second remedy, retention of the premium, is actually one aspect in which Colombian law is harsher than English law (both before and after the introduction of the Consumer Insurance Act) for it allows the insurance company to retain the premium both in cases in which there was fraudulent intent on behalf of the proposer as in cases in which his non-disclosure or misrepresentation was negligent. Nevertheless this issue by itself has not been enough to motivate reform.

The last remedy is the third substantial difference between Colombian and English law (at least in regards to business insurance in England) that has prevented the need for reform. Similar to section 7 of schedule 1 of the Consumer Insurance Act, paragraph 3 of article 1058 established that the insurer would not be able to avoid the contract if the assured's non-disclosure or misrepresentation was due to a blameless mistake, in which case the insurer would only be allowed to reduce the indemnity. This solution has been regarded as a prudent balance between the need to protect the technical background of insurance and the wish to promote fairness in the contract[106] and therefore reduces criticism that might arise because of the existence of a univocal and severe remedy (as those that existed in England).

Unlike section 6 of Schedule 1 of the Consumer Insurance Act, Colombian law does not establish a fourth remedy consistent on treating the contract on different terms if the insurer, had he known of the non-disclosed or misrepresented fact, would have only entered the contract if those terms had been established. Such a remedy was not thought of but could be an interesting addition if reform of Colombian law was eventually sought.

104 A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* pp. 46-47; Andrés E Ordóñez, 'El Tratamiento Civil de la Mala Fe del Asegurado en el Contrato de Seguro' (2005) E-Mercatoria, Vol. 4, No. 2, 8-10; C. Jaramillo, *Op. cit.,* pp. 671-686.

105 Corte Constitucional, Judgement C-232 of 15 Mayo 1997, per Jorge Arango Mejía.

106 J. Ossa, *Op. cit.,* pp. 340-341.

It must be noted that nowhere in article 1058 is the proposer's duty conditioned to his knowledge of the facts and circumstances that are being declared. The academics are divided on the issue: on the one hand, Professor Ossa considered that the proposer's duty to sincerely declare the state of the risk is limited to the facts or circumstances that he knows or ought to know when the contract is entered into[107]. This position would set Colombian law in a similar state to that of England[108]. However, professor Ordóñez believes otherwise: he considers that the assured's knowledge is not a requisite and that therefore any non-disclosure or misrepresentation will allow the insurer to avoid the contract irrespective of the proposer's knowledge, except if his ignorance can be proved to be a type of blameless error of the proposer, in which case the insurer will only be allowed to reduce the indemnity[109]. If this is the case, Colombian law might be more demanding on this issue than English law, both as established in the MIA and the Consumer Insurance Act.

6. Further development of the duty by the Supreme Court

One of the most important cases regarding article 1058 of the Commercial Code was decided by the Colombian Supreme Court of Justice in Judgement of 2nd August 2002, per Carlos Ignacio Jaramillo. Reference to this paradigmatic case is important because it evidences the different approach held by the Colombian and English Courts on a similar issue, being the approach of the former more pro-assured than the approach of the latter.

The facts of the case were the following: the insured, Jaime Forero Malo, approached the defendant insurance company interested in insuring his life. He was provided with an application form that contained, among other things, in accordance to article 1058, a questionnaire designed to inform the insurer about the state of the risk and, based on his answers, he was ordered some general medical exams. The doctor that performed the exams indicated the existence of some anomalies, suggested an additional exam and considered the risk as unacceptable. Nevertheless, the insurance company, with the information provided in the questionnaire and the exams made by its own doctor, but without ordering the additional exams that had been suggested, accepted to insure Mr. Forero for an additional premium. Mr. Forero, after having answered the questionnaire, but before the insurer accepted to insure him, discovered through another doctor that he had bladder cancer but did not inform the insurance company of his discovery. The assured died a couple of months after being insured, so consequently the beneficiaries presented a claim to the insurance company, which in turn objected the claim arguing that the policy was void because Mr. Forero had breached the principle of good faith by failing to disclose that he had bladder cancer before the contract was entered into and that, if they had known of that circumstances, they would not have agreed to insure him at all.

107 J. Ossa, *Op. cit.,* pp. 330, 337.

108 It is accepted in English law that "you cannot disclose what you do not know". See Joel v Law Union and Crwon Insurance (1908) 99 LT 712; Economides v Commercial Union Insurance plc [1997] 3 All ER 636.

109 A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* pp. 37-38.

As explained by professor Ordóñez[110], two issues had to be solved by the court: a) is there a breach of the duty to sincerely declare the state of the risk if the assured does not declare facts or circumstances that, if known by the insurer would have led him to not accept the risk, if these facts or circumstances came to the assured's knowledge after he had answered the questionnaire but before the insurance company had accepted the risk?; b) can the assured's breach of the duty to sincerely declare the state of the risk be excused when the insurer does not know of the non-disclosed information because of his own negligence?

Regarding the first issue the Supreme Court considered that, since good faith "is not a principle of ephemeral and irrelevant figuration within the scene of law", for it is present in full and with marked intention along all the stages of contract formation, development and execution, in order to "evaluate whether a given person acted or not in good faith, it is imperative to examine, in each of the aforementioned phases, the behaviour displayed by him". Consequently if the proposer answers sincerely the questionnaire set by the insurer but later on discovers that his answers contradict what he now knows and does not inform the insurer about this fact before the insurer accepts the risk, then it cannot be said that his behaviour was in accordance to good faith. "Hence the relevant facts or circumstances supervening to the declaration of the state of the risk [...] must be communicated without delay." In this aspect Colombian and English law are alike[111].

However, considering the second issue, the Court established that this was a clear example of how, in accordance with the provisions of article 1058 of the Commercial Code, if the insurer knew or, as it was in this case, should have known of the undisclosed or misrepresented fact, he would not be allowed to avoid the contract. The judge considered that since the insurer's medical doctor suggested an additional exam, that would have revealed the grave health condition of the assured, and the company refused to order such an exam, then the insurance company was taking on itself the risk in whatever condition it may be, therefore it could not pretend to avoid the contract for a non-disclosed fact that it should have known if it had been diligent. It must be clarified that there is no duty in Colombian law for the insurer to inspect the risk,[112] but once the insurance company had already decided to inspect the risk by ordering some medical exams and these resulted in the company's medical doctor advising to perform some additional ones, then common business sense did oblige the company to either perform such additional exams or to assume the consequences of not having done so.

Even though the facts of this case are substantially different from those of Bates v Hewitt[113] commented above, the judge's decision to maintain the contract in force despite the assured's fraudulent non-disclosure, ie notwithstanding the assured's clear breach of the principle of good faith (it was proven

110 Andrés E Ordoñez, 'Inexactitud y Reticencia en la Declaración del Estado del Riesgo a Través de Dos Sentencias de la Corte Suprema de Justicia Colombiana' (2003) E-Mercatoria, Vol. 2, Num 1, 2-3.

111 Looker v Law Union and Rock Insurance Co Ltd [1928] 1 KB 554.

112 Corte Constitucional, Judgement C-232 of 15 Mayo 1997, per Jorge Arango Mejía.

113 (1867) LR 2 QB 595.

in the process that Mr. Forero had deliberately withheld the information from the insurer), evidences a more pro-assured approach even when dealing with an institution that has the objective to protect the insurer from fraud.

It cannot go without saying that this last point has been severely criticized by professor Ordóñez, who considers that when it is proven that the assured's non-disclosure or misrepresentation was intentional, the insurer should be able to avoid the contract even if he would have known of the undisclosed fact had it not been for his carelessness in the contracting stage[114].

7. Final remarks on the duty to make a fair presentation of the risk

It cannot be forgotten that the regime that has been explained above was only introduced by the 1971 Commercial Code. If we take a second look at the law on the matter in the previous code, we can evidence that the changes introduced were far-reaching. The old law was too simple for such an important matter and if it had not been changed with the rest of Colombian commercial institutions in 1971, it is likely that a great amount of criticism would have risen in these last 40 years.

The regime introduced by articles 1058 and 1059 is not perfect. Although it is in general terms a pretty fair balanced regulation, that offers a great deal of protection for assureds (especially if it is remembered that its principal purpose is to protect insurers), it also has its disadvantages and hardships: the right the insurer has to retain the premium every time he can avoid the contract is excessive and unfair to non-fraudulent assureds who just happened to not be diligent enough in the declaration of the risk; the fact that the proposer's knowledge is not taken into account to determine what must be declared, is also unjust. Nevertheless, all things considered, these few drawbacks do not amount to a need for reform.

It must also be borne in mind that the abundance of good faith in Colombian contract law in general, makes it easier for Colombian lawyers to accept the existence, influence and consequences of good faith in insurance law. Even if good faith is present with unique intensity and imposing stricter burdens than in other contracts, the special rules that apply to insurance are not at all that different from those that apply to other businesses and therefore are easily received by the legal community.

All this put together leads to the fact that, after the significant changes introduced in 1971, no further modification to the assured's pre-contractual information duties has been deemed necessary.

114 A. Ordóñez, *Lecciones de Derecho de Seguros, Op. cit.,* pp. 40-45; A. Ordóñez 'Inexactitud y Reticencia en la Declaración del Estado del Riesgo', *Op. cit.,* 14-16.

Conclusion

As seen throughout this paper, both Colombian and English law impose pre-contractual information duties on the assured; in both cases these duties are derived from the principle of good faith present in Roman law, the law merchant and throughout early modern insurance law. However, the development of this principle and the consequent duties in each jurisdiction led to sufficiently significant differences that produced substantial criticism and reform in England, but have not led to much criticism in Colombia.

It cannot be affirmed that the Colombian approach is always more favourable to the assured; for example, in regards to retention of the premium and the relevance of the assured's knowledge, English law is less harsh. In several circumstances both jurisdictions have reached similar solutions as in the fact that the duty is in place until the contract is entered into, the requirement of inducement or relevance and in avoidance (*ab initio*) being the principal remedy. Nevertheless, the specific situations in which Colombian law is more assured friendly have been enough to not disturb the different actors of the insurance business. Yet, the differences between English and Colombian law, mainly the different scope of the information that has to be disclosed or represented, the availability of remedies depending of the circumstances surrounding the non-disclosed or misrepresented circumstances, and the pro-assured or pro-insurer approach held by the courts, do manifest a more protectionist regime for the assured in the Colombian setting that is more consistent with the original objectives of the principle of good faith.

The solutions introduced in 2012 in England have in a great way equated, at least in the field of consumer insurance law, the assured's pre-contractual duty of information with the Colombian regime. The new consumer insurance rules in England, by eliminating the duty of disclosure, removing the requirement of materiality leaving only the requirement of inducement, and not allowing the assured's representations to be made into the basis of the contract, have levelled the playing ground between insurers and assureds in a similar way to the Colombian Commercial Code of 1971. Regarding the remedies the Consumer Insurance Act 2012 established, it can even be said that it went beyond the advantages that Colombian law has on this matter. Nevertheless, although this could be erected as a model to update Colombian law, the current state in which it is, is sufficiently satisfactory.

In the end both jurisdictions have been able to cope with the difficulties that good faith in the pre-contractual stage can entail. Most problems have been or are being addressed and good faith and the assured's pre-contractual information duties remain a very significant and important part of both countries insurance contract law.

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